Grain Industries Limited v Ali & 6 others (Civil Case E051 of 2023) [2024] KEHC 8416 (KLR) (8 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8416 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE E051 OF 2023

DKN MAGARE, J

JULY 8, 2024

BETWEEN

GRAIN INDUSTRIES LIMITED .... APPELLANT

AND

ALI MOHAMED ALI .... 1ST DEFENDANT

JUMA MICHAEL ATONYA CHAHANYA .... 2ND DEFENDANT

SWALAH MOHAMED .... 3RD DEFENDANT

HABIBA ABDULLAHI T/A AL HAMDU WHOLESALERS ...... 4TH DEFENDANT

SAID T/A NEW GAMA LOGISTICS .... 5TH DEFENDANT

COLLINS OTIENO OGADA .... 6TH DEFENDANT

AHMED SOUD ATHMAN .... 7TH DEFENDANT

RULING

1. This is in respect of an application to set aside exparte Judgment. The matter was heard and concluded. The court entered judgment on 14/12/2023. The same was executed and title transferred.

2. Only the defendant entered appearance. There was a consent to withdraw the case against the 3rd defendant. Thereafter the court proceeded to formal proof hearing. The Deputy Registrar of this court entered transfer. The title to the pledged land is now in the plaintiff's name.

3. It appears that the 6th and 7th defendants, on realizing that they could not set aside Judgment, caused some parties to file an application dated 5/2/2024, which was not prosecuted. The Applicant, the 6th defendant sought the following prayers:-

   a. Spent.

b. Spent.

c. That the court be pleased to stay execution of the orders of the [court] made herein on 14th December, 2023 pending the hearing and determination of this application.

d. That the court be pleased to set aside the ex parte orders of the [court] herein on 14th December, 2023 and be granted unconditional leave to defend the suit on its proper merit.

4. The suit had been filed on 4/7/2023. Summons to enter appearance were issued. They were served on the defendants. Affidavits of service for each defendant were served. The 6th defendant was served via email – otienocollins@gmail.com and No. 0720118996 and the 7th was served through 0721614356. He was served via WhatsApp messaging service. The message was delivered.

5. The 3rd defendant entered appearance and as such a new request had to be made. The 3rd defendant stated that he was an agent serving the market and was not involved in preparation. The 3rd defendant entered appearance through the firm of Aboubakar Mwanakitina & Company Advocates.

6. The firm of George Egunza & Co. Advocates entered appearance for the 4th and 5th defendants under protest on 20/9/2023.

7. On 2/11/2023 a consent order was recorded to remove the 3rd defendant with no order as to costs. Compliance documents were filed on 3/11/2023. The matter was heard and submissions filed on 20/11/2023.

8. Initially the application was not prosecuted and as such the court dismissed the same. The same was later reinstated the application after the Applicant filed an application dated 19/2/2024 to set aside. The plaintiff filed a detailed replying affidavit dated 15/2/2024 sworn by said Mohamed Nabil. The plaintiff stated that the 6th and 7th defendants have not stated the defence they have. They annexed correspondences regarding execution of transfer vide a letter dated 13/3/2023.

9. The said advocates indicated that the transfer had been executed. The correspondence is mentioned as is. They stated that the 6th Defendant had been in constant communication with the plaintiff and was in the office on 5/2/2024 to discuss the suit. They stated that the 6th and 7th defendants actively participated in the fraud and surrendered the title deed.

10. They stated that transfer to plot No. Chembe/Kibamsheshe/108 has been effected. This was done on 6/2/2024 as per annexture. Annexture D confirmed this aspect of transfer. The Respondent prayed that the application be dismissed.

11. The 6th Defendant/Applicant stated that the Kilifi Land Registry informed them that there was intended transfer. This was not indicated on which number. They stated that transfer occurred on 6/2/2023. In the further affidavit they stated the email address does not belong to him. They sought to cross examine the Process Server but did not do so.

12. The Respondent was loudly silent on the averments related to the communication from Bosire & Nyari Company Advocates. The Green Card showed transfer on 6/2/2024. On the same day, there was an application by 10 people, purporting to be beneficiaries of the pledged land. The court did not find the same urgent. On the date for next hearing date the Applicant went missing. The said application was responded to but is of no relevance to the case at hand.

13. The plaintiff filed submissions on 26/4/2024 while the 6th and 7th defendants/applicant filed theirs on 3/5/2024. I directed ruling be fixed for today.

The Applicant's Submissions

14. The Applicant raised issue whether there was a proper service of summons. He stated that the service of summons is couched in mandatory terms as per Order 5 Rule 1 of the CPR, 2010. They stated that the phone belongs to Ruth Kuyu. They also stated that the email was not his. He does not operate such an email.

15. They relied on the case of *Frigonken Ltd V. Value Park Food Ltd, HCC No. 424 of 2010*, where the High Court stated:

> " If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court ex debito justiciae, as a matter of right.

16. They further submitted that the court setting aside irregular ex-parte judgement is not by discretion but as a matter of right without even taking into consideration whether a defence raising triable issues is presented, as per CA No. 6 of 2015 James Kanyita Nderitu V Maries Philotas Ghika & Another [2016] eKLR.

17. They also relied on the case of David Kiptanui Yego & 134 others v Benjamin Rono & 3 others [2021] eKLR it was rightly held that the court should not countenance (tolerate) an irregular judgement.

18. They prayed that the court allows the application dated 5/2/2024 and ignores errors indicating that the case indicates Nairobi instead of Mombasa. The last submission is unnecessary as there is no court that can penalize a party for such a mundane error.

19. The plaintiff, on the other hand submitted that the application is untenable and ought to be dismissed. They stated that the court is guided by Order 10 Rule 11 of the Civil Procedure Rules.

20. The Respondents averred that the Applicant disavowed the phone number given and later email without stating what the correct one is. The respondent raised issued on the statement by the 6th defendant claiming that the 7th defendant was not served.

21. It was their case that 6th and 7th defendants provided the said contacts and they surrendered the addresses and phone numbers. It was their position that communication between them occurred using the numbers that were provided by the Applicants. It was their case that a sum of Kshs. 145,042,485 was due and owing.

22. They submitted that there is no plausible defence proffered by the 6th defendant/Applicant. It was posited that the Applicants land as security which has been transferred and they admitted as such. It was their position that a party to a claim like the one the Applicant was facing must offer a serious defence, which the applicant failed to do. Reliance was placed on the case of Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR, where the Court of Appeal stated as doth: -

> " The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in Thorp v Holdworth (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible", (underling supplied).

I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant's defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of 0 6 r 13(1)(a)."

Analysis

23. Being an application to set aside, the 6th and 7th defendants, must do 2 of the three things below:-

    i. Displace the presumption against the Process Server.

    ii. Show there was no service.

    iii. Show that they have an arguable defence.

24. At least in this matter, the Applicants do not pretend to have a defence. They rely solely on service. However, there is no triable issue raised. A sum of Kshs. 145,042,485 was fraudulently taken. The 6th and 7th defendant surrendered the titles. They have not exhibited any defence to the claim. Therefore, if the other two limbs fall, the court has to dismiss the application.

25. In the case of Frigoken Limited V Value Pak Food Limited [2011] eKLR, The Court Stated as doth: -

> "In the case of Baiywo v BACH [1986-1989] EA 27, the Court of Appeal held that there is a qualified presumption in favour of the process server recognized in MB Automobile v Kampalla Bus Service [1966] EA 480 at page 484, as having been the view taken by the Indian Courts in construing similar legislations to ours. On Chitaley and Annaji Rao the Court of Civil Procedure Vol. 11 at 1670, the learned commentators are quoted as saying – "3. Presumption as to service – There is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service."

26. The Applicant started on a wrong footing. There is no requirement that their last known address be theirs. The plaintiff who had dealt with the parties positively averred that the two were the last known address. The Applicant did not say that they did not use the number, but that the phone number used is registered in the name of Ruth Kungu. The Applicant failed to displace the evidence that they gave out the number with the title deed. The same may have been part of fraud. They also needed to question the Process Server, which they failed to do.

27. However, if it is the number the applicants habitually used then the court will take it as their last known address. I am perturbed that the Applicants did not bother to disclose that there were correspondences. In this contest the service on the 6th defendant was proper. He has not shown that the number he uses is different from the one he was served upon. He did not say that he does not have email. He failed miserably to show that they were numbers they were not using. They also failed to displace the evidence that they were continuously in constant communication with the plaintiff's advocates.

28. Earlier communication in February 2023 was that they have surrendered interest in the land. Thirdly, I have not seen an affidavit from the 7th defendant denying the phone number. The 6th defendant is singularly not qualified to deny the address of the 7th defendant. He has no authority to do so.

29. In the case of Simeon Nyachae v Lazarus Ratemo Musa & Another [2007] eKLR, M. Warsame, as he then was stated as doth: -

> " It is my decision that it is the legal duty of litigants to prove the allegations set down in their pleadings. And it would be unreasonable for PW1 to attest to the contents of a plaint filed by the plaintiff, simply because he was given power of attorney by the plaintiff. Once a party expresses a case of defamation, he is expected to show in detail the statement was against his character, dignity and reputation. And as a result of that publication or statement, he has suffered injury to attract the award of damages."

30. The matter in the above case related to defamation. However, the principle is the same. The 6th defendant has no authority to deny service on behalf of the 7th defendant. The case by the 7th defendant/ applicant is incurable in all ways. It is dismissed in limine. The 7th defendant placed no material before the court for consideration.

31. The 6th defendant did not place sufficient material on the table, to show that he was not served. In the case of James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR [supra], the Court of Appeal stated as follows: -

> " We do not think, in the circumstances of this case, the trial judge can be faulted for setting aside the irregular default judgment. Apart from Marios, the fact that the default judgment was irregular was brought to the attention of the Court by the administrator of the estate of Androniki, the owner of the original parcel, as well as by Athman, who claimed to have acquired ownership thereof through adverse possession. The court was therefore not expected to shut its eyes to the glaring irregularities we have pointed out above regarding the default judgment.
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> The former Court of Appeal for Eastern Africa, in Ali Bin Khamis v. Salim Bin Khamis Kirobe & Others, [1956] 1 EA 195 expressed the view that where an order is made without service upon a person who is affected by it, procedural cockups will not deter the court, ex debito justitiae, from setting aside such an order. Briggs, JA., with whom Worley P. and Sinclair, VP. concurred, stated thus:
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>> "On the appeal before us Mr. Khanna relied on Craig v Kanseen [1943] 1 All ER 108 as showing that where an order is improperly made without serving a person known to be affected by it and having a statutory right to be served before its can be made, the order is a nullity in the sense that it must be set aside ex debito justitiae, and that in cases of nullity procedure is unimportant, since the Court has inherent jurisdiction to set aside its own order. I accept these principles, as laid down by Lord Greene, MR."

32. Under section 112 of the *Evidence Act*, a party who has special knowledge must disclose the same. The Applicants know their numbers, they never indicated that a digit or two were missed. The court must as a corollary make an adverse inference. The section provides as follows: -

> " In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

33. In the case of Nesco Services Limited v CM Construction [EA] Limited [2021] eKLR, Justice G V Odunga as then he was stated as doth:

> " In my view, the fact that the document in question was authored by the Appellant's agent and was produced by consent of the parties themselves entitled the learned trial magistrate to rely on it. The Court of Appeal in *Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982* [1982-1988] 1KAR 278 had this to say on the issue:
>
> > "Where documents are put in by consent, as for example an agreed bundle of correspondence, the usual agreement is that they are admitted to be what they purport to be (so as to save the necessity for formal proof of each document)."
> >
> > 41. Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse inference could be made thereon. In Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows:
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> > > "Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:
> > >
> > > > 'In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.'
> >
> > Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make the adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

34. Using the evidence on record, and in view of the above findings, I find that service was regular. Having found that there is no defence offered, I have no discretion other than to dismiss the application dated 5/2/2024.

35. As regards costs, section 27 of the *Civil Procedure Act* provides as follows: -

    (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

36. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh *Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012*; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

Determination

37. The upshot of the foregoing is that I make the following orders:-

a. The application dated 5/2/2024 lacks merit and is accordingly dismissed with costs of Kshs. 15,000/= payable within 30 days.

b. In default execution to issue.

c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 8TH DAY OF JULY, 2024.

Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for parties

Court Assistant – Jedidah