



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO.219 OF 2016

THE MAURITIUS COMMERCIAL BANK LIMITED....PLAINTIFF/RESPONDENT

VERSUS

JADE PETROLEUM LIMITED.....1ST DEFENDANT/APPLICANT

PANKAJ VRAJLAL VALLABH SOMAIA.....2ND DEFENDANT/APPLICANT

AMAR MAHENDRA CHANDRA PANDYA.....3RD DEFENDANT/APPLICANT

RAJ HARIKRISHNA MOHANLAL DEVANI.....4TH DEFENDANT/APPLICANT

RULING

Before Court are the two Notices of Motion both dated **18th September 2017** filed by the 1st, 2nd and 3rd Defendant/Applicants. The Applicants in the two applications sought for orders inter alia:-

“3. THAT the Honourable Court do hereby set aside the Decree and default judgment dated 9th August 2016 entered herein and all the consequential Orders premised thereon.

4. THAT the Honourable Court do allow the 1st Defendant's/ Applicants advocate to cross-examine Mr. Leonard Muendo so as to ascertain the veracity of his affidavit of service sworn on 18th July 2016.

5. THAT the Plaintiff do serve the Complaint and Summons upon the 1st Defendant/Applicant Advocate and thereafter leave be granted to the 1st Defendant/Applicant to file its statement of Defence and defend the claim herein.

6. THAT the costs of this application be in the cause.”

The applications which were both premised upon **Article 50(1) and (2) and 15(d) of the Constitution of Kenya 2010, Section 1A & 1B of the Civil Procedure Act 2010, Order 5 Rule 768, Order 10 Rule 11 of the Civil Procedure Rules** were supported by the affidavits of **VISHAL SOMAIA** (a director of the 1st Defendant) and **PANKAJ VRAJLAL VALLABH SOMAIA** (the 2nd Defendant herein) and **AMAR MAHENDRA CHANDRA PANDYA** (the 3rd Defendant).

The background to this matter is that by way of Complaint dated **16th May 2016** and filed in Court on **8th June 2016** the Plaintiff sued the 1st, 2nd, 3rd and 4th Defendants seeking judgment against all four in the sum of US Dollars 6,500,000/= plus interest and costs. Through his affidavit sworn on **18th July 2016** and filed in Court on **19th July 2016**, **Mr. LEONARD MUENDO** who described himself as a process server duly authorized by the High Court, averred that he served upon all the four defendants summons to Enter Appearance together with copies of the Complaint, Verifying Affidavit, List of witnesses and witness statements. In his Affidavit of service sworn on **18th July 2016**, the process - server averred in Paragraph (3) that on **29th June 2016** he effected service upon the 1st Defendant at their offices at Cross Road Plaza, 3rd Floor, Westland Road Nairobi and that the documents were received on behalf of the 1st defendant by a lady who introduced herself to him as **MUMBI NGURE**, the Human Resource Manager of the 1st Defendant Company. The lady confirmed that she was authorized to receive documents on behalf of the company. The said **‘Mumbi Ngure’** acknowledged receipt of the summons and Complaint on behalf of the 1st Defendant but declined to sign the original documents.

The process-server proceeded to aver in Para (8) of his Affidavit of Service that on the same day being **29th June 2016** at about 1.15p.m he proceeded to Manyani Road East, House No.23, the residence of **AMAR KAHENDRA CHANDRA PANDYA** (the 3rd Defendant) where he effected service of the summons to enter appearance, the plaint as well as the other documents by affixing them at a conspicuous place on the front door.

The process-server went on to aver in Paragraph (10) of his affidavit that on **30th June 2016** at an unspecified time the he proceeded to the house of **PANKAJ VRAJLAL VALLABH SOMAIA** (the 2nd Defendant) being House No.27 Nyari Estate, Red Hill Drive, Nairobi. Upon ringing the doorbell a gentleman who identified himself as the 2nd Defendant opened the door. The process-server handed over to this gentleman the summons and Plaint, which service the gentleman acknowledged but declined to sign the original copies.

Following this service by the process - server, the 1st, 2nd and 3rd Defendants all failed to enter appearance in the matter. This prompted the Plaintiff to apply for judgment to be entered on its behalf for a liquidated sum in default of appearance by the Defendants. The court obliged and on **2nd August 2016** judgment in default of appearance was entered. The decree was extracted on **9th August 2016** and a certificate of Costs was issued on **16th June 2017**. On **25th July 2017**, the Plaintiffs proceeded to file a Notice to Show Cause Application asking that the court summon the defendants to show cause why they should not be committed to civil jail for failure to pay the decretal sum of **Us Dollars 7,403,489.00** and **Kshs.6,691,838.00**. Upon service of the Notice to show Cause upon the 1st, 2nd and 3rd defendants, they filed the present applications.

The 1st, 2nd and 3rd Defendant/Applicants all insist that contrary to the averments in the Affidavit of Service they were **not** served with a summons to Enter Appearance or the Plaint at all. The Defendant/applicants insist that they were totally unaware of the present suit until they were served with the Notices to Show Cause.

The Plaintiff filed Grounds of Opposition to the two applications on **10th October 2017**. They insist that service was properly effected upon the Defendant/Applicants; that the annexed draft defence raises no triable issue; and that the claim is not in any event time-barred as alleged by the defendants. The Plaintiff urge the court to dismiss the two applications.

The Court gave directions that the applications be disposed of by way of written submissions. All parties in the matter did duly file their written submissions and counsel appeared before the Court on **13th July 2018** for purposes of highlighting those submissions.

In his submissions **MR. KANJAMA** for the 1st, 2nd, 3rd Defendant/Applicants submitted that the Affidavit of Service sworn on **18th July 2018** by Mr Leonard Muendo contained material falsehoods in that in fact no service had been effected on any of the defendants, thus the default judgment entered on **2nd August 2016** ought to be set aside **ex debito justitiae**. Counsel further submitted that the annexed draft defence raised triable issues therefore it was only just that the Defendants be accorded a fair hearing and they ought not be condemned unheard. Counsel urged that if in any doubt the Court should summon the process-server for cross examination.

MR FRAZER SC acting for the Plaintiff/Respondent opposed the applications. He submitted that as regards the 1st Defendant/Applicant, service was properly effected at its place of business by serving the Human Resource Manager. Counsel conceded that in cases where service is found not to have been proper then any judgment in default must be set aside. However he submitted that in cases where an affidavit of service had been filed then there arises a presumption of service and the burden is upon the defendant who seeks to challenge that presumption. In this case the defendants have failed to discharge that burden. Finally counsel submitted that the draft defence is vague and full of inconsistencies and does not raise any triable issues. He urged the court to dismiss the applications and to uphold the judgment entered in default of appearance.

ANALYSIS AND DETERMINATION

I have carefully analyzed the facts of this case, the written submissions filed by both counsels, the relevant law and case law. The following issues arise for determination.

- i. Was service properly effected on the 1st, 2nd and 3rd Defendants?
- ii. Is there need for the court to summon the Process-Server for cross-examination?
- iii. Does the draft defence raise triable issues?

1. Question of service

Indeed the question of service is one which is at the crux of this matter. Once the Plaint had been filed the Plaintiffs were obliged to effect service of the Summons to Enter Appearance as well as a copy of the Plaint on each defendant. As conceded by both counsel in cases where service is not so effected then any judgment entered in default of appearance must be set aside **“ex debito justitiae”** that is as a matter of right. Despite the affidavit of service sworn by **Mr. Leonard Muendo** on **10th July 2016**, the 1st, 2nd and 3rd defendants all insist that they were not served in the manner claimed by the process-server.

In The case of **SHADRACK ARAP BAIYWO –VS BODI BACH [1987]** eKLR the Court held thus:-

“There is a presumption of service as stated in the process servers report and the burden lies on the party questioning it, to

show that the return is incorrect.”

The 1st Defendant who was allegedly served through the Human Resource Manager at the Company’s place of business, denies that on the material date the said ‘**Mumbi Ngure**’ was in the employ of the company. I do agree with **Mr. Frazer** that the affidavit sworn by **Mr Pankaj Somaia** amounts to a vague denial. The 1st defendant conceded that this ‘**Mumbi Ngure**’ was at one time an employee of their company but claims that on **29th June 2016** the date of the alleged service she had ceased so to be. Despite the claim by **Mr. Somaia** that this lady tendered her resignation on **31st March 2016** and left the employ of the 1st defendant on **30th April 2016** no document e.g letter of resignation has been annexed to prove that this fact. No affidavit sworn by the said **Mumbi Ngure** confirming those averments has been annexed. The 1st defendant does not deny that the company premises are located at Cross Road Plaza in Westlands as stated in Para (3) of the Affidavit of Service. There is no way the process server would have known the location of the registered offices of the company much less the name of the Human Resource Manager unless he had actually gone there and met her.

Order 5 Rules 3 of the Civil Procedure Rules provide that in where a suit is filed against a Corporation, service may be effected by leaving the documents at the registered offices of the corporation. Nowhere does the 1st defendant dispute that the documents were indeed left at the registered offices of the company. He only challenges the identity of the person who was served. I reiterate that it was not possible for the process-server to have known the name of the Human Resource Manager unless he had actually seen and met her. I find that the presumption of service upon the 1st defendant/ Applicant has not been successfully rebutted.

With respect to the 2nd defendant/Applicant para (8) of the Affidavit of Service indicates that service was effected by leaving the document in a conspicuous place on the front door of the 2nd Defendant’s house. The 2nd Defendant concedes that he did at one time reside at the given address but he denies that he was resident at that house on **29th June 2016**. The 2nd Defendant claims that he moved out of the premises in **February 2008**. He produced a letter from the landlord stating that the 2nd Defendant’s lease ran for only one year from **1st February 2007** and that the property has since been sold. Once again these averments by the 2nd Defendant are vague and leave many obvious questions unanswered. The mere fact that a property has been sold does not mean that an existing tenancy is terminated. Further a lease once expired can easily be and often is renewed. Most importantly there is a loud silence from the 2nd Defendant regarding where he was actually residing on **29th June 2016**. If as the 2nd defendant claims he had moved out of the house in question where did he move or relocate to. The easiest way to prove that he did not occupy the house in question would have been for the 2nd Defendant to avail evidence (proof) of where he was actually residing on that date. His failure to avail such proof speaks volumes. Once again I find that the presumption in favour of proper service has not been successfully rebutted.

Finally with respect to the 3rd Defendant/Applicant, the process - server in his affidavit averred that he served the summons by going to the home of the 3rd Defendant and delivering the summons to him personally. The 3rd Defendant like the 2nd Defendant concedes that he did reside at the address in question but claims that he moved out in **August 2008** when his mother sold the property. A sale agreement is annexed in support of this allegation. Once again there is a loud silence from the 3rd Defendant regarding where he moved or relocated to. The 3rd Defendant does not state exactly where he was residing on **30th June 2016** the date when service was effected. Further the mere existence of an agreement for sale is not proof that the house was actually sold and transferred. Once again the denial of the 3rd Defendant is vague and leaves several unanswered questions. Even on a balance of probability this court cannot find that the presumption of service has been effectively rebutted.

All in all I am not persuaded that service of summons was **not** effected on the 1st, 2nd and 3rd Defendant/Applicants. The affidavit of the process-server was clear and precise regarding the dates, times, location and identities of the persons whom he served. I find no reason to summon him for further cross-examination.

Having settled the question of service the final issue requiring consideration is whether the ex parte judgment ought to be set aside on any ground other than that of defective service. The Defendants plead that their draft defence raises triable issues. It is a cardinal principle of law that no man should be condemned unheard. **Article 50(1) of the Constitution of Kenya 2010** provides:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate another independent and impartial tribunal or body.”

In **SANGRAM SINGH SANG RAM SINGH –VS- ELECTION TRIBUNAL, KOTE, AIR 1955 SC 664** the Supreme Court of India held as follows:-

“There 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.”

Order 10 R 11 of the Civil Procedure Rules provides:-

“Where judgment has been entered under this Order the Court may vary such judgment and consequential decree or order upon such terms as are just.”

Therefore notwithstanding the finding above that service was properly effected upon the Defendants, the court may proceed to set aside the ex-parte judgment if it deems that it is just to do so. The court must weigh on the one hand the Plaintiff’s rights to enjoy the fruits of his judgment and on the other hand the Defendants rights to a fair trial which includes the right to present their defence for consideration. In **MUTUNE MUSAU –VS – DESIGN WEAR [2013] eKLR** the judge stated:-

“In such a case I must consider the balance of convenience setting aside the ex parte judgment will only delay the claimant’s enjoyment of the fruits of this judgment while failure to set aside the judgment will completely lock out the Respondent from defending the claim against it. The scale thus tilts in favour of granting the prayer of the Respondent...”

Likewise in **JAMES KANYIITA NDERITU & ANOTHER –Vs- MARIOS PHILOTAS GHIKA & ANOTHER [2016] eKLR**, the Court of Appeal held as follows:-

“In a regular default judgment the defendant will have been duly served with summons to enter appearance but for one reason or the other, he had failed to enter appearance to file defence, resulting in default judgment. Such a defendant is entitled, under O10 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 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 a whole it is in the interest of justice to set aside the default judgment.”

In this case the judgment in default of appearance was entered on **2nd August 2016**. The Notice to show Cause was served on the Defendants on **31st August 2017**. Immediately upon receiving the Notice to Show Cause the Defendants filed the present applications on **18th September 2018**. In my view the defendants acted swiftly in filing this application as soon as they became aware of the Notice to Show Cause. I have perused the annexed draft defence which does in my opinion raise triable issues. The amount in issue is **USD 6,500,000/=** (roughly **Kshs.700,000,000/=** at current exchange rates). This is not a small sum of money and justice demands that the Defendants be availed an opportunity to be heard before they are condemned to pay such a vast sum. Ultimately the scales tilt in favour of setting aside the ex parte judgment in default and allowing the defendants to present their defence for consideration.

Accordingly and based on the foregoing, I do hereby set aside the ex parte judgment entered against the defendants on **2nd August 2016** and all orders consequential thereto. I further direct as follows:-

- i. The Complaint and Summons to be served upon the 1st, 2nd and 3rd Defendants within 7 days of today’s date.
- ii. The Defendants each to file and serve their statement of defence within 14 days of service.
- iii. Parties to appear before the Hon. Deputy Registrar for Case Management Conference on 5th November 2018.
- iv. The costs of this application will be borne by the Defendants.

Dated in Nairobi this.....day of October, 2018.

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Justice Maureen A. Odera

Ruling delivered at the Nairobi High Court this **5TH**.day of **OCTOBER** , 2018.

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JUDGE