



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 52 OF 2014

MIDDLE EAST BANK KENYA LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

PRISCO PETROLEUM NETWORK LIMITED.....1ST DEFENDANT

CHARLES WAITHAKA KING'ORI.....2ND DEFENDANT

SHADRACK NDAMBUKI KOMBO.....3RD DEFENDANT

ELIJAH JOHN MWANGI KINYANJUI.....4TH DEFENDANT/APPLICANT

NAPHTALI MUNGAI MUREITHI.....5TH DEFENDANT

CHRIS NYAKUNDI.....6TH DEFENDANT

RULING

1. This ruling relates to a notice of motion application dated 25th June 2018, brought under the provisions of Order 5 Rule 7, 8, 13 & 15, Order 10 Rule 3 & 11 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act (Cap 21) of the Laws of Kenya.

2. The Applicant is seeking for orders that;

(i) The Judgment entered against the 4th defendant on 31st October 2014 be set aside and the 4th defendant be granted unconditional leave to file his statement of defence to the plaintiff's suit herein;

(ii) The plaintiff be ordered to serve the 4th defendant personally with the summons to enter appearance in this suit in accordance with the law;

(iii) The costs of this application be borne by the plaintiff.

3. The application is supported by the grounds on the face of it and an affidavit dated 25th June 2018, sworn by Elijah John Mwangi Kinyanjui, the 4th Defendant. He deposed that, sometimes in the mid month of March 2018, some unknown person visited his matrimonial home located on Land Reference No. 14747/19 (IR No. 48457) in Kiambu Municipality and pinned a copy of the prohibitory order dated 21st September 2017 and a Hearing Notice dated 9th March 2018 at the gate. He did not meet the person who pinned the documents as he was not at home at the material time. The subject documents were later handed over to me by his wife.

4. Upon perusal of the same documents, he was surprised to note that they were issued in this suit where he is sued as the 4th Defendant but which he was not aware of. However, on reflection of his memory, he remembered that, a Mr. Roy Muthama had called him a few weeks earlier and informed him that he had been instructed by Middle East Bank, (herein "the plaintiff") to investigate the assets of Prisko Petroleum Network Limited (herein "the 1st Defendant") but he did not divulge any further information.

5. The 4th Defendant referred the caller to one Mr. Shadrack Ndambuki Kombo who was operating the company. Even then, he visited the Plaintiff's company and held meeting with the Managing director who informed him that the judgment being executed was in relation to banking facilities which were granted to the 1st Defendant and which the 4th Defendant allegedly signed as a personal guarantee to secure

repayment thereof. However, the said Managing director did not give him further details although he categorically informed him that he was not aware of this suit and/or the judgment.

6. Thereafter the 4th defendant approached his Advocates on record for advice and was advised that it was necessary to peruse the court file and find out the actual position as to the nature of the suit and how the court summons were served. However, upon perusal of the court file, it was revealed that; the Plaintiff was filed on 12th February 2014 against several Defendants wherein he was named as the 4th Defendant; there was no evidence on the court file to show whether the summons to enter appearance were issued against him, neither was there an affidavit of service duly filed in court showing how the summons were served upon him, if at all. Nonetheless, a memorandum of appearance was filed on 25th March 2014 by the firm of Kisia & Company Advocates purporting to enter appearance on his behalf jointly with all the other Defendants. The said Firm of Advocates subsequently filed a joint Statement of Defence on 3rd April 2014 and thereafter the List of Witnesses and the witness statement of one Mr. Shadrack Ndambuki Kombo (herein “the 3rd Defendant”).

7. That by a Notice of Motion dated 20th June 2014, the Plaintiff requested for judgment to be entered on admission against him and the other Defendants and served the application upon Kisia & Company Advocates. That despite being served with the said application and the Plaintiff’s written submissions, the firm of Kisia & Company Advocates failed to file any Replying affidavit in opposition to the Plaintiff’s application for judgment or to attend court. Consequently, judgment was entered against him jointly with the other Defendants on 31st October 2014 for Kshs. 39,544,065.95 together with interest and costs thereon leading to the execution of the decree issued on 31st October 2014 attaching his matrimonial home to recover the decretal sum together with interest and costs.

8. The Applicant avers that he has never been served with the Summons to enter appearance in this suit or any other proceedings or at all and he was not aware of the existence of the court proceedings herein. Further he did not instruct or authorize the firm of Kisia & Company Advocates who purported to enter appearance in the suit and file a defence and other pleadings on his behalf and/or accept the Summons to enter appearance on his behalf. He does not know any Advocate from the said firm or whereabouts of the physical location of the said firm of Advocates. That the duly appointed firm of M/s Kagwimi Kang’ethe & Company Advocates wrote a letter dated 23rd May 2018, to Kisia & Co. Advocates raising the above concerns on his behalf whereupon that firm responded and confirmed that they were instructed by the 3rd Defendant and not the Applicant. That in view of this confirmation given by Kisia & Company Advocates, it is clear that the Memorandum of appearance and statement of Defence and other pleadings purportedly filed herein by the said firm on his behalf are irregular, null and void in law and should be disregarded or struck out from the record.

9. The Applicant averred that, the 1st Defendant company has been hijacked by other two Defendants who have excluded him from its day to day management thereof partly because he is unwell and currently being treated at the Cancer Care Hospital at MP Shah Hospital and so he was not aware of the suit and did not give instructions to any of the directors to accept service of the summons on his behalf or appoint a counsel to act on his behalf as purported.

10. That he is of an advanced age of over 70 years and stands to suffer irreparable damage and prejudice if his matrimonial home is attached and sold in execution of the irregular decree. Finally the Applicant avers that he has a strong and credible defence as demonstrated in the draft Statement of Defence. Therefore it is in the interests of justice that he should be granted the prayers sought.

11. The application was opposed vide a Replying affidavit dated 22nd November 2018, sworn by Elizabeth Ong’are, the Credit officer in the Credit Administration Department of the Plaintiff’s (herein “the Respondents”). She deposed that, the suit arises from financial facilities extended to the 1st Defendant way back in the year 2011. That at all material times, the 4th Defendant was one of the directors of the 1st Defendant’s company. That jointly with others they provided personal guarantees for repayment of the financial facilities advanced. That the Applicant has previously written to the Plaintiff admitting their indebtedness as shown by the letter dated 22nd August 2013, signed by the directors of the company.

12. She joined issues with the Applicant that the suit was filed on 12th February 2014 and summons to enter appearance issued against all the Defendants including the Applicant. She averred that summons were delivered to the offices of the 1st Defendant where all the Defendants were based but instead of each Defendant signing in acknowledgement of the same, they placed the 1st Defendant’s stamp upon all them. Following the service of summons, the firm of Kisia & Company Advocates entered appearance for all the Defendants including the Applicant and filed a joint statement of defence on 7th April 2014, on behalf of all them.

13. The statement filed by the 3rd Defendant states at paragraph 1 that he was authorized by the 2nd, 4th and 5th Defendants to make the statement. Further, on 25th June 2015, the Plaintiff filed an application for judgment on admission dated 20th June 2014, and all the Defendants filed a joint replying affidavit on 16th July 2014, sworn by Shadrack Ndambuki Kombo on their behalf. Therefore the application for judgment on admission was not heard unopposed as alleged. That the Applicant has not demonstrated the purpose the setting aside of the judgment will serve.

14. The Respondent described the proposed statement of defence as a sham, in view of the ruling of the court on the application for judgment that a defence filed was a mere denial. The Respondent argued that it is a serious breach of professional duty and possibly a criminal offence for an Advocate to purport to act in court proceedings for a party without the party’s instructions or knowledge. Yet it is baffling and informative to note that the Applicant has not shown any evidence to suggest that he has taken issue or lodged a complaint to the Law Society of Kenya against Mr. Kisia of Kisia & Co. Advocates that entered appearance for him without instructions particularly given that the ‘errant’ Advocate’s action has now exposed him to liability for a colossal judgment amount in the proceedings herein.

15. Further the letter dated 23rd May 2018, from Kagwimi Kang’ethe & Company Advocates addressed to Kisia & Co. Advocates does not accuse the said Advocate for any wrong doing instead directly solicits a denial or disclaimer of instructions from the said Advocate so as to assist in setting aside the judgment. That Mr. Kisia Advocate chose to make a ‘without prejudice’ statement rather than swear an affidavit to disclaim instructions from the Applicant.

16. Finally the Respondent avers that the 4th Defendant cannot allege that he was not aware of the proceedings for the reason that; the ruling was delivered on 30th October 2014, and sometimes in April 2015 or thereabouts as the auctioneers set about to trace attachable assets belonging to the Defendants. The Applicant and Mr. Shadrack Kombo (whom the Applicant describes at paragraph 5 of his supporting affidavit as being left in charge of operations of the company) went to the Plaintiff's bank and presented a letter dated 23rd April 2015 and represented that they had secured a property L.R. No. 209/6880 belonging to a third party (Khadija Adana Reid) from the sale of which they hoped to recover the Kshs. 300 million. They indicated that they required 15 days to settle the outstanding loan.

17. The deponent directed the Applicant and Mr. Shadrack Kombo to their Advocates M/S Nyaundi Tuiyott & Co. Advocates who were seized of the matter wherein Mr. Tom Onyambu Advocate of the firm of Nyaundi Tuiyott & Co. Advocates advised them to present proof by way of an agreement or otherwise from the third party that they had authority to deal with the property before the Plaintiff would consider their proposal. Subsequently, on 25th May 2015, the Defendants sent an email forwarding a copy of an agreement drawn by M/S Kiiru & Co. Advocates. That all the above are efforts by the Applicant were in an effort to avoid the consequences of execution of the judgment and he cannot now claim that he never had knowledge of the matter.

18. Further, the Applicant's allegations that he did not execute the personal guarantee to secure repayment of the facility advanced is an outright lie in light of the copies of his duly executed guarantee shown to the court and at all material times he was an active director of the 1st Defendant when the facility sums was advanced/utilized. Further in face of evidence where the Applicant was personally actively involved in efforts to secure concessions and indulges in payment of the debt. The Respondent argued that the application lacks merit and the Applicant's conduct can only be viewed as yet another strategy to deny the decree-holder its rights to recover payment and realize a judgment lawfully obtained.

19. However, should the court be inclined to grant the orders sought for in the application, the Applicant should deposit security for the decretal sum and costs as a guarantee for fair play and justice to the decree holder

20. After filing the application, the parties attempted to reach a consent settlement on the matter but it was unsuccessful. Subsequently, the court ordered that the Advocate who purportedly acted without instructions be summoned for cross examination. Mr. Maurice Kisia appeared and was examined on oath whereupon he stated that he was instructed by the 3rd Defendant as the Managing director of the 1st Defendant company to enter appearance on his behalf. That the 1st, 2nd, 4th and 5th defendants were members of the Board of the company. The 3rd Defendant informed him that he had agreed to represent them and on that strength the law firm of Kisia & Company Advocates filed a witness statement made by the 3rd Defendant on his own behalf and the other defendants. However, he only received summons issued in favour of the 3rd Defendant only.

21. On cross examination, he maintained that the notice to enter appearance, the defence and the witness statements were filed on behalf of all the Defendants on instructions of the 3rd Defendant. He conceded that he has not met the 1st, 2nd, 5th and 6th Defendants personally.

22. I have considered the application, the affidavit in support and opposition thereto, alongside the submissions filed by the parties and I find that, the only issue to determine is whether, the Applicant has advanced reasonable and sufficient reason to set aside the judgment entered against him on 31st October 2014. The main reason advanced is that, he was not served with summons to enter appearance, but the Respondent avers that, he was served through the 3rd Defendant and filed a defence to the Plaintiff's claim.

23. However, the Applicant's counsel referred the court to the case of; Harrishchandra Bhovanbhai Jobamputra & Another Vs. Paramount Universal Bank Limited & Others: HCC No. 828 of 2010 (2014 eKLR) where court held that; the filing an appearance alone, unless it is in reply to the summons and Plaint served in accordance with Order 5 of the Civil Procedure Rules, does not remove the necessity, to serve the summons and is not proof of service of summons.

24. That the return of summons served together with evidence of service is mandatory and should be seen as a tool of accountability of court processes.

25. The Respondent on its part referred the court to the case of; ; Paola Tarlazzi (Suing Through His Attorney and/or Agent) Carla Tarlazzi v Robert Ciavolella [2016] eKLR; where the court held that it is trite that if a Defendant files a Memorandum of Appearance in a suit, unless the same is filed under protest, he is deemed to have had due notice of the institution of such suit.

26. The Respondent also referred to the case of; Board of Trustees of African Independent Pentecostal Church of Africa Church v Peter Mungai Kimani & 12 others [2016] eKLR where it was held that the aim of summons to enter appearance was achieved as the Defendant entered unconditional appearance and participated in the proceedings which constituted voluntary and complete waiver of any defect that could have affected the summons.

27. The Respondent argued that, it is basic knowledge in the legal profession that when an Advocate of the High court of Kenya places himself on record as representing a party he or she, as it were, dons two hats- first he is an officer of the court before which he appears and second he is a professional representative of his appointing client. In both of these roles, the Advocate is governed and by high professional standards and answers to a rigorous professional code. It is for this reason that a party is held by law bound by the acts of his Advocate.

28. That, in view of the fact the Applicant has not taken any legal action against the firm of Kisia & Company Advocates, is an indication that the said Advocate was acting in concert with the Applicant to frustrate the Respondent from realizing the fruits of the judgment. Reference was made to the case of; Farkhandas Nurmohamed Abdulkader v Mohamed Hasham Bakarani & another [2014] eKLR where the court **stated and observed that**; the Applicant's failure to date take any disciplinary action against her Advocate could also be an indication that the Applicant's allegations that she did not give instructions to her advocate could be without basis. **Further reference was made to the case of; George Miyare t/a Miyare & Company Advocates v Nyando Power Techniques Limited [2017] eKLR**, where the court stated that the Respondent having by its conduct failed to disown the Applicant's authority at the earliest opportunity but instead conducted

itself as if it had instructed the Applicant cannot now be heard to deny knowledge of the Applicant's source of authority.

29. In this matter I have considered the submissions of the parties on the issue of service of summons and subsequent instructions to the firm of Kisia & Company Advocates to represent him in this matter. I find from the court file that, the court summons and in particular the 4th defendant/Applicant, were issued on 26th February 2014. Subsequently a memorandum of appearance was filed by the firm of Kisia & Company Advocates on 21st March 2014. A copy thereof shows that, it was filed on behalf of the 1st to the 5th Defendants.

30. I have also gone through all the documents on the file, and I have not seen any Affidavit of service as evidence that the summons were served on the Applicant. Moreover, although Mr. Kisia testified that he was only served with summons in respect of the 3rd Defendant, there is no evidence to that effect in the court file. For him to have entered appearance for all the five defendants, the logical presumption would be that summons were served upon all of them.

31. However, it is evident that all through, the firm of Kisia & company Advocates dealt with the 3rd Defendant and although with alleged authority to act on behalf of the Applicant, there is no evidence of express authority from the Applicant to the 3rd Defendant to accept summons and/or appoint an Advocate on his behalf. Indeed the provisions of; Order 5 Rule 7 of the Civil Procedure Rules requires that in a suit where there are more than one Defendants, service of summons shall be effected on each Defendant. Further, Rule 8 thereof; requires that services be made on the Defendant in person where it is practically possible unless he has an authorized agent to accept service and if service has to be effected on an Advocate, then there has to be evidence that he had instructions to accept service on behalf of the Defendant. Similarly, Rule 15 requires that upon service of summons, an Affidavit of service should be filed in court by the process server, stating the mode of service, the person service, the time and place of service.

32. These provisions were not complied with in the instant matter as the Respondent has confirmed through the Replying affidavit that the summons were delivered to the 1st Defendant's office and acknowledged by the 1st Defendant's stamp. Therefore the Defendants were not served individually and personally as required under the Rules. In the absence of evidence that the 4th Defendant was served with summons personally, I find there is sufficient ground to hold that the provisions of; Order 5 Rule 7 of the Civil Procedure Rules were not complied with. Further in the absence of any evidence that the Applicant instructed the firm of Kisia & Company to act for him, the judgment entered against the Applicant cannot be sustained.

33. Be that as it were, the Respondents submitted that, although the Applicant may not have been properly served as alleged, there is evidence that he knew of the judgment long before he applied to set aside. Reference was made to a letter dated 23rd April 2016, written to the Managing director of the Plaintiff's company in which the 1st Defendant was seeking for time to dispose of a property valued at Kshs. 360,000,000 and pay off the balance of the outstanding loan facility. I have looked at the letter and realize that it is signed by two persons described as authorized signatories but without their names indicated.

34. Further reference was made to an email and a letter dated 22nd May 2015, marked as "EOO5" from the law firm of M/S Thuita Kiiru & Company Advocates to the Chairman of New Karen Ventures Limited in relation to an offer to purchase a property; LR No. 209/668 Gatundu Crescent in the sum of Kshs. 379,000,000. The Respondent alleges that these correspondences are evidence that the Applicant was aware of the judgment. But I find that, none of them are signed by the Applicant.

35. Finally, the Applicant avers that, it has a defence that raises bona fide triable issues and relies on the case of; Multiscope Consulting Engineers vs. University of Nairobi Civil Case No. 47 OF 2013 (2014) eKLR to argue that an arguable defence is not necessarily a defence that must succeed on trial, but the Respondent submitted that, the Applicant has not denied that he guaranteed the debt. That based on various correspondences before and even after judgment, the debt is admitted and therefore it will serve no purpose to set the Judgment aside. That the court observed in the ruling delivered on the application for summary judgment, that the defence appeared to be a mere defence denying everything and not explaining the previous admission of debt. That is a sham to the extent that it didnot respond to the admissions contained in the various correspondences.

36. In conclusion of this matter, I find that, in view of the fact that there is no evidence that the Applicant was personally served with summons and/or he personally instructed the firm of Kisia & Company Advocates to represent him, it will be in the interest of justice to grant the Applicant an opportunity to be heard.

37. However, it is not in vain when the Respondent points to the court that, the Applicant is a director in the 1st Defendant's company, which was advanced the loan facility and which he guaranteed. It is also on record that despite being aware through the evidence of Mr. Kisia that, he acted on his behalf without him instructing that firm, the Applicant has chosen not to take any action against the 3rd Defendant and/or the firm of Kisia & Company Advocates and opted to follow the Respondent.

38. I have considered the draft defence filed in the light of the entire matter and most specifically the ruling delivered on 31st October 2014, seeking for judgment on admission in favour of the Plaintiff as against the Defendants in sum of Kshs. 39,544,065.91 and the subsequent finding in favour of the Plaintiff that the defence filed by the Defendants did not raise triable issues. I find that the Applicants draft statement of defence will be considered in the light of that ruling. It will only serve the interest of justice for both parties if the Applicant deposits the sum of money he is liable to pay under the guarantee liability. The same be deposited in court and/or in a joint interest earning account in the names of the counsels representing the Applicant and the Plaintiff. It is evident from paragraph 10 of the Plaint dated 6th February 2014 that the sum advanced was secured by individual deeds of personal guarantee and indemnity dated 8th September 2011, whereby the 2nd to the 6th Defendants, unconditionally and irrevocably jointly and severally guaranteed the sum advanced. In that regard, and in view of the fact that, execution is ongoing against the co-guarantors it will be important to ascertain the figure that the Applicant is liable to pay before any order can be made as to the sum of money to be deposited.

39. Those are the orders of the court.

Dated, delivered and signed in open court this 22nd day of July 2019.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Onyambu for the plaintiff/Respondent

Mr. Ngaira for Mr. Kangethe for the 4th defendant/Applicant

No appearance for the Defendants

Dennis.....Court Assistant