

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 1611 OF 1999

DAIMA BANK LTDPLAINTIFF

VERSUS

ISAAC KIPCHUMBA MAIYO & ANOTHER DEFENDANTS

R U L I N G

In the Plaint dated 5th November 1999, filed into the court on the same day, the Plaintiff sued the First Defendant and another seeking judgment against the two jointly and severally for K.shs 363,356/25 with interest at the rate of 3.3% per month from the 15th day of July 1999 and costs of the suit. The Plaintiff allegedly had a licensed process server to serve the Summons to Enter appearance together with a copy of the same Plaint on the Applicant herein on 21st December 1999 at 3.00 p.m. at the home of the Applicant. No appearance was entered by 24th January 2000 and consequently, the Plaintiff requested for Judgment under Order 9A Rules 3 and 9.

Interlocutory judgment was entered on 26th January 2000 against Isaac Kipchumba Maiyo, the first Defendant. Certificate of Costs was issued on 23rd May 2000. Before then the Plaintiff alleges that Notice of Judgment was issued and served upon the Applicant through Chebii & Co., advocates but this is denied. The Applicant herein, Isaac Kipchumba Maiyo has filed this application by way of chamber summons dated 7th November 2001 in which he is seeking three orders which are first that, there be a stay of execution of the judgment entered against him on 26.1.2001 and all other consequential orders pending the hearing and determination of this application or until further orders of the suit. Second order sought is that judgment entered against the First Defendant/Applicant on 26.1.2000 be set aside and the Applicant be granted leave to defend this suit. The third order sought is that the annexed draft defence be deemed as duly filed upon the payment of requisite fees.

The last order sought is that of costs. The grounds for the same application are that the summons to enter appearance were never served upon the Applicant, that the Applicant has a good defence on merits which defence raises several triable issues; that interest charged is in dispute and/or never agreed upon and that the Affidavit of service is misleading. There were two affidavits filed by the Applicant – one supporting affidavit and one Supplementary affidavit. There were annexures to the same Affidavits.

The Plaintiff/Respondent filed Replying Affidavit and annexed several exhibits. The same Replying affidavit was sworn by Respondent's Credit Control Manager, Solomon Musimba. The Respondent maintained in that Affidavit that the Applicant was properly served with summons to enter Appearance and a copy of the Plaint; that as the Applicant failed to file Appearance and defence in time the Plaintiff applied for judgment and the same was entered against the Applicant on 26.1.2000. On 18th May 2000, the Applicant was served with Notice of judgment by way of registered post to his last known address P.O. Box 2116, Eldoret.

The Respondent/Plaintiff maintains that the Applicant has always been aware of the suit as he actually filed Memorandum of appearance in the Central registry and a copy to him served upon the Plaintiff's advocate on record, that the draft Defence is a sham as the Defendant has made written admission of the debt sum through his (Applicant's former advocates) that the Applicant has failed to explain the delay in filing this application; that as on 12th July 2000 auctioneers had gone to proclaim the Applicants movable properties and the Applicant paid to the same auctioneers K.shs 80,000/- on 21.7.2000 being in part settlement of the decretal sum and promising to pay the balance soon thereafter; that on 19th January

2000, the Applicant made proposals to settle the outstanding debt and at that time the Applicant was aware of this suit. I also allowed the Process Server and the Applicant to be cross examined and re-examined on their respective Affidavits. This was in response to applications by both sides. The same Process Server and Applicant were cross-examined and re-examined and the record of the same proceedings are in the record. I have considered the application, the Affidavits, the annexures, the oral evidence; able submissions by the learned counsels as well as the various proposals in the authorities that I was referred to. First on whether or not the Applicant was served with summons to enter appearance. The process server was in my humble opinion, a straight forward and honest witness.

He stated how he was directed to the Applicant's home by one Councillor Yiego of Kipkenyi location (ward) and how he found the Applicant who introduced himself as Isaac Kipchumba Maiyo. He had gone to the same home the previous day 20th December 1999 and had met the wife of the Applicant who had informed him of the whereabouts of the Applicant and that the Applicant would be at home on 21.12.1999, the very day he met the Applicant at his home. It is true, nobody actually pointed out the Applicant to him at the time of service, but his evidence that the Applicant himself admitted that he was the Defendant has not been challenged.

Further, when this evidence is considered together with the other evidence on record which I believe such as that the Defendant did file an appearance in this suit in a wrong court (i.e. Central Registry at Nairobi) dated 8th January 2000 (for I cannot see any good reason why another person should be interested in filing Memorandum of appearance for the Applicant); that the Applicant was served with Notice of Judgment; that the Defendant indeed did pay part of the decretal amount when auctioneers went to attach his property on 21.7.2000 long after he was allegedly served, and the inordinate delay in filing this application which was filed almost two years later notwithstanding the fact that from the records, it is clear the Applicant knew about this suit in court even by 21st July 2000 when he paid part of the decretal amount, the totality of all these leave me with only one conclusion and that is that he was properly served with the summons to enter appearance

The Applicant gave evidence on this aspect of the application and was clearly dishonest person. He even denied the contents of his own affidavit which were duly signed by him. He denied signature on his own affidavit and he stated that it was never explained to him the contents of his own affidavit and that he consequently did not know what was contained in the same Affidavit. That was the Affidavit alleging non service upon him of the Plaint and summons to enter appearance. His supplementary affidavit was signed on a date he did not know and was signed in the Chamber of his counsel. At the time when he signed Supplementary affidavit in his counsel's office, there was no one else in the office. This means that his supplementary affidavit was actually not signed before a Commissioner for Oaths.

That is the person who also denies his signature on the Memorandum of Appearance bearing his own name and filed at the Central registry. That is the person who is seeking to persuade me that he was not served with the summons to enter appearance when he denies his own signature in the same supporting Affidavit where he makes the same allegations. I do not believe him. As I have stated hereinabove, I do believe the Process Server. The effect of all this is that the interlocutory judgment entered was regular. The draft Defence annexed by the Applicant is comprised of denials at paragraphs 3, and 4. Paragraph 5 says that the K.shs 200,000/- he has paid to the Defendant has already discharged his indebtedness to the Plaintiff and the Plaintiff has no claim against him. Paragraph 6 states that interest and other charges levied were never agreed upon with the Plaintiff and that the same are excessive or exorbitant and unconscionable, and that as he has paid K.shs 200,000/- his liability is discharged.

The claim in the Plaint is for K.shs 363,356/25. The Plaintiff is a Banking institution. The Applicant cannot be serious when he states that no interest would be due to the Plaintiff. That is clearly not being reasonable. In any event I have perused all the letters written by and/or on behalf of the Applicant. He does not deny at any stage that interest was chargeable. He does not in any of those letters question the rate of interest that was chargeable. I am not satisfied that the draft defence raises a reasonable defence that would necessitate my setting aside a regular interlocutory judgment. I will not set it aside. The application by way of chamber summons dated 9th November 2001 is dismissed with cost to the Plaintiff/Respondent.

Dated and delivered at Nairobi this 15th day of February 2002.

ONYANGO OTIENO

JUDGE