Gulf African Bank Ltd v Cedarine Ltd & 2 others (Commercial Case E039 of 2023) [2024] KEHC 8421 (KLR) (8 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8421 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

COMMERCIAL CASE E039 OF 2023

DKN MAGARE, J

JULY 8, 2024

BETWEEN

GULF AFRICAN BANK LTD ..... PLAINTIFF

AND

CEDARINE LTD ..... 1ST DEFENDANT

AHMED SHARIFF ABDI ..... 2ND DEFENDANT

ALIMZAMIL ABDI MOHAMED ..... 3RD DEFENDANT

RULING

1. This is ruling on application dated 27/3/2024. The defendant filed a notice of appointment dated 20/3/2024 and filed an application to set aside judgment among other orders. They sought the following orders: -

    a. That this application be certified urgent and heard exparte in the first instance.

    b. That pending the interpartes hearing this Honourable Court be pleased to stay execution of the exparte Decree issued by the Court on 12/2/2024.

    c. That pending interpartes hearing, this Honourable Court be pleased to restrain the Plaintiff by itself, its agents and/or servants from selling and/or leasing the Applicant's Trailer Nos. KDL 502L & KDL 504 DL/ZH 10513 7 ZH 10514.

    d. That this Honourable Court be pleased to order the Plaintiff to release to the Defendants trailers Nos KDL 502 L & KDL 504 DL/ZH10513 & ZH 10514 that were repossessed on 2.2.2024 without Court Order.

    e. That this Honourable Court be pleased to vary and/or set aside the Exparte Decree of the Court made on 12.2.2024 and allow the case to be heard on merit.

f. That the costs of this Application be provided for.

2. The request for judgment was for Kshs. 25,409,404.83/- as at 23/10/2023 with a contractual profit at 14.5% per annum from 23/10/2023 until payment and costs at court rates of 15% per annum.

3. The application was opposed through an affidavit filed by Lavi Sato sworn on 4/4/2024. Parties did not submit on the application related to repossession. It is thus not clear whether this was due to attachments herein or independent of the suit. The court will determine the application for setting aside and for the application for release of attached motor vehicles.

4. The Plaintiff filed submissions. They relied on the case of *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR, decided by the Court of Appeal [Makhandia, Ouko & M'inoti, JJ.A]. In that case the court held as follows –

> " The approach of the courts where an irregular default judgment has been entered is demonstrated in the following cases. In Frigonken Ltd v. Value Pak Food Ltd, HCCC NO. 424 of 2010, the High Court expressed itself thus:
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> > "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 justitiae. Such a judgment is not set a side in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process."
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> Earlier in *Kabutha v. Mucheru*, HCCC No. 82 of 2002 (Nakuru) Musinga, J. (as he then was) had expressed the principle thus:
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> > "With respect to the trial magistrate, she had no discretion to exercise in the circumstances of the case since there was no service at all and as earlier said, the default judgment had to be set aside as a matter of right. Discretion would have arisen if service was proper and there had been for example delay in entering appearance. Where there is no service of summons to enter appearance, an applicant does not have to show that he has an arguable defence so as to persuade the court to set aside an ex parte judgment. In such circumstances, the court is under a duty to remedy the situation and uphold the integrity of the judicial process."

5. They state that this court should establish whether Judgment is irregular, which must be set aside or regular while issues of delay and merits are considered. They stated that the Judgment is not irregular as there was service by Patrick M. Mulewa. They stated that there is a presumption in favour of the process server and relied on the case of *Wanguny vs Ndelu & Another* (2022) KEHC 12007 KLR.

6. The Process Server is said to have served the summons on infocedarlile@gmail.com. It is unclear whose address this was.

7. The Respondent submitted that summons were served on 19/4/2013. They stated that Mr. Kirui should have disavowed a letter dated 27/2/2024. He is said to have represented the defendant in CMCC E1202 of 2023. They state that the defence does not raise a triable issue.

8. The 2nd and 3rd defendants as guarantors, they relied on the case of *Kenindia Assurance Co Ltd vs National Finance Bank Ltd* 92003) eKLR and prayed that the motion dated 27/3/2024 be dismissed with costs.

9. The Defendants/applicant submitted vide their submissions dated 9/4/2024. They stated that they relied on the case of Alderman vs Shah & 30 Others. They stated that the email used to serve was not the same that he was served with service of Notice of entry of Judgment.

10. It was their case that the Judgment was irregular and as such must be set aside ex debito justiceae. They state that the defendants ought to have been compensated in full. They stated that the plaintiff does not deny existence of a moratorium.

11. The applicant submitted that it is not open for the plaintiff to repossess trailers and claim the same money in court. They stated that they have a good defence.

Analysis

12. The cardinal principle of law is audi alterum paterm, hear the other side. The Respondent filed suit and served or so they thought on an email address they never disclosed in the Plaintiff's affidavit of service. The question before me is whether, the judgment entered herein is regular or irregular.

13. In the case of *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [*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 Andronikí, 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."

14. The address used for service is not the same provided in paragraph 2 and 3 of the plaint. There is no knowing how the address was obtained. There appears to be emails exchange but the same relate to insurance. The Respondent is not an insurer. There must be a banker relationship and details for service must have been provided. None of these are disclosed as having been used.

15. The court is not satisfied with service. Without service the judgment is irregular. An irregular judgment is set aside unconditionally. There is no need to prove the kind of defence the parties have.

16. To compound the misery, there are two sets of claim in the plaint, that is: -

    a. 25,409,404.83 which is a pecuniary claim.

b. 14% per annum as contractual profit, which is not a liquidated claim.

17. The second limb is a non-pecuniary or a special loss. This was to be proved via a formal proof, if there was proper service. In the absence of proof of 14.5% per annum as profit, was this subjected to formal proof? In the case of *Samson S. Maitai & Another -vs- African Safari Club Ltd & Another* [2010] eKLR, the High Court in trying to define Formal Proof stated thus:

> " ..... I have not seen judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption."

18. Order 10 rules 4, 5, 6,7 and 9 provide as follows: -

4.

(1) Where the plaint makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.

(2) Where the plaint makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.

5. Where the plaint makes a liquidated demand with or without some other claim, and there are several defendants of whom one or more appear and any other fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against any defendant failing to appear in accordance with rule 4, and execution may issue upon such judgment and decree without prejudice to the plaintiff's right to proceed with the action against such as have appeared.

6. Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.

7. Where the plaint is drawn as mentioned in rule 6 and there are several defendants of whom one or more appear and any other fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against the defendant failing to appear, and the damages or the value of the goods and the damages, as the

case may be, shall be assessed at the same time as the hearing of the suit against the other defendants, unless the court otherwise orders."

19. The claim herein was not purely liquidated. The same ought to have been proved. In the case of *Swalleh C. Kariuki & another v Viloet Owiso Okuyu* [2021] eKLR, the court, Justice Luka Kimaru, as then he was, stated as doth; -

> "In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:
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> > "Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

20. Secondly the emails used belong to Munail Gotrack and Halima Yunis. There is no basis for presenting these two addresses belonging to the defendant.

21. Thirdly, there is a triable issue raised by the defence. Can the plaintiff repossess security and at the same time sue for the amount used to purchase them? This is a valid point of defence.

22. Lastly there was no attempts to serve summons. The emails were sent to unknown people and this cannot be the basis for entry of judgment. Such judgment is described as a nullity. In *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

23. The effect of a nullity is that there is no judgment before service of summons. The court finds that the summons were not properly served. In the circumstances the defendants are entitled to defend. This service fell below the ordinary standards.

24. In any case, the second aspect of 14.5% interest rate was not proved. It is not a liquidated pecuniary loss. This said part of the claim is not proved.

25. The next aspect is the issue of Interim Orders related to repossession. The court was not addressed on all aspects.

26. This suit is for the entire amount for the repossessed vehicles. It is doubtful that the plaintiff has a right to pursue both suit and repossession. Given that the suit is already filed, the repossession cannot proceed until this court gives an order to that effect. This is for good measure. The Plaintiff must elect a course of action to use. They cannot repossession and pursue a decree herein. That is stealing a match from the defendants.

27. To enable parties be in the same pedestal, the subject matter must be returned to the defendants until the hearing and determination of the suit.

28. The matter shall be listed for directions on 23/9/2024.

Determination

29. The upshot of the foregoing is that I make the following orders;

    a. The court finds that the application dated 24/3/2024 is merited and allows the same as follows.

        i. Ex parte Judgment is set aside for being irregular. The Defendants are entitled to enter appearance within 15 days from the date of service of this order and file defence within 15 days.

        ii. There be stay of execution of the exparte decree issued by the court on 12/2/2024 pending the hearing of the suit.

        iii. That pending the hearing and determination of this suit, the Plaintiff by itself, its agents and/or servants is hereby restrained from selling and/or leasing the Applicants' trailer Nos. KDL 502L and KDL 504 DL/ZH 10513 & ZH 10514.

        iv. The pending the hearing and determination of this suit, the Plaintiff is hereby ordered to release to the Defendants trailders Nos. KDL 502L & KDL 504 DL/ZH10513 & ZH 10514 that were repossessed on 2/2/2024 without court order.

    b. The Defendants shall have costs of Kshs. 15,000/- for the application.

    c. The file be mentioned on 23/9/2024 in Mombasa for directions.

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

RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

MAGARE KIZITO

JUDGE

In the presence of:-

Mr. Kongare for the plaintiff

No appearance for the Defendants

Court Assistant - Jedidah