



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO.70 OF 2018

MAWE MBILI LIMITED.....PLAINTIFF/1ST RESPONDENT

VERSUS

EQUITY BANK KENYA LIMITED.....1ST DEFENDANT/2ND RESPONDENT

JEAN FRANCOIS RAYMOND LOUIS DAMON...2ND DEFENDANT/APPLICANT

RULING

(1) Before this Court is the Notice of Motion dated **1st June 2018** by which **JEAN FRANCOIS RAYMOND LOUIS DAMON** (the 2nd Defendant/Applicant) seeks the following Orders:-

“(a) SPENT

(b) SPENT

(c) THAT the proceedings of 13th July 2018 be set aside in total and the Applicant given an opportunity to participate in the matter.

(d) THAT costs be in the cause.

(2) The application which was premised upon **Sections 1A, 1B, 3A, 3B of the Civil Procedure Act Cap 21, Laws of Kenya, Article 50(1) of the Constitution 2012, Order 51 Rule 1 and Order 45 Rule of the Civil Procedure Rules 2010** was supported by the affidavit of even date sworn by the Applicant.

(3) The Plaintiff/Respondent **MAWE MBILI LIMITED** opposed the Application and relied on the Replying Affidavit dated **21st February 2019** sworn by **JACQUELINE DAMON** a Director of the Plaintiff Company. The 1st Defendant being **EQUITY BANK LIMITED** did not oppose the application.

(4) Pursuant to directions made by this Court the application was canvassed by way of written submissions. The 2nd Defendant/Applicant filed written submissions on **9th July 2019** whilst the Plaintiff/Respondent filed its submissions on **10th September 2019**.

BACKGROUND

(5) For purposes of the present application the court deems it is not necessary to delve too much into the history of this dispute. Suffice to say the Plaintiff and the 2nd Defendant were both Directors in the Company **Mawe Mbili**. The two were once a couple but have since divorced. The wife on behalf of the Plaintiff company filed under Certificate of Urgency an application dated **12th February 2018** seeking orders as follows:-

1. THAT this application be certified as urgent and be heard ex parte in the first instance.

2. THAT this Honourable court do grant the Applicant herein leave to serve the 2nd Respondent by way of substituted service – advertisement in the local newspapers.

3. THAT this Honourable court be pleased to order the 1st Respondent to unconditionally lift the freezing order placed by itself without any valid court order on the Applicants Accounts Number 0550299840204 and 0550299839723 held at Equity Bank Limited, Westlands Branch A/Cs name – MAWE MBILI LIMITED and to grant Jacqueline Ruth Damon sole access to the said accounts pending the hearing and determination of this Application.

4. THAT this Honourable court be pleased to order the 1st Respondent to remove Valerie Jane Damon Perrier and Jean – Francois Raymond Louis Damon as the Account signatories and appoint Jacqueline Ruth Damon as the sole signatory pending the hearing and determination of this suit.

5. THAT this Honourable court be pleased to restrain the 2nd Respondent whether by himself, his servants, employees, agents and/or otherwise from freezing and accessing the Applicant's Accounts Number 0550299840204 and 0550299839723 held at Equity Bank Limited, Westlands Branch A/Cs name – MAWE MBILI LIMITED pending the hearing and determination of this suit.

6. THAT costs of this application be provided for.

(6) The application was placed before Hon Lady Justice Olga Sewe who on 16th February 2018 directed that it be served on all parties for interpartes hearing on 21st February 2018. On 21st February 2018 counsel for the Plaintiff/Respondent informed the Court that they had experienced difficulties in serving the 2nd Defendant/applicant who was claimed to be out of jurisdiction and was said to be evasive due to a warrant of Arrest issued against him by a Naivasha Court.

(7) The matter then proceeded notwithstanding the absence of the Applicant and directions were given. Finally this application of 12th February 2018 came up for hearing before me on 13th July 2018. The application was heard once again with the present Applicant being absent and Ruling was reserved for 12th October 2018.

(8) It is at this point that the Applicant filed the present application seeking to set aside the proceedings which were conducted in his absence on 13th July 2018.

(9) The Applicant contends that he is a majority shareholder in the company holding 96% of the shares jointly with the said Jacqueline Damon who is a co-director. The Applicant states that he was not served with the application and was not accorded an opportunity to respond to the same. The Applicant further contends that no attempt was made to serve him either out of jurisdiction or by way of substituted service. He contends the Plaintiff was represented by his former wife who knew where the Applicant could be served and knew details of the Applicant's Advocates in various other matters which had pitted the two against each other. That the decision not to serve him with the application was both deliberate and malicious, and was aimed at shutting him out of the present proceedings. For these reasons the Applicant prayed to have the proceedings of 13th July 2018 be set aside and that he be allowed an opportunity to file his Reply to the Notice of Motion dated 12th February 2018 and be allowed to participate in the present proceedings.

(10) The Plaintiff/Respondent submits that the present application is frivolous and amounts to an abuse of court process. It is submitted that it was not possible to effect service upon the Defendant/Applicant as he was out of jurisdiction attempting to evade arrest for alleged criminal wrongdoings.

ANALYSIS AND DETERMINATION

(11) Article 50(1) of the Constitution of Kenya 2010 provides for the Right to a Fair Hearing. Of necessity this includes the Right to be heard.

Order 5 of the Civil Procedure Rules, 2010 provide for service of upon parties to a suit. The Plaintiff was obliged to ensure that the person being sued i.e the Defendant /Applicant was properly served at each stage of the proceedings.

(12) In this case it is manifest the application dated 12th February 2018 was never served upon the 2nd Defendant. The Plaintiff has not filed any Affidavit to prove that the 2nd Defendant was served nor is any allegation made that service was effected. The Plaintiff by Prayer (2), of the application sought leave to serve the 2nd Defendant by way of an advert in the Daily Newspaper. That leave was granted on 26th February 2018. However there is no affidavit of service or other evidence that such advert was never placed in the Daily Newspaper nor does Plaintiff confirm having done so. There is no evidence of service upon the 2nd Defendant's Advocate or of service in any other manner whatsoever.

(13) It is clear that the 2nd Defendant had no notice of this application against him and was not accorded any opportunity to respond to the same. Given the bad blood between the Plaintiff and the 2nd Defendant this Court cannot rule out the possibility that the omission to serve the 2nd Defendant may have been deliberate.

(14) I am satisfied that the application was not served upon the 2nd Defendant/Applicant. Therefore *ex debito justiae* the proceedings of 13th July 2018 having been conducted in his absence must be set aside. The present application is allowed and court orders that:-

(i) The proceedings of 13th July 2018 be and are hereby expunged from the record.

(ii) The 2nd Defendant/Applicant be granted an opportunity to file his reply to the Notice of Motion dated 12th February 2018.

(iii) The said Reply to be filed within 14 days of today's date.

(iv) Costs of this Application will be met by the Plaintiff/Respondent.

Dated in Nairobi this 15th day of April 2020.

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Justice Maureen A. Odero