



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 1504 of 2001**

**CO-OPERATIVE BANK OF KENYA LIMITED.....PLAINTIFF**

**VERSUS**

**SAID SHEIKH AHMED.....DEFENDANT**

**RULING**

By an application brought by way of a Chamber Summons dated 26.10.2004, and filed in Court on 1.11.2004 the Defendant herein seeks an order that the ex-parte judgement entered against him on 9.05.2002 be set aside, and all consequential orders be stayed.

The application is supported by the Affidavit of the Defendant himself sworn on 26.10.2004 and filed together with the application on 1.11.2004. The Defendant's principal ground is that the Affidavit of Service sworn on 4.04.2002, by the process server, Mr. Peter O Khainga is false, and that his signature in purported acknowledgment of the Plaintiff and Summons to Enter Appearance is false, and is a forgery. He exhibited a page 3 of his Passport No. 1111209 Personal No. 0600000R-2486668 which shows that he exited from Jomo Kenyatta International Airport Nairobi to an unknown destination (foreign country), on 7.03.2002, and there is on page 30 of the same passport, an entry stamp of 12.03.2002 probably upon return or arrival from the same destination. For the process server to say as he did, that he served the Defendant with Summons to Enter Appearance on 8.03.2002, when the same Defendant left the country the previous day and returned five days later (on 12.03.2002) is a most improbable story of personal service.

I am no expert in handwriting, but I have observed the signature purporting to be that of the Defendant endorsed upon the back of the Summons to Enter Appearance dated 8.10.2001, and that used by the Defendant on both his passport and the Supporting Affidavit to this application, and I note that they are manifestly different and have no resemblance whatsoever with that in the alleged acknowledgement of Service of Summons to Enter Appearance. I think the process server Peter O. Khainga has some explaining to do.

Arising out of alleged Service of Summons to Enter Appearance the Plaintiff requested for and was granted an ex-parte judgement on 8.05.2002. The Defendant depones that he was not served at all, and by virtue thereof, the Default-Judgement and all consequential orders be set aside. This application is premised upon the provisions of Order IXA, rule 10 and Order XXI rule 22 of the Civil Procedure Rules.

For the record Order XXI rule 22, is no provision to found an application for stay of Execution in this

Court. It is applicable to a Court to which a decree or order has been sent for execution. If this application were purely premised on this Order, I would have dismissed it with costs.

The thrust of the application is fortunately for the Defendant premised upon the provision of Rule 10 of Order IXA which provides that “**where judgement has been entered under this order the Court may set aside or vary such judgement and any consequential decree or order upon such terms as are just.**”

In the leading case of **SHAH vs. MBOGOH [1967] EA. 116**, Harris J. held that the Court’s discretion to set aside an ex parte judgement is intended to be exercised to avoid injustice or hardship resulting from inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused.

In this instance, there is on balance of probability evidence in the Affidavit of Randolph M. Tindika Advocate, sworn on 23<sup>rd</sup> January 2003 and again on 16.11.2004 that the Defendant was served with Notice of Entry of Judgement on 17.01.2003, and that since that time the Defendant has done nothing to move the Court. The Defendant’s memory was only jugged up with a Notice to Show Cause served on him on 14.08.2004. He depones that he has a good defence – but no such defence was attached to the application. It is always desirable when making such an allegation to attach a copy of the draft defence to the application. It will assist the Court in determining whether there is a meritorious defence on record. That was the effect of the Court’s decision in **TREE SHADE MOTORS LIMITED vs. D.T. DOBIE (K) LTD & ANOTHER [1995 – 1998] 1 EA 324** and **KINGSWAY TYRES AND AUTOMART LTD VS. RAFIKI ENTERPRISES LTD [1995] KLR 2478 (CAK)**.

It is not however a rule of law or procedure that a draft defence must always be attached to an application to set aside an ex parte order or judgement for the application is not dependent upon the existence of a defence meritorious or otherwise, but rather the applicant meets the criteria for setting aside an ex parte judgment as set out in the **Shah vs. Mbogoh** case (supra).

I have deep suspicion from the averments of the Replying Affidavit of Randolph M. Tindika sworn on 16.11.2004 and filed in Court on 18.11.2004 that the Defendant has been deliberately evading taking any action in this suit. Paragraph 15 of the Defendant’s Supporting Affidavit avers that the Plaintiff has all along been acting in bad faith as the allegation that there had allegedly been negotiations between the parties is not supported by any evidence of such negotiations. The Defendant does however point out in paragraph 17 of his Supporting Affidavit that the liabilities on account of the supplemental card issued to his wife had been settled in full. Liabilities (if any), were to be cleared by his employer. This is to me a triable issue – was it the employer or the individual employee to meet the liabilities under the card? Coupled with the very likelihood that the Summons to Enter Appearance was never served upon the Defendant and the Affidavit of Service of Peter Khainga is false, I would give the benefit of doubt to the Defendant, and allow the Defendant’s application dated 26.10.2004 and filed on 1.11.2004.

However, because there is no explanation as to the inordinate delay between 17.01.2003 and 1.11.2004, a period of 21 months in bringing the subject application, the Defendant will pay the costs of this application. The Defendant shall file and serve its defence upon the Plaintiff within 14 days of this Ruling. There shall be orders accordingly.

**Dated and delivered** at Nairobi this 1<sup>st</sup> day of December 2004.

ANYARA EMUKULE

AG. JUDGE