



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 208 OF 2017

GROFIN AFRICA FUND LLC.....1ST PLAINTIFF/RESPONDENT

GROFIN CAPITAL (PPY) LTD.....2ND PLAINTIFF/RESPONDENT

- VERSUS -

NAMSI LIMITED t/a NOBILIA EAST AFRICA..1ST DEFENDANT/APPLICANT

PAUL MUNYIRI KAGUAMBAH.....2ND DEFENDANT/APPLICANT

CECILIA NAMSI MUNYIRI.....3RD DEFENDANT/APPLICANT

RULING

1. *Grofin Africa Fund LLC* and *Grofin Capital (PPY) Limited* are the two plaintiffs in this matter. By a plaint filed on **18th May, 2017**, the plaintiff seeks judgement against *Namsi Limited*, as the principal debtor and *Paul Munyiri Kagumbah* and *Cecilia Namsi Munyiri* as the guarators for **Ksh 89, 457, 739.00**.

2. According to the affidavit of service, of *Robinson Muhando Khaliiali* sworn on **6th July, 2017**, the summons in this matter were served upon the two guarantors' authorised agent in accordance with **Order 5 rule 8 (1) of the Civil Procedure Rules** (the rules).

3. There is no evidence of service of the summons upon the principal debtor *Namsi Limited*.

4. The plaintiffs applied for entry of judgment in default of appearance and the Deputy Registrar of this court on **20th July, 2017**, minuted the entry of that judgment.

5. It is that judgment that the defendant seeks by their **Notice of Motion** dated **13th October, 2017**, be set aside and that they be granted leave to file defence and counter claim.

6. The defendants by their affidavit in support of the application deponed that they instructed a law firm of *Mathenge Gitonga & Co. Advocates* to represent them in this matter. They also deponed that the said advocate filed a memorandum of appearance, but I must say that I have not sighted that memorandum of appearance in the court file.

7. The defendants further deponed that they believed the said law firm had filed a defence on their behalf and that it was only after they were disatisfied with the lack of progress of this matter that they changed their advocate to the present law firm representing them, that is, the firm of *Akatch & Partners*. On making that change of advocates, the new law firm found out that there was a default judgment entered against them.

8. The defendants annexed a copy of their proposed defence and counter claim which in this court's view raises triable issues. The defendants in their said defence alleged, amongst other grounds, that the plaintiff was obligated but failed to provide business development services, monthly statements, working capital of **Ksh 22 million** in lumpsum and payment within the time frame given. The defendants also counter claimed that the agreement with the plaintiff was intended to be an incentive, whereby the plaintiff and the defendant were to share the profits and losses of the principal debtor. That the profits to be made was based on financial input/ accommodation by the plaintiffs. Further that the plaintiff had an obligation to insure that the principal debtor's business remained profitable. To that end, the defendants by their counter claim prayed that the court would find the plaintiff's breached the agreement, that the agreement was invalid and that the plaintiff acted negligently.

9. The application was opposed by the plaintiff on reliance on the following grounds of opposition:

“1. The application is bad in law and fatally defective as it offends mandatory provisions of the Civil Procedure Act Cap 21 and Civil Procedure Rules, 2010.

2. The Application is marred with blatant untruths and therefore lacks merit.

3. The application lacks justifiable grounds to warrant setting aside of default judgment entered on 20th July, 2017.

4. The application is an abuse of Court process.”

10. As it can be seen, in ground of opposition Nos. 2, 3 and 4 above, rely on facts which were unavailable because the plaintiff did not file an affidavit in reply.

11. The plaintiff’s learned counsel in submission was critical of the defendants allegations, that a memorandum of appearance was filed on their behalf, was also critical of the allegation, by the defendants, that the failure to file a defence was due to the mistake of the previous counsel. The plaintiff cited the case of ***Habo Agencies Ltd vs Wilfred Odhiambo Musingo [2016]eKLR*** where the court of appeal in dealing with an application to reinstate a dismissed appeal on account of attendance stated:

“We are cognizant of numerous decisions of this Court and persuasive decisions from other jurisdictions that mistake of counsel should not be visited upon a client. In the Ugandan case of ***Edith Nantumbwe Kizito & 3 Others vs Mariam Kutesa, CA Civ. Ref. No. 98 of 2008***, it was held, inter alia, that mistake of counsel should not be visited on an innocent litigant. In the Kenyan case of ***Rajesh Rughani v Fifty Investments Limited & Another (2005) eKLR***, this court expressed that “**it is not simply enough to accuse the advocate for failure to inform as if there is no duty on the client to pursue his matter.**” Whereas it is true that in general, mistake of counsel should not be visited upon a client it is equally true that when counsel as agent is vested with authority to perform some duties and does not perform the duty as directed by the principal, such principal should bear the consequences. (see ***Bains Constructions Co. Limited v John Mzare Ogowe (2011) eKLR***.

In ***Gatti v Shoosmith (1), [1993] 3 AII E.R.916***, it was observed that there is nothing in the nature of mistake to exclude it from being a proper ground for not allowing it as an effective ground to grant leave to appeal. Whether a mistake should be treated as good ground must depend on the facts of each individual case and there may be facts in a case which would make it unjust to allow a party to succeed on the ground of mistake of counsel.”

ANALYSIS AND DETERMINATION

12. I have considered the application and its supporting affidavit and the submissions of learned counsels.

13. ***Order 10 rule 11 of the rules***, gives the court wide discretion to set aside judgment entered under that rule. In the case of ***Shah vs Mbogo and another [1967]*** that discretion was stated to be intended to be exercised to avoid injustice, hardship resulting from accident, inadvertedness or excusable mistake or error. That discretion however, was stated by the Justices in that case, was not intended to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice.

14. In this present case, the 2nd and 3rd defendants, the two guarantors, were served with the summons to enter appearance. The reason they both gave for having failed to file a defence is that it was due to the mistake of their previous counsel, who did not file a defence as instructed by them.

15. In my humble view, the two guarantors needed to do more to show that they indeed instructed counsel, within the period provided by the summons. They did not. The only evidence that the guarantors had instructed the law firm of ***Mathenge Gitonga & Co. Advocates*** to act for them, is the letter written by that law firm to the Deputy Registrar dated ***11th September, 2017*** requesting the court file to be availed to enable them file the defence. It will be noted that ***11th September, 2017*** was out of time of the 15 days given in the summons to file a memorandum of appearance. In my view, there is no reasonable explanation why the guarantors failed to file their defence in time.

16. With regard to ***Namsi Limited***, the principal debtor, service of the summons was not effected as required under the rules. Order 5 Rule 3 of the rules provides the mode of service required in respect of corporations. The rule is in the following terms:

“3. Service on a corporation [Order 5, rule 3.]

Subject to any other written law, where the suit is against a corporation the summons may be served-

a. On the secretary, director or other principal officer of the corporation; or

b. If the process server is unable to find any of the officers of the corporation mentioned in rule 3(a)-

(i) By leaving it at the registered office of the corporation;

(ii) By sending it by prepaid registered post or by a licensed courier service provider approved by the court to the registered postal address of the corporation; or

(iii) If there is no registered office and no registered postal address of the corporation, by leaving it at the place where the

corporation carries on business; or

(iv) By sending it by registered post to the last known postal address of the corporation.”

17. Service in respect to the principal debtor, should have been effected upon the secretary, director, or principal officer of the corporation. In this case service was effected upon the care taker of the two guarantors at the home of those guarantors. That service in my view was unsatisfactory.

18. The defendants annexed to their application a detailed defence and counter claim. The plaintiff failed to provide any factual basis in response to the defendant’s proposed defence. In my view the issues raised in that proposed defence and counter claim cannot be ignored without factual basis.

19. It is also necessary to bear in mind, as one considers the authorities of the period prior to the new constitution, that those authorities should be tampered by the constitutional provision under Order 50 of the constitution, that is the right to be heard. This right was recognized by **Justice M. Mativo** in the case of **Wachira Karani v Bildad Wachira [2016]eKLR** where it was stated as thus:

“I find useful guidance in the court of appeal decision in the case of Richard Nchapai Leiyangu vs IEBC & 2 Others where the court expressed itself as follows:-

“we agree with the noble principles which go further to establish that the courts’ discretion to set aside ex parte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice”

I find the reason offered to be reasonable and excusable. I hold the view that it would be unjust and indeed a miscarriage of justice to deny a party who has expressed the desire to be heard the opportunity of prosecuting his case. The court in the above cited case of Richard Nchapai Leiyanguvs IEBC & 2 others proceeded to state as follows:-

“The right to a hearing has always been a well protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality”

20. Having therefore found that the principal debtor was not served as required under the rules and having found that the proposed defence and counter claim raise triable issues, the interest of justice would best be served by acceding to the notice of motion dated **13th October, 2017**.

21. In the end, I grant the following orders:

a. The default judgment entered on **20th July, 2017** against the defendants is hereby set aside.

b. The default judgment is set aside in (a) above on condition that the defendants file and serve their defence **within 7 days** from today.

c. The defendants in filing that defence, shall, and in order to avoid confusion, in the counter claim describe the defendants as plaintiffs in the counter claim.

d. The costs of the notice of motion dated **13th October, 2017** shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 19th day of July 2018.

MARY KASANGO

JUDGE

Ruling read in open court in the presence of

Court Assistant.....Sophie

..... for the Plaintiffs

..... for the Defendants