



**Panchal Trading (K) Ltd v Pma Trading Co (Civil Suit  
38 of 2020) [2023] KEHC 20928 (KLR) (19 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20928 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT 38 OF 2020**

**OA SEWE, J  
JULY 19, 2023**

**BETWEEN**

**PANCHAL TRADING (K) LTD ..... PLAINTIFF**

**AND**

**PMA TRADING CO ..... DEFENDANT**

**RULING**

1. Before the court for determination is the notice of motion dated January 20, 2022. It was filed by the defendant, PMA Trading Co under articles 50 and 159(2)(d) of the *Constitution of Kenya*, sections 1A, 1B and 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya as well as order 10 rule 11, order 51 rules 1 and 4 of the *Civil Procedure Rules* for orders that:
  - (a) Spent
  - (b) Spent
  - (c) The judgment delivered on August 11, 2020 together with the consequential decree and all the ex parte proceedings be set aside and the defendant be granted leave to defend this suit and be heard de novo.
  - (d) The costs of the application be provided for.
2. The application was premised upon the ground that the defendant had entered appearance and filed a notice of preliminary objection contesting the jurisdiction of the court, which ought to have been heard first before the court could make any adverse orders against the defendant. It was further the contention of the defendant that it has a good defence to the suit which raises triable issues and therefore should be accorded its constitutional right to be heard.
3. In support of the application, the defendant relied on the affidavit of Atal Singhal, in which it was averred that the defendant had raised a jurisdictional issue on account of the plaintiff's failure to comply



- with order 5 rules 21 and 27 of the Civil Procedure Rules; and that the preliminary objection ought to have been heard first before the court could entertain the suit. Annexed to the supporting affidavit are copies of the defendant’s memorandum of appearance dated July 1, 2020 and a copy of the notice of preliminary objection dated July 2, 2020 (marked annexures “AS-1” and “AS-2” to the said affidavit. In addition, the defendant annexed a draft defence as annexure “AS-4” and contended that it has a good defence to the suit which raises several triable issues, including the issue of jurisdiction.
4. The application was resisted by the plaintiff and a replying affidavit in that regard filed on March 8, 2022, sworn by one of its directors, Rajender Kumar Premchand. The plaintiff averred the supporting affidavit of Atal Singal is fatally defective as it is undated and does not disclose where it was sworn; and should therefore be struck out. It was further averred that:
    - (a) the application is way out of time, having been filed 2 years since the judgment was delivered;
    - (b) the application is fatally defective as it does not disclose or attach the judgment and decree it seeks to have set aside;
    - (c) the defendant’s statement of defence does not disclose any triable issues.
  5. Accordingly, the plaintiff prayed that the application be dismissed with costs for being fatally defective and an abuse of the court process.
  6. The application was urged by way of written submissions, pursuant to the directions given herein on June 21, 2022. Thus, Ms Onyango, learned counsel for the defendant, filed her written submissions on July 6, 2022 and proposed the following issues for determination:
    - (a) Whether the supporting affidavit is fatally defective to warrant the striking out of the application;
    - (b) Whether the court should set aside the ex parte judgment delivered on October 9, 2020;
    - (c) Whether leave to defend the suit should be granted to the defendant.
  7. On the validity of the supporting affidavit, Ms Onyango conceded that it was drawn in Mombasa but notarised in India; and is therefore a foreign document in the eyes of the law. She accordingly submitted that the affidavit cannot therefore be subjected to the laws applicable to affidavits sworn in Kenya, such as section 88 of the *Civil Procedure Act*. In her view, the real issue ought to be whether an affidavit for use in Kenyan Courts can be sworn outside jurisdiction. In this regard, counsel relied on article 159 of the *Constitution* and the cases of *Microsoft Corporation v Mitsumi Computer Garage Ltd & Another* [2001] KLR 470; *Peeraj General Trading & Contracting Company Limited Kenya & Another v Mumias Sugar Company Limited* [2016] eKLR and *DT Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another* [1980] eKLR, among others, to underscore her submission that the defect is not fatal and that a court of justice should aim at sustaining a suit rather than terminating it on technicalities.
  8. On whether the court should set aside the ex parte judgment, Ms Onyango relied on order 10 rule 11 of the *Civil Procedure Rules* and *Remco Limited v Mistry Jadva Prabat & Co Ltd & 2 Others* [2002] 1 EA 233 for the proposition that in situations where there is proper service of summons to enter appearance, the resulting judgment is a regular one but which the court has the unfettered discretion to set aside for good cause. She pointed out that the defendant challenged the issue of service of summons and therefore its preliminary objection ought to have been disposed of first. She made reference to *Shanzu Investments Ltd v the Commissioner of Lands*, Civil Appeal No 100 of 1993 and *Tree Shade Motors Ltd v DT Dobie & Another* [1995-1998] 1 EA 324 in urging the Court to find that the defendant has



- demonstrated that it has a defence that raises triable issues and therefore ought to be allowed to defend the suit.
9. It was further the submission of Ms Onyango that article 50 of the Constitution is the cornerstone of the rule of law; and that the right to a fair hearing is a fundamental human right. She therefore urged that the defendant ought to be accorded the opportunity to present its case, notwithstanding any lapses on its part. She relied on *Sebei District Administration v Gasyali* [1968] EA 300 and *Signature Tours & Travels Limited v National Bank of Kenya Limited* [2018] eKLR to support her assertion that the defendant has provided a justification for the setting aside of the default judgment to pave way for hearing on the merits.
  10. On his part, Mr Maithya for the plaintiff relied on his written submissions filed on September 28, 2022. He responded to the issues as framed by counsel for the defendant. He pointed out that, other than that the date of the deposition is missing from the jurat, the affidavit bears the names of two different people, namely Atal Singal of Khevat No 61150, Khtoni No 67 and Sanjay Goel as the deponent. He therefore submitted that the affidavit does not disclose who among the two is the affiant. For that reason, Mr Maithya posited that the error in the supporting affidavit is too grave to be rectified or excused under article 159(2)(d) of the Constitution.
  11. Mr Maithya further submitted that, although the court has the discretion to set aside an ex parte judgment, the discretion must be exercised judiciously. He relied on *Shah v Mbogo* [1967] EA 166 in asking the court to consider why the defendant waited for over 2 years to file the instant application, if not to derail and frustrate the plaintiff from realizing the fruits of its judgment. He pointed out that the defendant has been taking the plaintiff in circles by making promises it did not care to fulfil. In his postulation, setting aside the ex parte judgment will expose the plaintiff to further financial stress considering that interest is continuing to accrue on the USD 195,305 in addition to erosion in value of the Kenya Shilling. Counsel also drew the attention of the court to the ruling of Hon Njoki Mwangi, J in a similar matter, namely, Mombasa High Court Civil Case No 35 of 2020: *Panchal Trading (K) Limited v NFMetals Corporation*, in connection with a similar application for setting aside of a default judgment.
  12. I have given careful consideration to the application, the parties' respective affidavits and the written submission filed by their counsel. The background facts are largely not in dispute. The plaintiff filed this suit for recovery of USD 195,305 being the balance due in respect of goods ordered and supplied to the defendant, together with interest at commercial rates from April 24, 2020 until payment in full and costs of the suit. The record confirms that the defendant was duly served through a recognized agent as per order 9 rule 2 of the Civil Procedure Rules and a memorandum of appearance was thereafter filed on behalf of the defendant on July 6, 2020.
  13. The record further shows that, since the defendant failed to file a defence within 14 days as required by order 7 rule 1 of the Civil Procedure Rules, the plaintiff moved the Court pursuant to order 10 rule 10 of the Civil Procedure Rules for interlocutory judgment in default of defence in the liquidated sum of USD 195,305/= together with interest and costs. Accordingly, interlocutory judgment was entered herein on August 11, 2020 subject to formal proof. Thereafter, a decree was issued on August 19, 2020. While the matter was pending execution of the decree, the defendant filed the instant application seeking the setting aside of the default judgment.
  14. In the premises, the issues for determination, as correctly framed by learned counsel, are:
    - (a) Whether the supporting affidavit is fatally defective;



- (b) Whether sufficient cause has been shown for setting aside the default judgment entered herein on August 11, 2020.
15. Counsel for the plaintiff assailed the defendant’s supporting affidavit on two fronts; firstly, that the jurat was not dated, which is true; and secondly, that the name appearing on page 1 of the affidavit is different from the name of the affiant as indicated on page 2 of the affidavit; such that it is impossible to tell who between the two individuals named is the deponent. This is also a fact, looking at the supporting affidavit filed with the subject application. It is apparent therefore that the objection was raised with section 5 of the [Oaths and Statutory Declarations Act](#), Chapter 15 of the Laws of Kenya, in mind. That provision is explicit that:
- “Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”
16. The question that then arises is whether the validity of the affidavit, which was taken in India, can be challenged on the basis of the law applicable to affidavits taken in Kenya. The general position is that which was stated by hon Ringera, J (as he then was) in *Microsoft Corporation v Mitsumi Computer Garage Ltd & Another* (supra) that:
- “...The [Oaths and Statutory Declarations Act](#), Cap 15, gives Commissioners for Oaths appointed under the provisions thereof jurisdiction throughout Kenya (section 4). It also commands the Commissioner to indicate in the jurat the place where he took the affidavit. Obviously a Commissioner for Oaths appointed under Cap 15 cannot take an affidavit in England. Accordingly, the provisions of section 5 of the Act or indeed any other section in Cap 15 cannot apply to an affidavit taken out of Kenya by a foreign person. In the premises I think the issue of whether the affidavit complained of complies with section 5 of Cap 15 raised by counsel for the first defendant is misconceived and is a mere moot point in the instant matter...”
17. I however hasten to add that in the Microsoft Corporation case the issue was the failure to indicate the place where the oath was taken. Indeed, the court is under obligation to consider the circumstances of each to determine whether the omission is of such a nature as to occasion prejudice to the opposing party. In this instance, the supporting affidavit is deficient in three respects. Firstly, the jurat does not bear the date when the oath was taken. Secondly, it does not indicate the name and stamp of the notary public before whom the oath was taken. Finally, it is befuddling as to the exact identity of the affiant.
18. At paragraph 1 of the supporting affidavit the name appearing is that of Atal Singal of Khevat No 61/50, Khtoni No 67, India. It is therefore inexplicable that the jurat bears the name of Sanjay Goel as the deponent. That confusion, taken with the fact that the date and name of the notary public before whom the oath was taken are missing from the jurat, are fundamental errors that go to the substance and not just the form of the affidavit. I therefore take the view that the supporting affidavit does not qualify as a statement taken under oath; and in this regard I find succour in [CMC Motors Group Limited v Bengeria arap Korir trading as Marben School & Another](#) [2013] eKLR in which it was held:
- “The merit as I find it in respect of Waudo’s affidavit is that the affidavit does not seem to have been sworn before a Commissioner for Oaths. For avoidance of doubt the [Black’s Law Dictionary](#) defines an oath as follows –



‘Oath is a solemn declaration accompanied by a swearing to God or a revered person or thing that one’s statement is true or that one will be bound to a promise ... The legal effect of an oath is to subject the person to penalties for perjury if the testimony is false.’

... Bearing that definition the question that needs to be answered is whether Waudo took an oath before a Commissioner for Oaths. Looking at her affidavit it would seem that she signed the affidavit in Nairobi and the Commissioner for Oaths signed it in Mombasa. It will therefore seem that her affidavit fails to conform to the requirements of section 5 of Cap 15. It is not an affidavit which is under oath. That being so the same is hereby struck out.”

19. In the premises, I take the view that the supporting affidavit is fatally defective and is incurable under article 159(2)(d) of the Constitution. The same is hereby struck out. The consequence thereof is that the notice of motion dated January 20, 2022 is likewise untenable and is hereby struck out with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 19<sup>TH</sup> DAY OF JULY 2023**

***OLGA SEWE***

**JUDGE**

CIVIL SUIT NO. 38 OF 2020 RULING 3

