



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO 1324 OF 2000

NATIONAL BANK OF KENYA LIMITED PLAINTIFF

VERSUS

ROBERT KABUTA MURIMI DEFENDANT

RULING

The Plaintiff filed this case against the defendant claiming Kshs.947,659.59 with interest at 23% per annum on account of the use of a credit card issued to the defendant by the Plaintiff, pursuant to an agreement dated 28th January, 1997. On 23rd September, 2002, judgment was entered exparte for the Plaintiff against the defendant as prayed in the Plaint with costs of the suit and interest. The defendant then filed an application by way of summons in chambers for an order that the exparte judgment entered against him be set aside as he is a stranger to the proceedings and he has a credible defence. The application is brought under the provisions of Order XXI and 22 and 91 of the Rules as well as order IX B Rule 8 and Sections 3 A of the Civil Procedure Act, hereinafter referred to as, the Act, and supported by the annexed affidavit of the defendant.

In the affidavit of service of summons the process server, deponed that he served the summons upon the defendant at Magiwa Estate on 20th August, 2002, and that the defendant resided at that estate. This was after numerous attempts to trace the defendant which attempts had not been successful in the past. In the affidavit in support of the defendant's application, he deponed that he was not aware of this case as he was never served with summons to enter appearance. He further deponed that he does not reside at Magiwa Estate as alleged by the process server and that on the contrary, he resides at Golden Gate Estate. He annexed receipts for payment of rent for a house in Golden Gate Estate [annexures RM 1 (a) and (b)]. He also deponed that he is a stranger to these proceedings and that the only thing which he recollects remotely connected him to the Plaintiff is that the Plaintiff issued him with credit card No 4544-9000-0006-6213 which got lost and he wrote to the Plaintiff, reported the loss of the card and asked for a replacement (See RM 2) and that he did not receive any response. He did not incur any further expenditure after the loss of his card neither did the Plaintiff alert him of any massive charges on the lost card. It is for those reasons that the defendant prays that the judgment entered be set aside so that he can defend the suit. He filed a supplementary affidavit and annexed a draft defence.

A replying affidavit was filed by the credit manager of the Plaintiff and a letter annexed to it and dated 9th August, 2000, "RA 1", from counsel for the Plaintiff informed the Plaintiff that the defendant had made a proposal to pay Kshs.240,000/= in full and final settlement of the Plaintiff's claim which offer was not accepted by the Plaintiff.

First I shall deal with the issue of service of summons. If the same is found not to have been served, then the judgment entered against the defendant would be irregular and the defendant would be entitled to an order setting it aside as a matter of right. However, if it is found that the summons were indeed served, then the judgment would be a regular judgment in which case the court will have to apply its discretion, consider the draft defence, the reason why the same was not filed and decide whether or not to allow the application.

Although at paragraph 5 of the defendant's affidavit, he brought out the issue of the suit having been filed in the year 2000 and the summons to enter appearance allegedly served in the year 2002, an indication that the said summons had long expired, the record shows that the said summons were extended on 14th January, 2002 by the court, Mwera J.

From the affidavit of the process server, he was led to a house in Magiwa Estate by one security guard whose name is not given and who pointed out the house as that where the defendant lived. That a male adult found at that house denied, that he was the defendant herein after he was given the papers to the case. Prior to that, he had said that he indeed was the defendant but, that was before the papers were handed over to him. All this took place on 20th August, 2002.

On the issue of service, it is the defendant's word against that of the process server contained in the affidavit of service. The Applicant's/defendant's counsel had applied to cross-examine the process server, but he abandoned the idea when he presented the application without doing so. The defendant denies that he resided at Magiwa Estate and that he in fact resided at a house in Golden Gate Estate. The statement of payments of rent [annexure "RM 1(b)"] is for the year, 2000. No statement was annexed for the year 2002, in any case, that statement shows that the lease was to expire on 29th April, 2001. The process server is alleged to have served summons upon the defendant on 20th August, 2002. There is no evidence from the defendant that in that year and month, he lived at Golden Gate, as he has not annexed a statement for rent paid beyond September, 2000. He cannot therefore rely on the statement for the year 2000 to say that in the year 2002, particularly the month of August, he was still living in Golden Gate.

From the affidavit of service, it is clear that for some time, the process server could not trace the whereabouts of the defendant. The summons were given to him on 28th May, 2002 and if he had wanted to file a false affidavit of service, I do not see that he could have taken so much trouble trying to trace the defendant. I therefore find that there is no evidence whatsoever to show that the defendant did not reside at Magiwa Estate at the time he was served with summons to enter appearance on 20th August, 2002. I believe the process server's affidavit is stating the correct position. The judgment entered against the defendant is a regular judgment.

I now come to the issue of why no defence was filed and whether he has a reasonable defence to warrant granting him the orders sought. Setting aside a regular judgment is a discretionary remedy and the defendant must show that he has a defence that raises triable issues. He denies owing the amount claimed but at paragraph five admits that he owes not more than Kshs.40,000/=. He knew this all along because in the same affidavit he deponed that he had asked the Plaintiff to reconcile his accounts so that he could close the credit card facility which was in arrears of not more than Kshs.40,000/=. but that the Plaintiff was not cooperative. To show good faith on the part of the defendant, whatever is admitted i.e Kshs.40,000/= should have been paid. As the account was not closed, then the arrears must have continued to attract interest over the years and in the year 2000 when the suit was filed the amount in arrears cannot be Kshs.40,000/= which the defendant concedes.

I am of the view that the court cannot exercise discretion in favour of the defendant when he clearly admits owing some money which he has not paid over the years. He does not come to court with clean hands. First he alleges that he was never served with summons when he was clearly served. Secondly he alleges that he resided at Golden Gate Estate at the time of the alleged service of summons upon him, and annexes a rent account for a completely different period. Thirdly, he now concedes that he owes the Plaintiff some money (see draft defence) while in the affidavit in support of the application, he makes no such admission. He in fact depones that all that he could recollect, remotely though, that connects him to the Plaintiff, was that he was once a card holder of a credit card issued by the Plaintiff which card got lost

and he made a report to the Plaintiff. The defence raises no triable issues and the application dated 10th March, 2003 is dismissed with costs to the Plaintiff/Respondent.

Delivered at Nairobi this 16th day of May, 2003.

S. C. ONDEYO

JUDGE

16.5.2003