REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 26 OF 2015

ECOBANK KENYA LTD..PLAINTIFF

-VERSUS-

HARVEY ENGINEERING LTD................................1ST DEFENDANT

STANLEY NDUATI MWANGI..................................2ND DEFENDANT

JOSEPH MBURU MUIGAI.......................................3RD DEFENDANT

R U L I N G

1. The Plaintiff instituted this suit against the Defendants by a Plaint filed 26th January 2015, which Plaint was subsequently amended on 26th May 2015. All the three Defendants on being served with the summons and Plaint filed a Memorandum of appearance through the law firm of Wambugu & Muriuki. The Defendants failed to file a defence within the prescribed period and on the Plaintiff seeking judgment in default of defence judgment was entered against all the three Defendants on 7th August 2015. From then on there has been various interlocutory applications filed herein and in one such application a Ruling dated of 19th July 2018 was delivered whereby attachment of the 3rd Defendant's immovable property was granted and orders made for the sale to proceed by public auction of that property.

2. What is before Court is the Notice of Motion dated 22nd October 2018. It is filed by the 2nd Defendant. He seeks by that application the setting aside of the *ex parte* judgment against him.

3. The 2nd defend has based the prayer in that application on the grounds that he had not been served with any documents by the Decree Holder (it is not clear what documents he referred to); that he resigned as a Director of the 1st Defendant on 2nd February 2010 (he attached minutes as proof of resignation); and that he was unaware of this case.

4. The application is opposed by the defence counsel, only on one ground. That is that the firm of Mutuearandu Kaimenyi Mose & Company Advocates, who filed the application for the 2nd Defendant had not obtained leave of the Court to take over the conduct of this case from the firm Wambugu & Muriuki Advocates, who previously acted for the 2nd Defendant.

ANALYSIS

5. I will begin by considering the objection raised by the Plaintiff.

6. In raising that objection the Plaintiff was alluding to Order 9 Rule 9 of the Civil Procedure Rules. That Rule requires an Advocate seeking to take over the conduct of a case where judgment has been entered to obtain leave of the Court.

7. In this case, as quite rightly submitted by the Plaintiff, judgment had been entered when the firm of Mutuerandu Kaimenyi Mose & Company Advocates filed the application, under consideration, on behalf of the 2nd Defendant. I have, in my perusal of this file, come across a letter of consent dated 17th October 2018 signed between the firms Muruerandu Kaimenyi Mose & Company Advocates and Wambugu Muriuki Advocate where they consented to the firm of Mutuerandu Kaimenyi Mose & Company Advocates acting for the 2nd Defendant.

8. The mischief directed by Order 9 Rule 9 of the Civil Procedure Rules was to protect Advocates who after successfully obtaining judgment

for a party would have their brief taken away from them without their consent. That being so and because off the consent referred to above the objection raised by the Plaintiff is rejected.

9. What then of the 2nd Defendant's application set aside *ex parte* judgment.

10. Order 10 Rule 11 of the Civil Procedure Rules provide for the setting aside of judgment entered under that order including *ex parte* judgment. That Rule provides:

> **"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."**

11. In considering the application of the above Rule the Court should consider two things. If the *ex parte* judgment entered against the applicant was irregular, for example: if there is evidence such a party was not served with summons and Plaint, the Court is then obliged to set aside the *ex parte* judgment *ex debito justitiae*. If however, the *ex parte* judgment was regularly entered the Court will in exercise of its discretion, as provided under Order 10 Rule 11 consider where the justice lies.

12. In this case the 2nd Defendant very vaguely stated he was not served with "documents" by the Decree Holder. The 2nd Defendant remained shy and failed to categorically state what was not served on him. It follows that he does not deny that he was served with the summons and Plaint. This Court is therefore entitled to assume he was properly served.

13. A Memorandum of Appearance was filed by the firm Wambugu & Muriuki Advocates his behalf, although the Memorandum incorrectly referred to him as Stephen rather than Stanley. The 2nd Defendant does not deny he instructed the firm of Wambugu Muriuki to file an appearance for him.

14. I do find and hold that the 2nd Defendant was served with the summons and that he instructed the firm of Wambugu & Muriuki Advocates to act for him and to file a Memorandum of Appearance. It follows that the judgment obtained by the Plaintiff, against the 2nd Defendant in default of defence was a regular judgment and cannot be set aside as a matter of right, *ex debito* justitiae.

15. Is the 2nd Defendant deserving to the order to set aside the ex parte judgment in exercise of this Court's discretion?

16. The 2nd Defendant alleged that he resigned from the 1st Defendant company before the financial facility was given to the 1st Defendant by the Plaintiff. The only evidence the 2nd Defendant relied upon, in this respect, was minutes attached to his application stating that he was resigning. Nothing more. One would expect that a search would have been done at the company's registry to confirm the same and also one would have expected a copy of the 1st Defendant's annual company return to confirm the same. But even if all those documents were there it is important to note that the 2nd Defendant was not sued because he is or was a Director of the 1st Defendant. No. He was sued because he executed a guarantee guaranteeing the 1st Defendant. The minutes of his resignation, if at all, do not advance the 2nd Defendant's application.

17. The 2nd Defendant attached to his application a draft Defence. That defence is a mere denial of the Plaintiff's claim. More importantly in respect to paragraph 11 of the Plaintiff's Plaint, which paragraph pleaded the guarantee executed by the 2nd Defendant, the 2nd Defendant simply responded to it, in his draft defence thus:

> **"The 2nd Defendant denies the contents of paragraphs 7, 8, 9, 10 and 11 and puts the Plaintiff to strict proof thereof."**

18. The 2nd Defendant did not specifically deny executing the guarantee, as pleaded in the Plaint. In this regard I will refer to the case **PEERAJ GENERAL TRADING & CONTRACTING COMPANY LIMITED, KENYA & ANOTHER V MUMIAS SUGAR COMPANY LIMITED [2016] EKLR** thus:

> "In **Mugunga General Stores –vs- Pepco Distributors Ltd [1987] KLR 150, Platt, Gachuhi and Apaloo JJA** expressed the following view:
>
> > **"...a mere denial is not a sufficient defence in this type of case. There must be some reason why the Defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore to simply deny liability without giving some reason. A mere denial was not a sufficient defence in this type of case."**

CONCLUSION

19. In the end I find the Notice of Motion dated 22nd October 2018 has no merit and it is dismissed with costs to the Plaintiff.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **4TH** day of **OCTOBER,** 2019.

MARY KASANGO

JUDGE

Ruling Read and **Delivered** in **Open Court** in the presence of:

Sophie..................................... **COURT ASSISTANT**

.... **FOR THE PLAINTIFF**

.... **FOR THE DEFENDANT**