



**Ngechu t/a Aberdare Steel & Hardware v Chase Bank (Kenya) Limited (Civil Case 82 of 2016) [2023] KEHC 30 (KLR) (Commercial and Tax) (13 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 30 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 82 OF 2016  
A MABEYA, J  
JANUARY 13, 2023**

**BETWEEN**

**SOLOMON NDIMBUI NGECHU T/A ABERDARE STEEL &  
HARDWARE ..... APPLICANT**

**AND**

**CHASE BANK (KENYA) LIMITED ..... RESPONDENT**

**RULING**

1. Before Court is an application dated November 22, 2021. It was brought under Articles 25(c), 47, 159 (2) of the *Constitution*, Section 3A of the *Civil Procedure Act*, and Order 10 Rule 11, Order 22 Rule 22 and Order 51 Rule 1 of the *Civil Procedure Rules*.
2. The main order sought is the setting aside of the judgment entered on October 17, 2019 against the applicant.
3. The grounds for the application were set out on the face of the application and in the supporting and supplementary affidavit of Solomon Ndimbui Ngechu sworn on November 22, 2021 and 7/4/2022, respectively.
4. It was the applicant's case that he was unaware of the matter and had never been served with the Summons or even Notice to Show Cause. That he had never opened an account with the respondent, and if he had, it was inactive. That the applicant had never taken a loan from the respondent and there was no proof to show that he had offered security for the alleged loan of Kshs 10,399,252/=.
5. The applicant further contended that he had never instructed the firm of Sospeter & Company Advocates to act on his behalf in the matter. That he had indeed filed a complaint against Nyongesa Sospeter Masika P 105/6041/06 before the Advocates Disciplinary Tribunal and LSK. That he only



- became aware of the matter when the respondent sent the Notice to Show Cause to his advocate on record vide WhatsApp.
6. The applicant also denied ever signing any statement or affidavit that the firm of Sospeter & Company had placed before court. To back up his contentions, he produced a sample of his signature to demonstrate that all documents filed by the said firm were forged.
  7. The applicant therefore disclaimed all the pleadings filed on his behalf by the said firm. That the respondent had not produced any evidence of a comprehensive bank statement of his alleged account as proof of the loan. He therefore sought that the judgment and consequential decree of Kshs 94,924,420.53 be set aside.
  8. The respondent opposed the application vide the replying affidavit of Kevin Kimani, the respondent's legal officer, sworn on 15/3/2022. He averred that the firm that the applicant now denied had represented the applicant in similar suits including NRB HCC No 419 of 2014. That the respondent wrote to Mr Sospeter on 4/3/2022 and he confirmed that the applicant had instructed him to represent him in this matter.
  9. That the applicant opened an account with the respondent on November 24, 2009 and was advanced a loan of Kshs 10,399,253/= vide the letter of offer dated 21/8/2013.
  10. That the applicant's pleadings were struck out on October 17, 2019 after he failed to participate in mandatory mediation, and also failed to attend all court proceedings. That judgment for the liquidated claim was therefore entered and the applicant's advocate served the applicant with a notice of entry of judgment through the applicant's address provided on the letter of offer.
  11. That there was no evidence of forgery and no case had been established for setting aside the judgment. That the decretal sum in the Notice to Show Cause (NTSC) was incorrect and would be rectified, but that was not a ground for setting aside the judgment.
  12. The manager of the law firm in question, one Sospeter Masika Nyongesa also filed a replying affidavit sworn by himself on 11/5/2022. He was however not a party to the suit.
  13. He contended that the applicant was his client since 2010 and he had represented him in various matters including NRB HCC No 419 of 2014 against the respondent. He produced various pleadings as "SMN1". That the applicant was aware of this matter and they communicated regularly through phone. That he always acted professionally to represent and protect the applicant and his business.
  14. The application was canvassed by way of written submissions. The applicant's submissions were dated 13/6/2022 while those of the respondent were dated October 11, 2022. This Court has considered all the pleadings, evidence and submissions before it.
  15. The issue in contest is whether the applicant was ever served with summons to enter appearance in the matter, and consequently, whether the judgment should to be set aside.
  16. It was the defendant's case that it served the applicant's advocate, the firm of Sospeter & Company Advocates, with summons to enter appearance, as it represented the applicant in NRB HCC No 419 of 2014 which had been instituted by the applicant against the respondent.
  17. That Mr Sospeter confirmed he had instructions to receive the summons and upon service, he entered appearance and filed the defendant's statement of defence and witness statement. The applicant on the other hand denied ever instructing that firm to represent it in this matter. That he was unaware of its existence until the time when his advocate on record received a WhatsApp message with the NTSC against the applicant.



18. Order 5 of the [Civil Procedure Rules](#) provides that the summons should invite the defendant to appear in the suit. It obligates a plaintiff to prepare Summons, collect them for service and also provides for renewal of the same. Rule 8(1) & )2) of the [Civil Procedure Rules](#) provides: -
- “ 1. Wherever it is practicable, service shall be made on the defendant in person unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.
  2. A summons may be served upon an advocate who has instructions to accept service and to enter an appearance to the summons and judgment in default of appearance may be entered after such service.”
19. The question to be addressed is whether the firm of Sospeter and Company (“the said firm”) was the applicant’s agent or had instructions to receive Summons in this case and enter appearance on his behalf.
20. The applicant denied giving instructions to the said firm. He also denounced the signature on the undated witness statement filed by that firm. Judicial notice is taken that the copy of the witness statement “SNN2” is incomplete and not commissioned. This court has seen that signature, together with the signature appearing on the applicant’s supporting and supplementary affidavit and the specimen signatures in attachment “SNN3”. It is quite evident that the applicant’s signature in the pleadings before court is very different from the one appearing in the aforementioned witness statement.
21. The Court has also seen the annexure “SMN1” in the replying affidavit sworn by Mr Sospeter, wherein pleadings of various matters in which the said firm represented the applicant were produced. The signature appearing in the verifying affidavit dated October 26, 2015 in ELC No 1054 of 2015 purportedly signed by the applicant is also completely different from the one in the witness statement filed in this case by the said firm.
22. There also appears another verifying affidavit in an un-numbered case HC .... of 2016 Aberdare Steel & Hardware Ltd vs Co-operative Bank of Kenya purportedly sworn by the applicant on 23/3/2016. Again, that signature is different from the ones appearing in other pleadings filed by the said firm. This casts doubts in the Court’s mind as to whether the applicant signed the witness statement in this matter.
23. Further, though Mr Sospeter swore that he had represented the applicant since 2010, he did not produce any document to establish an existing advocate-client relationship between him and the applicant. He stated that the applicant was aware of the present suit as they communicated through telephone.
24. This is a 2016 matter, it is unbelievable that in all those years, Mr Sospeter did not once communicate formally to his long-term client. There was no evidence of any correspondence whether electronic or hardcopy, no evidence of payment of legal fees, or even instruction notes for this or any other matter. The pleadings filed by Mr Sospeter were not convincing either. The verifying affidavits purporting to be sworn by the applicant bore different signatures and the pleadings themselves did not have either the law firm’s stamp or any court stamp.
25. It was contested that the applicant had filed NRB HCC No 419 of 2014 against the respondent and Mr Sospeter represented him in that suit. That that was the reason the Summons were served on him. There was no evidence to show that the said firm had any instructions from the applicant to represent him in this matter.



26. Further, the respondent did not show that it made any attempts to serve the applicant personally and failed. Even where the applicant was personally unreachable, Order 5 of the Civil Procedure Rules offers different ways of substituted service which do not have to involve third parties. It is noted that the alleged proceedings in NRB HCC No 419 of 2014 were not produced to demonstrate that indeed the applicant had instituted the claim against the respondent and that the said firm represented him therein.
27. Mr Sospeter swore that he represented the applicant in this suit, and did so professionally to represent and protect his interests. However, it the respondent stated that the said advocate only entered appearance, filed a defence and witness statement, and vanished. The firm never attended mentions, failed to comply with the direction for court-annexed mandatory mediation, failed to appear during notice to show cause and at all other times. That this had led to the striking out of the applicant's alleged pleadings and entry of judgment for the liquidated amount. That is not the conduct of an advocate who professionally represented and protected his client's interests. Mr Sospeter was but anything else but honest.
28. In view of the foregoing, the Court is not satisfied that the said firm had any instructions to receive service of the summons on behalf of the applicant. The said firm did not and could not therefore purport to represent the applicant.
29. In Misnak International (UK) Limited vs 4MB Mining Limited c/o Ministry of Mining Juba Republic of South Sudan & 3 Others [2019] eKLR, the Court of Appeal held:
- “We concur with and adopt the following sentiments of Aburili, J in Law Society of Kenya vs Martin Day & 3 Others (*supra*): “It is not sufficient for a plaintiff to institute suit against a party. That party must be invited to submit to the authority of the court in order for the legal process of setting down the suit for trial to commence. The circumstances of this case are such that Summons must be served in the manner provided for in the rules to enable the defendants who have no registered office or business in Kenya submits to the jurisdiction of this court. It therefore follows that their knowledge of the existence of the suit is not sufficient enough to proceed against them. They may be aware of the suit but unless they are prompted by the summons in the manner provided for in the rules, the jurisdiction of this court is not invoked.”
30. The upshot is that there was no proper service of the Summons to enter appearance on the applicant.
31. In such circumstances, what is the effect? In James Kanyita Nderitu v Maries Philotas Ghika & Another [2016] eKLR, the Court of Appeal delivered itself thus: -
- “In an irregular judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito justitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular, it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue, or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be



heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.”

32. This Court associates itself with the above findings. Summons having not been served upon the applicant, it follows that the judgment against him was irregular. The automatic consequence is that the same must be set aside.
33. In the end, this court finds that the application is meritorious and make the following orders: -
- a) The judgment entered on October 17, 2019 against Solomon Ndimbui Ngechu T/A Aberdare Steel & Hardware together with any consequential decree is hereby set aside.
  - b) The applicant is granted leave to file a defense within 14 days of the date hereof.
  - c) The applicant is granted leave to appoint the firm of Mwae and Associates to represent him in this suit.
  - d) All pleadings filed by Sospeter & Co Advocates on behalf of the applicant are hereby struck out.
  - e) The costs of the application are awarded to the applicant in any event.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF JANUARY, 2023.**

**A. MABEYA, FCI Arb**

**JUDGE**

