REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 474 OF 2007

ORIENTAL COMMERCIAL BANK LTD

(Formerly the Delphis Bank Ltd).....PLAINTIFF/1ST RESPONDENT

VERSUS

PRADEEP IAN MAKHECHA (as the Administrator of the Estate of the late Hasmukh

Pranjivan Makhecha t/a Makhecha & Co. Advocates)...1ST DEFENDANT/APPLICANT

MAKHECHA & CO. ADVOCATES .....2ND DEFENDANT/RESPONDENT

RULING

1. This ruling relates to a notice of motion application dated 6th November 2018, brought under the provisions of; Article 50, 159(2)(d) of the Constitution of Kenya 2010, Sections 1A, 1B and 3A of the Civil Procedure Act, Order 10 Rule 11 and Order 51 Rule 1 of the Civil Procedure Rules 2010, and all other enabling provisions of the law.

2. The Applicant is seeking for orders that;

a. That the ex parte Judgment entered against the 1st *Defendant/Applicant in this matter and all consequential orders/directions be set aside and the 1st Defendant/Applicant be granted liberty to file its defence within fourteen (14) days of the order hereto;*

b. That the costs of the application be awarded to the 1st *Defendant/Applicant herein.*

3. The application is premised on the grounds on the face of it and an affidavit dated 31st October 2018, sworn by Pradeep Ian Makhecha, (herein "the 1st Applicant"). He deposed that he is a citizen of the United Kingdom, where he generally resides and works. That, on 17th June 2006, his late father, Hasmukh Pranjivan Makhecha, passed on and upon his death, he petitioned for letters of Administration ad colligenda bona on 7th July 2006, vide a Succession cause No. 1515 of 2006. Subsequently he was appointed as the Administrator of the estate on 17th July 2006.

4. That as evidenced by the information in his passport, he was at all material times not within Kenya nor aware of the following occurrences:-

a. any legal proceedings concerning; Civil Suit 474 of 2007 (O.S.) in relation to the Plaintiff/1st *Respondent's Originating Summons dated 12th September 2007 and supported by the affidavit of Atulkumar Dave;*

b. an interlocutory judgment and decree both dated 12th June 2015, against his late father's estate;

c. any legal proceedings in this matter as none have ever been served upon him in the United Kingdom.

5. He averred that the above facts have only recently been brought to his attention as indicated in a letter dated 15th August 2018, from the Plaintiff/1st Respondent's Advocates on record, Messrs. Kale Maina & Bundotich Advocates and a summons for revocation of grant filed by the Plaintiff (herein "the 1st Respondent") against the Applicant. Therefore it is in the best interest of justice and his constitutional rights that the ex-parte Judgment dated 12th June 2015, be set aside and he be given leave to defend the suit. That he is ready to comply with any just

pre-conditions imposed by the Honourable Court.

6. However, the 1st Respondent in response, filed a Replying affidavit dated 28th November 2018, sworn by Wilfred Machini, its Credit Manager. He deposed that the Applicant was served with summons by substituted means through advertisement in the daily Standard Newspaper of 31st March 2010; and was sued as the Administrator of the estate of the later Husmuch Pravin Makhecha which he does not dispute.

7. Further the Applicant does not deny in any manner that the estate of the deceased was indebted to the 1st Respondent to the tune of the sum claimed. Indeed, the supporting affidavit does not plead any defence to the claim and neither has a draft defence been tendered in evidence. Niether do the photocopies of the passport tendered in evidence demonstrate in any manner that, the Applicant was out of the country when the substituted service was effected.

8. As such the application is a smokescreen and has been filed solely to delay the 1st Respondent from executing the judgment in, High Court Succession Cause No. 1515 of 2016, in which execution process has commenced.

9. The Application was disposed off vide the filing of submission. The Applicant submitted that, Article 159(2) of the Constitution of Kenya, 2010 provides inter alia that, in exercising judicial authority, the courts and tribunals shall be guided by the principles that: Justice shall be done to all, irrespective of status". Therefore all parties to a dispute are to be accorded fair treatment.

10. That in the same vein, the provisions of Section 1A of the Civil Procedure Act provides as follows:-

> "(1) the overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act;
>
> (2) The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1);
>
> (3) A party to civil proceedings or an Advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court"

11. The Applicant therefore submitted that based on the above provisions the legal obligation of the court all parties in legal proceedings, is to ensure expeditious and fair administration of justice. Reliance was placed on the case of; *Caltex Oil Limited vs Evanson Wanjihia Civil Application No. Nai 190 of 2009 (unreported*), quoted by Court of Appeal in the case of; *Hunker Trading Company Limited vs Elf Oil Kenya Limited (2010) eKLR.*

12. The Applicant further relied on Order 5 Rule 22 of the Civil Procedure Rules 2010,which deals with service outside Kenya and provides as follows:

> " service out of Kenya of the following process or of notice thereof may be allowed by the court by:-
>
> a. an originating summons, originating notice of motion, petition, or other originating proceedings under any written law under which proceedings can be commenced otherwise than by Plaint."

13. Therefore, it is trite law that "notice" is a matter of procedural fairness and an important component of the common law principle of natural justice which states inter alia that, *"No man shall be condemned unheard."* The case of; *Geothermal Development Company Limited vs Attorney General & 3 Others (2013) eKLR*, was relied on.

14. It was submitted that, despite the 1st Respondent's knowledge that at all material times the Applicant is a citizen of the United Kingdom and resides there, the 1st Respondent failed to act diligently by not seeking the leave of the Honourable Court to serve Applicant in the United Kingdom and instead sought for substituted service in Kenya. Consequently, the 1st Respondent has offended the binding Constitutional principles of justice and fairness, the common law principle of natural justice and Order 5 Rule 22 of the Civil Procedure Rules. That it would be inimical to the interests of justice to punish the Applicant for the 1st Respondent's negligence.

15. The Applicant further argued that it is evident from the draft defence, marked "Exhibit *PIM5"* and annexed to the Applicant's further affidavit, that the Applicant has a good case, which raise triable issues that should be heard on its merits at a full trial.

16. That a simple calculation of the bills of costs referred to under paragraph 5 of the Plaintiff's Originating Summons, (exhibit "PIM3" Applicant's Supporting Affidavit) indicates that the Deceased's estate claims a total of Kshs. 6,255,326.43, as legal fees from the 1st Respondent. To date, this sum remains due and owing by the 1st Respondent in favour of the estate of the deceased and when set off this sum against the Plaintiff's claim, it is patently clear that, it is in fact the estate of the deceased that is a creditor of the 1st Respondent which owes the estate Kshs. 148,193.

17. Finally, the Applicant submitted that, as soon as the said ex parte judgment was brought to its attention vide a letter dated 15th August 2018, from Messrs Kale Maina & Bundotich Advocates, the applicant filed the application dated 9th November 2018 without delay to set aside the said ex parte judgment. That even then, the 1st Respondent's Replying affidavit sworn on 28th November 2018, fails to demonstrate the prejudice it would suffer if the application to set aside the said ex parte judgment is allowed.

18. However, the 1st Respondent submitted that, the decision to set aside or not to set aside the judgment is a pure discretion of the Honourable court, but the Applicant must demonstrate that the ex parte judgment was irregular and he has an arguable defence to the Plaintiff's claim.

19. The 1st Respondent further submitted that although the Applicant alleges that he was not in Kenya on 18th January 2010 when notice by substituted means was published in the Standard Newspaper, it is evident from the photocopy of the passport tendered in evidence that the Applicant has been visiting Kenya regularly as per the stamp therein showing he lastly exited on 24th November 2013, after the substituted notice was effected.

20. That of more concern is the fact that, the Applicant instructed Mr. Wambugu Gitonga Advocate, then operating in the name and style of Makhecha & Company Advocates and now Makhecha & Gitonga Advocates, to file Succession proceedings, in respect of the estate of the late Hasmukh Pravin Makhecha. That the Applicant does not deny the same and indeed he has been kind enough to tender copies of bills of costs the Advocate filed on behalf of the 2nd Defendant for taxation. Therefore the fact that the 2nd Defendant entered appearance and defended the suit is a clear indication that the Applicant was all along aware of the proceedings herein. As such the question that, the court should ponder is this: who other than the Applicant would have lawfully instructed the 2nd Defendant to defend the suit herein?

21. However, the 1st Respondent further stated that has not tendered evidence of any taxed bill of costs and within which the court can state with certainty that there is an amount due to the 2nd Defendant. That a bill of costs is not prima facie evidence that fees is owing to the 2nd Defendant (herein "the 2nd Respondent"). Therefore the Applicant has not demonstrated in any manner that it has an arguable defence. The totality of the above is that, the application lacks merit and should be dismissed with costs.

22. I have considered the application and the arguments for and in opposition and I find that the only issue to consider is whether the Applicant has met the legal prerequisite of setting aside the ex parte and/or default judgment.

23. It suffices to note that a civil case commences with the Plaintiff filing a "claim" with the court, and the court issue a "summons" that notifies the defendant that the defendant is being sued and needs to defend the claim. The summons and claim must be "served" personally that is delivered by a process server to the defendant. If the plaintiff is unable to serve the defendant (or the defendant is avoiding service), the defendant can apply to the court to serve by substituted service which includes publishing a notice in a daily national or legal newspaper.

24. If the Defendant has been served with summons and plaint and fails to respond within the stipulated deadline, the plaintiff can request the court for a "default judgment and/or ex parte judgement." However, if the defendant thinks the default judgment was not appropriately entered, the defendant can file a notice of motion application with the court asking the court to "set aside" void or nullify the judgment.

25. The court will set aside a default judgment for among others the following reasons,:

a. mistake, inadvertence, surprise, or excusable neglect of the party who failed to defend himself in the case;

b. fraud, misrepresentation, or other misconduct by the party who filed the case;

c. the judgment has been satisfied, released, or discharged; and

d. the summons and claim were never personally served to the defendant who judgment was entered against.

26. Similarly, the procedural provision of Order 10, Rule 4 states that:-

> "4. (1) Where the plaint makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, the date of the judgment, and costs".

27. However Order 10, rule 11 of the Civil Procedure Rules states that;-

> "(11)Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just".

28. Thus the above provisions give the court the discretion in dealing with application to set aside an ex parte judgment and as stated by Potter, Kneller JJA and Chesoni (Ag) JA, in the case of; *Pithon Waweru Maina v Thuku Mugiria*, *Civil Appeal No 27 of 1982*, (Potter JA in quoting Duffus P in *Patel v EA Cargo Handling Services Ltd.*, [1974] EA 75) said:

> "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 conditions on itself to fetter the wide discretion given to it by the rules."(emphasis mine).

29. In the same matter, Kneller JA *quoting Harris J in Shah v Mbogo and Another [1967] EA 116 at 123 BC*, stated:

> "The discretion is intended to be exercised to avoi**d** injustice or hardship resulting from accident, inadvertence, or excusable mistake or errors, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to abstract or delay the cause of justice."

30. It therefore follows that the guiding factor in an application as herein is the interest of justice to both parties. However in the case of; *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR,* **Makhandia, Ouko & M'inoti, JJ.A) dealt at length with the distinction between** a default judgment that is regularly entered and one, irregularly entered. The court had this to say;

> "From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under *Order 10 rule 11* of the *Civil Procedure Rules*, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & Another v. Shah* (supra), *Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75*, *Chemwolo & Another v. Kubende [1986] KLR 492* and *CMC Holdings v. Nzioki [2004] 1 KLR 173).*

In an irregular default 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. (See *Onyango Oloo v. Attorney General [1986-1989] EA 456)*. The *Supreme Court of India forcefully underlined the importance of the right to be heard as follows in Sangram Singh v. Election Tribunal, Koteh, AIR 1955 SC 664, at 711:*

> "[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them."

31. In the instant case, the Applicant avers that he was not served at all. There is indeed evidence that he is a resident of and resides in the United Kingdom. That does not therefore mean that he cannot travel to Kenya at any time. However, the question remains as to whether he was properly served and whether the 1st Respondent knew that he was residing outside the jurisdiction of the court.

32. In my considered opinion given the circumstances of the case, being that the advertisement of the summons was in the Standard Newspaper in Kenya on 18th January 2010, the Applicant may have or may not have taken note thereof. If that is the case then the Applicant was not effectively served and therefore, the judgment will be deemed to be irregular and bound to be set aside *ex debito justitiae.*

33. However, the 1st Respondent raised a very interesting issue that the Applicant instructed a law firm to enter appearance and defend the suit against the 2nd Defendant, which is a clear indication that the Applicant was all along aware of the proceedings herein. This averment was not rebutted. However, that does not deal with the issue of whether the applicant was properly served or not. Be that as it were, if the applicant was aware of the ex parte judgment, then the Judgment will be deemed to be a regular judgement.

34. In that case the court will be considering legal principles laid down in the case of; *Pithon Waweru Maina vs Thuku Mugiria (1983) EKLR,* which states that:-

> "the principles governing the exercise of the judicial discretion to set aside an ex parte judgment obtained in the absence of an appearance or defence by the defendant or upon failure of either party to attend the hearing are;-
>
> > "The nature of the action should be considered, the defence if one is brought to the notice of the court, however irregularly, should be considered ; the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered; and finally, it should be remembered that to deny the subject a hearing should be the last resort of a court." (emphasis added)

35. In a nutshell, the Applicant has to demonstrate a reasonable cause for setting aside the ex parte judgment and in that regard, the principles governing the determination of what amounts to sufficient reason or cause for setting aside an *exparte* decree and by analogy judgment, from which the decree arises, have been severally enunciated in the jurisprudence, in ***S.C. Civil. Application No. 6 of 1987 Florence Nabatanzi v. Naome Binsobedde*** **(**cited with approval in ***Hikima Kyamanywa v. Sajjabi Chris CACA No. 1 of 2006),*** where it was held by the Supreme Court that;-

> "sufficient reason or cause depends on the circumstances of each case and must relate to inability or failure to take a particular step in time."

36. To revert back to this matter, I note that, the documents annexed to the affidavit in support of this application, includes; the passport of the Applicant which shows that most of the time he was physically out of the country. He may have given instructions for a law firm to enter appearance and represent the 2nd Defendant, but that does not require his physical presence in the country. The judgment that was entered herein, was given on an understanding that the service of summons upon the Applicant was properly done. The court has already observed that, the advertisement may not have been brought to the knowledge of the Applicant. It will therefore be in the interest of justice that the Applicant be given an opportunity to be heard. It will not be proper to deny the Applicant an opportunity to be heard in a case where the Respondent can be compensated by costs.

37. However I note this is an old matter having been filed in the year 2007. The judgment which is the subject of this matter was delivered on 12th June 2015, and the application for setting aside filed on 6th November 2018. If this application is allowed, it will definitely prejudice the Respondent who was granted the judgment as far back as 2007.

38. To mitigate this prejudice, I order that, the ex parte judgment entered against the 1st Defendant/Applicant and all consequential orders and directions be set aside and the 1st Defendant/Applicant, file the statement of defence within fourteen (14) days of the date of this order. The Respondent has fourteen (14) days within which to file a reply to the statement of defence, if need arises. Thereafter, the parties will appear before the court within one (1) month of this order to confirm compliance with pretrial directions. The matter should be set down for hearing within three (3) months of this order. In default the orders given herein shall automatically lapse. The costs arising out of this application will abide the outcome of the main suit.

39. Those then are the orders of the court.

Dated, delivered and signed in an open court this 4th day of April 2019.

G.L. NZIOKA

JUDGE

In the presence of;

Ms. Omamo holding brief for Mr. Korongo for the 1st Defendant/Applicant

Mr. Kiche holding brief for Mr. Bundotich for the Plaintiff/Respondent

Dennis…….....……Court Assistant