



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO.232 OF 2002

FIDELITY COMMERCIAL BANK LTD ::::::::::::::: PLAINTIFF

VERSUS

**MICHAEL RURAYA MWANGI :::::::::::::::1ST
DEFENDANT**

ARTHUR RUNYENJE NAMU ::::::::::::::: 2ND DEFENDANT

RULING

This is an application to set aside a judgment in default of appearance. The Application is brought under Order IXA Rules 3,4,5, 10 and 11 of the Civil Procedure Rules and Section 3A and 63 of the Civil Procedure Act.

The substance of the grounds in support of the application is that the 2nd Defendant was not served with the summons to enter appearance to the suit. Instead the Plaintiff has been using the 2nd Defendant to recover the alleged debt from the 1st Defendant on the express understanding that the Plaintiff has no legal claim against the 2nd Defendant which claim is premised on a dateless guarantee a copy whereof was not furnished to the 2nd Defendant/Applicant.

The application is supported by an affidavit sworn by the Applicant on 25th August, 2004. The Applicant has further filed a supplementary affidavit. The 2nd Defendant denies being served with summons to enter appearance and has deponed that the signature at the back of the summons to enter appearance resembles his but is markedly different. He has further deponed that he has a complete defence against the Plaintiff's claim on the basis that there is no valid contract of guarantee and indemnity between him and the Plaintiff.

The application is opposed on the ground that the Applicant was served with the Summons to enter appearance and that he has no defence to the Plaintiff's claim as he has previously admitted the same in writing and indeed has been liquidating the decretal amount. The Plaintiff has further maintained that the correspondence exchanged between the Applicant and the Plaintiff and exhibited by the Applicant show clearly that the Applicant was all along aware of this suit and the guarantee that he now seeks to deny.

The Law applicable is this. If there is no service or no proper service of the summons to enter appearance on the Defendant, the ex-parte judgment should be set aside ex debito justitiae and this is irrespective of the merits or otherwise of the defence.

In this case the Plaintiff maintains that the Applicant was served. Its Counsel has referred to the

affidavit of service on record and to correspondence by the Applicant indicating clearly that he was aware of this suit. In his view the signature on the summons to enter appearance is the Applicant's as it is the same signature appearing in correspondence exhibited by the Applicant.

The Applicant on the other hand denies being served with the summons to enter appearance and deposes that the signature on the said summons is not his. Cross-examination of the process server would probably have resolved this conflict. However, Counsel for the Applicant did not see it fit to apply to cross-examine the process server on his affidavit of service.

The record however shows that an affidavit of service of the summons to enter appearance against the Applicant was filed on 10th May 2002, by the process server, Peter O. Adhiambo. The affidavit has given details of the said service such as, place, time, the Applicant's rank and identification. Yet the Applicant in his supporting affidavit merely denies the signature on the said summons but not the other details given by the process server.

The record further shows that even when the Applicant admits having been served with a Notice to Show Cause he took one month before filing this application. The Plaintiff has also exhibited a proclamation by M/S Keysian Auctioneers which was served upon him on 11th June 2003. This proclamation gave particulars of this case and the decretal sum. Yet the Applicant did not come to Court immediately but took over one year to file this application.

In the circumstances, I have come to the conclusion that the Applicant was served with Summons to enter appearance. The ex parte judgment entered against him is therefore a regular judgment. As to whether or not I should set it aside is a matter of discretion. The discretion is unfettered. However, like all judicial discretions it should not be exercised arbitrarily or whimsically.

It is clear from the record that the Applicant has known all along about his indebtedness to the Plaintiff. When he held a meeting with the Plaintiff way back in November, 2002 he sought indulgence and acknowledged his commitment to the Plaintiff. He confirmed this in his letter dated 7th November, 2002. On 28th March 2003 the Applicant by his letter of even date referred to his guarantee and proposed to pay Kshs 3 million in April/May 2003 and the balance was to be paid at the agreed monthly instalment of Kshs 50,000/= with effect from 30th May 2003. A similar proposal was made in a handwritten letter of 26th March 2004.

I have come to two conclusions in the light of the material availed to me. The first conclusion is that the Applicant's proposed defence on the merits is a sham. It consists of bare denials and does not raise bona fide triable issues. The Applicant has unequivocally admitted the Plaintiff's claim. A trial would therefore serve no purpose.

The second conclusion is that the Applicant is guilty of prolonged delay. As already found above, he has known about this judgment for a long time yet he failed to challenge it until when his liberty was threatened.

I am alive to the fact that to deny a person a hearing should be the last resort of the Court. However, I am also aware that my discretion is intended to avoid injustice or hardship resulting from accident inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice.

In this case I cannot resist the conclusion that the Applicant has deliberately sought to delay the course of justice.

In the rest I am not inclined to exercise my discretion in favour of the Applicant. His application dated 25th August, 2004 is accordingly dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF

DECEMBER, 2004.

F. AZANGALALA

AG. JUDGE