Bank of Africa Kenya Ltd v Abdalla (Civil Suit E331 of 2019)
[2023] KEHC 20007 (KLR) (Commercial and Tax) (17 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20007 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT E331 OF 2019

A MABEYA, J

JULY 17, 2023

BETWEEN

BANK OF AFRICA KENYA LTD ..... PLAINTIFF

AND

SAID MOHAMED ABDALLA ..... RESPONDENT

RULING

1. This is a ruling on an application dated 5/3/2022. It was brought under Order 10 Rule 11, and Sections 3 & 3A of the *Civil Procedure Act*.

2. The same sought orders that the exparte interlocutory judgment entered against the applicant on 13/12/2019 and decree of even date be set aside and the matter be set down for full hearing on merit. It also sought that the process server do appear in court for cross examination on his affidavit of service dated 13/12/2019.

3. It further sought orders that the applicant be granted leave to file his defense and the respondent be compelled to account and preserve the proceeds of the sale of the applicant's properties being securities for the loan advanced by the respondent of Kshs. 24 million. It also sought orders restraining the respondent and his representatives from using the police to harass the applicant.

4. The same was supported by the defendant's affidavit of 5/3/2022. It was contended that the applicant took a loan from the respondent of Kshs. 24 million on the security of the properties registered as title numbers CR No. 43611/1 and CR No. 54997 (hereinafter "the said properties"). He also took an overdraft facility of Kshs. 5 million on the same securities.

5. That he was unable to repay and negotiated with the respondent whereby he was allowed to sell the bigger property at Kshs. 30 million which was paid to the respondent vide cheque no. 000253 on

14/12/2016. That only a small balance remained which he tried to pay. That without notice, the respondent sold the other property to recover the balance.

6. That the property was valued at Kshs. 20 million but the respondent did how much it had sold the property for. That no demand letter had ever been served.

7. The applicant contended that he did not owe the respondent any money as alleged as he had repaid the facility in full. That the loan was advanced in 2014 thus the interest could not have tripled within one year. That the respondent's claim for Kshs. 52 million was therefore untenable.

8. That the suit was malicious and the respondent had already recovered its outlay from the said properties. That the affidavit of service was full of lies and the applicant only became aware of the matter during execution and he instructed a lawyer on 4/11/2021 to inform the Court that the amount had already been paid. That the said advocate never filed the application which has now been filed by the applicant's advocates on record.

9. It was further contended that no prejudice would be suffered by the respondent as no debt was due. That the suit was filed secretly and the respondent's documents filed in court were maliciously prepared to mislead the Court and the interlocutory order and consequential decree ought to be set aside.

10. The respondent opposed the application vide the replying affidavit of Charles Waiyaki sworn on 21/7/2022. It was contended that the respondent advanced to the applicant a loan facility of Kshs. 5 million to offset his loan with Equity Bank vide letter of offer dated 25/7/2012. That he received a further loan of Kshs. 28,376,2014.48 vide letter of offer dated 30/8/2013. That both loans were secured by the legal charges dated 8/10/2012 and 6/12/2013, respectively over the said properties.

11. That the applicant was unable to repay and was allowed to sell by private treaty one of the properties for Kshs. 30 million which offset only part of the loan. That the respondent agreed to restructure the existing facility of Kshs. 52,223,366.96 vide letter of offer dated 2/12/2016 but the applicant still refused to pay. That the respondent issued a demand letter dated 4/9/2019 and thereafter instituted this suit to recover the sum of Kshs. 32,700,353.16 plus interest at 13% p.a.

12. It was contended that the plaint, summons and all other pleadings were served on the respondent as per the affidavit of service dated 13/12/2019 but the respondent failed to enter appearance nor file a defence within the statutory timelines. That the judgment was lawfully entered. That the applicant was always aware of the suit, judgment and commencement of execution having been properly served.

13. That the application was brought after inordinate delay as the pleadings were served on 25/11/2019.

14. The main issue for determination is whether this court should set aside the interlocutory judgment entered on 27/1/2020.

15. Order 10 Rule 4 (1) and (2) of the Civil Procedure Rules provides for entry of judgment where a plaint is for a liquidated claim and the defendant fails to enter appearance or file a defence once served. Under Rule 11 such a judgment may be set aside on terms.

16. In Patel vs EA Cargo Handling Services Ltd (1974) EA 75, the Court held that: -

> " There are no limits or restrictions on the judge's discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules, the principle obviously is that unless and until the count has pronounced judgment upon merits or by consent, it is to have power to revoke the

expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."

17. The principle therefore is that, the discretion of a court to set aside or vary a judgment entered in default of appearance or defence is a free one. It ought to be exercised to avoid an injustice or hardship but not to assist a person guilty of deliberate conduct intended to obstruct or delay the course of justice.

18. In Rayat Trading Co. Limited vs Bank of Baroda & Tetezi House Ltd [2018] Eklr. In Thorn PLC vs Macdonald [1999] CPLR 660, the Court of Appeal highlighted the following guiding principles: -

> " i) while the length of any delay by the defendant must be taken into account, any pre-action delay is irrelevant;
>
> ii) any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account, but is not always a reason to refuse to set aside;
>
> iii) the primary considerations are whether there is a defence with a real prospect of success, and that justice should be done; and,
>
> iv) prejudice (or the absence of it) to the claimant also has to be taken into account."

19. In the present case, it was not denied that applicant had taken a facility from the respondent. However, he contended that the same had been repaid in full through the sale of the two properties offered as security. That the respondent had failed to disclose how much it had sold the second property for.

20. The applicant denied being served with the summons or plaint or any demand. That he was unaware of this suit until execution.

21. This Court has considered the evidence before it. Contrary to the applicant's averments, there was a demand letter dated 4/9/2019 that was to the address that was used in the various letter of offers through which the loans were offered. In that notice, the respondent demanded for Kshs. 32,700,353/-.

22. This Court has also seen the affidavit of service dated 13/12/2019 through which the summons to enter appearance, plaint, verifying affidavit, list of witnesses, witness statement, list of documents and a bundle of documents were said to have bee served on the applicant.

23. The affidavit of service was well detailed and set out clearly the circumstances under which the above pleadings were served. The process server begun by conducting investigations and became aware of the residence, occupation and businesses of the applicant. He indicated the effort he made which was to travel to Mombasa on 24/11/2029.

24. The following day he traced the residence of the defendant but was told that the defendant was away in Malindi. That he traced the business place of the defendant's son was also out. That he called the defendant's son who advised him to leave the summons and other pleadings with manager of his business. That the son would later transmit the documents to the defendant.

25. The question is, is a one hurriedly attempt to serve a defendant enough to resort to alternative modes of service? Order 5 Rule 12 of the Civil Procedure Rules provides: -

> "Where in any suit, after a reasonable number of attempts have been made to serve the defendant, and defendant cannot be found, service may be made on an agent of the

defendant empowered to accept service or any adult member of the family of the defendant who is residing with him"

26. I am alive to the effort undertaken by the process server in tracing the defendant for service. However, the affidavit of service shows that he only made one attempt of 25/11/2019, when he was informed that the defendant was living somewhere in Malindi, he then looked for the defendant's son. He also did not find the defendant's son but on speaking to the said son, the said son instructed him to leave the documents with the manager of the business of the defendant's son.

27. Can that be said to be proper service? I don't think so. A single hurried visit to a defendant's residence cannot be said that the defendant cannot be found for service. The process server having established that the defendant was somewhere in Malindi should have, either sought to trace him there or, wait for the second day and serve the defendant's son personally. Then that could have been said to be service upon an adult member of the defendant's household.

28. My view is that, once the process server made a decision that the defendant could not be found, he should have endeavored to personally serve the defendant's son the following morning. To hold that service upon a manager of a son of a defendant is proper service upon the defendant, even with instructions from the defendant's son, would in my view to stretch the rule on alternative service too far. The suit did not belong to the defendant's son but the defendant.

29. Accordingly, I find that there was no proper service of the summons to enter appearance and defence.

30. This Court has considered the inordinate delay in bringing the application at a time when execution of the decree has begun. In my view, the delay perse cannot deny the defendant his right to have an irregular judgment set aside. An order for costs will atone the plaintiff.

31. Having found that service of summons was not proper, the defendant is entitled to have the judgment and all subsequent proceedings set aside unconditionally. However, due to the delay in bringing the application, the defendant shall bear the costs of the application.

32. In the upshot, the application dated 5/3/2022 is allowed on the following terms: -

    a. The inter-locutory judgment entered herein on 6/1/2020 together with all the subsequent proceedings are set aside.

    b. The defendant do file and serve his defence within 14 days of the date hereof.

    c. Mention before the Deputy Registrar on 31/8/2023 for pre-trials.

    It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JULY, 2023.

A. MABEYA, FCIArb

JUDGE