



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**HCC NO. 197 OF 2018**

**HAILE MENKERIOS.....PLAINTIFF**

**Versus**

**FRANCIS MUREITHI.....1<sup>ST</sup> DEFENDANT**

**DOC FIND CO. LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. There is default Judgement against Francis Mureithi (the 1<sup>st</sup> Defendant) and he now seeks to have it set aside and to be granted leave to file a Defence. The request is in a Notice of Motion dated 9<sup>th</sup> October 2018 and said to be brought under the provisions of Order 10 Rule 11, Order 40 Rule 1(a) and Order 51 Rule 1 of The Civil Procedure Rules.
2. At the instance of a Notice of Motion dated 12<sup>th</sup> July 2018 by the Defendant, this Court, on 31<sup>st</sup> July 2018, granted leave to the Plaintiff to serve summons of appearance herein upon the 1<sup>st</sup> Defendant by way of substituted service to be effected through the Daily Nation or The Standard Newspaper. The summons were duly served by way of an advertisement dated 1<sup>st</sup> August 2018 which was published in the newspaper edition of the Daily Nation dated 7<sup>th</sup> August 2018.
3. The 1<sup>st</sup> Defendant depones that he never saw the advertisement and only became aware of this suit through a social media post on 1<sup>st</sup> October 2018. He then took steps to participate in these proceedings through appointment of Counsel and the current application. He seeks an opportunity to file his defence which he asserts is a good defence.
4. The application is resisted and the Plaintiff argues that there is good and proper service effected in this matter and in conformity with the Court order. In any event, the Plaintiff asserts, the purported defence by the 1<sup>st</sup> Defendant is a sham and has no prospects.
5. This Court is keenly aware that where there is no proper service of summons on a Defendant, then the Defendant would be entitled to setting aside of a default judgement as a matter of right. Where however the service of summons is proper then the Defendant must demonstrate that his or her failure to file defence on time was caused by reason which is excusable and further that it has an arguable answer to the claim, that is an arguable defence. The discretion of the Court is wide but must not be exercised in a way that causes undue hardship or prejudice to the Plaintiff.
6. No doubt the service of summons herein was done in conformity with the Court order of 31<sup>st</sup> July 2018. It was duly published in the classified page of The Daily Nation of 7<sup>th</sup> August 2018. As the order for service in this way is yet to be set aside or impugned, it may be a plausible argument by the Plaintiff that the service effected on 7<sup>th</sup> August 2018 was good service.
7. Yet unlike personal service where there can be actual proof that the Defendant received process, it may not be so easy in the case of substituted service. The reason why a Defendant who has been personally served must do more to extricate himself/herself from a default judgment is because having actually become aware of the existence of a suit against him, the Defendant must explain why s[he] failed to act within the time prescribed by law.
8. In the matter before Court, the 1<sup>st</sup> Defendant says that he did not see the advertisement that was put out. That may be believable because not all Kenyans read every edition of the Daily Nation on the very day of publication. Neither do they all read each page of the paper including the page or pages that carry classified advertisement. Yet again, the 1<sup>st</sup> Defendant may actually have seen the advertisement. It is

therefore the word of one person against the other.

9. In the circumstances like this, where the manner of service was authorized by Court but there is denial by the Defendant that he saw the advertisement, the Defendant bears the duty to demonstrate that he or she acted with agility upon discovery of the suit and that there is an arguable defence to the claim.

10. The 1<sup>st</sup> Defendant says he became aware of the existence of this suit on 1<sup>st</sup> October 2018. If that is true then he acted quickly enough in bringing the present application as it was filed on 12<sup>th</sup> October 2018. He scores well on that.

11. In a nutshell, the Claim by the Plaintiff is that in the year 2016, the 1<sup>st</sup> Defendant induced him to enter into a series of agreements with the 2<sup>nd</sup> Defendant and other third parties for investment in the 2<sup>nd</sup> Defendant, on the strength of a promise on a return on that investment. The Plaintiff then entered into agreements of 27<sup>th</sup> April, 2016, 17<sup>th</sup> May 2016, 17<sup>th</sup> June 2016 and 5<sup>th</sup> August 2016 with the 2<sup>nd</sup> Defendant. There is then an undated agreement between the Plaintiff and Wina Trading Company and another agreement of 21<sup>st</sup> October 2016 between the Plaintiff, Wina Trading Company Limited and New Research Path Company Limited.

12. The Plaintiff's case is that the 1<sup>st</sup> Defendant is a shareholder and a Director of the 2<sup>nd</sup> Defendant.

13. The Plaintiff asserts that on account of the Agreements, the Defendants owe him a colossal sum of USD. 4,921,500.00, which the 2<sup>nd</sup> Defendant directly and through the 1<sup>st</sup> Defendant assured him of payment.

14. The Defence set up by the 1<sup>st</sup> Defendant includes that he is neither a shareholder nor director of the 2<sup>nd</sup> Defendant. That he does not know the Plaintiff nor has he ever met him or induced him into entering the said agreements. In the alternative he says that he is not privy to the said agreements and that if any money is owed to the Plaintiff then it is not by him.

15. The Plaintiff confronted this purported defence by producing post incorporation documents of the 2<sup>nd</sup> Defendant to show that the 1<sup>st</sup> Defendant was one of the subscribers of the Company. A copy of the annual return of the 2<sup>nd</sup> Defendant of 31<sup>st</sup> March 2011 show the 1<sup>st</sup> Defendant as one of the shareholders and Directors of the 2<sup>nd</sup> Defendant. Minutes of the meeting of 20<sup>th</sup> May 2016 and 24<sup>th</sup> May 2017 in which the 1<sup>st</sup> Defendant is present enter him as a Director of the Company. There is also a letter purportedly written by the 1<sup>st</sup> Defendant resigning from the Company.

16. The Plaintiff also refers to a letter of 24<sup>th</sup> August 2017 said to be written by the 1<sup>st</sup> Defendant as Managing Director of the 2<sup>nd</sup> Defendant to the Plaintiff. In the letter the Company admits the debt and ultimately states:-

*“I want to confirm that the monies due to Doc Find are now in the process of being transferred to Doc Find's account, and I promise to pay the entirety of the investments and profits due to you (\$3,416,000.00 and profits of Khs.45,736,160.00) latest on or before 30 September 2017. I wish to see these payments made and our joint business relationship to continue and prosper”.*

17. In a further affidavit, of 2<sup>nd</sup> November 2018, the 1<sup>st</sup> Defendant depones that the documents produced to prove his past shareholder or Directorship are forgeries. Curiously, however, the 1<sup>st</sup> Defendant is silent about the letter of 24<sup>th</sup> August 2017 which was not only referred to in the Replying affidavit of the Plaintiff but also in paragraph 9 of the Plaintiff and included on page 31 of the Plaintiff's bundle of Documents filed alongside the Plaintiff. Given that the 1<sup>st</sup> Defendant avoids this critical document, doubts are created about the bonafides of the defence of forgeries he now takes up.

18. That said, there is a defence taken up by the 1<sup>st</sup> Defendant that any debt owed to the Plaintiff is not owed by him. To imply that it may be owed by the 2<sup>nd</sup> Defendant. A question that could arise is whether any personal liability attaches on the 1<sup>st</sup> Defendant in respect to the agreements none of which were made in his name. The Court may be called to decide whether the following words in the letter of 24<sup>th</sup> August 2017, in the context of this matter, binds the 1<sup>st</sup> Defendant personally:-

*“I want to confirm that the monies due to Doc Find are now in the process of being transferred to Doc Find's account, and I promise to pay the entirety of the investments and profits due to you (\$3,416,000.00 and profits of Khs.45,736,160.00) latest on or before 30 September 2017. I wish to see these payments made and our joint business relationship to continue and prosper”.*

19. That, to me is an arguable defence that warrants further interrogation and inquiry and if only for that, the Court is inclined to grant the 1<sup>st</sup> Defendant an opportunity to file his defence.

20. In the end the Notice of Motion dated 9<sup>th</sup> October 2018 is allowed as prayed in terms of prayers (d) (e) and (f). Court fees on the Defence shall be paid within 14 days hereof. However, costs of the application and thrown away costs in respect to the interlocutory judgement shall be paid by the 1<sup>st</sup> Defendant.

Dated, Signed and Delivered in Court at Nairobi this 8<sup>th</sup> day of February, 2019.

F. TUIYOTT

JUDGE

**Present**

Oriri for 1<sup>st</sup> Defendant/Applicant

Mbugua for 2<sup>nd</sup> Defendant

Muigai for Plaintiff

Nixon- Court Assistant