



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO.542 OF 2013

SAMAAN TRADING COMPANY LTD.....PLAINTIFF

=VERSUS=

JEREMIAH KOSGEI KIBOWEN & ANOTHER.....1ST DEFENDANT

LOMSON ENTERPRISES LIMITED.....2ND DEFENDANT

RULING

[1] The Notice of Motion dated 26th August 2014 seeks orders that:

[a] Spent

[b] Spent

[c] The warrants of attachment and sale issued herein on 25th June 2014 be lifted unconditionally;

[d] The ex parte interlocutory judgment entered herein on 30th March 2014 be set aside;

[e] The costs of the application be borne by the Plaintiff;

[f] The Plaintiff to bear the Auctioneer's charges.

[2] The application was filed under Section 63 (e) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya and Order 10 Rule 11 of the Civil Procedure Rules, 2010. It is supported by the Affidavit of the 1st Defendant, JEREMIAH KIBOWEN, sworn on 26th August 2014. The contention of the 1st Defendant is that he was served with a Proclamation Notice on 7th August 2014 in respect of a debt of **Kshs 8,000,000 and yet he had not, prior thereto, been served with Summons to Enter Appearance or Notice of Entry of Judgment. He further averred that upon being served with the Proclamation Notice, he perused the Affidavit of Service filed herein and noted that it was false, and thus urged that the default judgment that was entered on the basis thereof be set aside to enable him present his side of this matter.**

[3] He exhibited a draft Defence as Annexure JKB1 in which he contended that while he did write and

issue certain cheques to **Ahmed Doblei** and **Bashir Moallin alias Jamal**, the said persons thereafter assigned the same, without his knowledge or authority, to Third Parties who was a strangers to him, namely **Saaman Trading Co. Ltd** (the plaintiff herein) and **Trust International Ltd**. The 1st Defendant posits that in so doing, **Ahmed Doblei** and **Bashir Moallen** aforementioned were intent on defrauding him as per the particulars set out in paragraphs 9 and 10 of the draft Defence. It was thus the contention of the 1st Defendant that he has a good defence to the suit and should be allowed to ventilate the same.

[4] The Plaintiff/Respondent opposed the application vide the Replying Affidavit sworn on **8 October 2014** by its Director, **Mohamed Mohamud Guled**. The Plaintiff contended that the Defendant was duly served with summons to Enter Appearance and Notice of Judgment, and in proof thereof, copies of summons to Enter Appearance and certificate of posting as well as the Plaintiff and Affidavit of Service were exhibited as annexures to the Plaintiff's Replying Affidavit. It was thus the argument of the Plaintiff that the default judgment, having been regularly obtained could only be set aside on just cause; which has not been shown; and that the proposed Defence raises no reasonable defence to the claim as it consists only of a blanket denial.

[5] The Court has carefully considered the subject Notice of Motion and the affidavits filed in respect thereof in the light of the pleadings and the written submissions filed. The brief background emerging therefrom is that by an Agreement dated **29 January 2013**, the Plaintiff and a company known as **Trust International Trading Ltd** on the one part, and the 1st Defendant trading as **Lomson Enterprises limited** (2nd Defendant) on the other hand contracted as follows:

[a] The Plaintiffs were to lend the 1st defendant **Kshs. 18,650,000**, which the 1st Defendant was to repay by supplying the lenders with 500 bags of maize per week with effect from 1st February 2013 till full payment.

[b] In addition, the 1st Defendant issued 9 cheques to the Plaintiff through **Trust International Trading Ltd** amounting to **Kshs. 8,000,000** as a guarantee which were to be encashed in default.

Apparently, the Plaintiff presented the cheques on their due dates for payment, but the same were returned unpaid for lack of sufficient funds. Consequently, the Plaintiff filed this suit claiming **Kshs. 8,000,000** together with interest and costs.

[6] Upon the filing of this suit, summons to Enter Appearance issued on **14 January 2014** for service along with the Plaintiff, and it is the contention of the plaintiff/Respondent that the defendants were duly served therewith, and that the 1st Defendant acknowledged such service by signing and stamping on the back of the Summons to Enter Appearance. The said copies were exhibited herein.

[7] It was on the basis of the foregoing evidence of service, as was deponed to in the Affidavit of Service, sworn by **MOHAMED ABUKAR AMIN** on **28 January 2014**, that the Plaintiff moved the court for the entry of *ex parte* judgment, and the same was entered herein in the Plaintiff's favour on **20 March 2014** after the Defendants failed to enter appearance or file a Defence within the prescribed timelines. The Decree was drawn and issued on **23 April 2014** on the basis of which execution issued on **25 June, 2014**. It was thus the Proclamation that was served on **7 August 2014** that jolted the 1st Defendant into action.

[8] Granted the foregoing, the issues that the court must resolve herein are thus:

[a] **Whether the Defendants were served with Summons to Enter Appearance and Plaintiff as alleged; and**

[b] **Whether sufficient cause has been shown by the 1st Defendant to warrant the setting aside the default judgment entered herein in favour of the Plaintiff.**

[9] Although the 1st Defendant denied having been served, contending that the Affidavit of service filed

by **MOHAMED ABUKAR AMIN** on **13 March 2014** is a forgery, the Defendant did not seek to cross-examine the Process Server to demonstrate the allegations of forgery. Having perused the uncontroverted Affidavit of Service aforementioned, I am satisfied that service was duly effected on the 1st Defendant who acknowledged service by signing on the reverse of the Summons to Enter Appearance, not only on his own behalf, but also on behalf of the 2nd Defendant. That is why he affixed the stamp of the 2nd Defendant below his signature. A cursory look at the signature shows that it is similar to the 1st Defendant's acknowledged signature appearing on his supporting Affidavits sworn on **26th August 2014** and **2nd September 2014**. The court is therefore satisfied, given the facts aforesated, that the default judgment entered herein was regularly entered pursuant to **Order 10 Rules 4 and 5 of the Civil Procedure Rules**.

[9] Although the Court has the discretion, under **Order 10 Rule 11 of the Civil Procedure Rules** to set aside or vary a default judgment, where, as in this case, the default judgment is found to be a regular judgment, the Court would ordinarily refrain from disturbing it unless an applicant demonstrates sufficient cause to warrant setting aside. This was the holding of the Court of Appeal in the case of **Shanzu Investments Ltd vs the Commissioner of Lands CA no. 100 of 1993** in which it was stated thus:

“Now, in this instance, the Judgment was regularly obtained and in such circumstances the Court will not interfere unless satisfied that there is a defence on the merits. This means there must be a “triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication...”

[10] In the written submissions filed herein on behalf of the Defendant, it was posited that the Defendant's draft Defence annexed to the Supporting Affidavit of the 1st Defendant does raise triable issues which should be heard and determined on their own merit. On the authority of **Patel vs East Africa Cargo Handling Services** and others, the court was urged towards the viewpoint that a defence on merits does not necessarily mean a defence that must succeed.

[11] In this matter although the 1st defendant has denied any privity of contract between it and the Plaintiff, there is on record an agreement pursuant to which it issued the 9 cheques that are the subject of this suit. That agreement was made between **Trust International Trading Ltd** and **Samaan Trading Co. Ltd** on the one hand and the 1st Defendant on the other hand. In **Clause 2(1)** thereof the parties covenanted thus:

“That Mr. Jeremiah Kosgei Bowen t/a LOMSON ENTERPRISES LTD has given cheques which amount to Kshs. 8,000,000 to SAMAAN TRADING COMPANY LTD as a guarantee in case of non-fulfilment of this agreement. The cheques of Kshs. 8,000,000 were handed through TRUST INTERNATIONAL TRADING LTD which is in agreement with SAMAAN TRADING COMPANY LTD”.

[12] It therefore rings hollow for the 1st defendant to now say that there was no privity of contract between it and **SAMAAN TRADING COMPANY LTD** or **TRUST INTERNATIONAL TRADING LTD**. Secondly, the suit is based on cheques that were issued for valuable consideration. It was thus incumbent on the 1st Defendant to explain why the **Kshs. 8,000,000** is not due other than his allegation that he issued blank cheques, which is incredible given the clear terms set out in their agreement.

[13] Thirdly, it is noteworthy that according to the 1st Defendant he stopped the payment of the cheques because there was no contract between him and the Plaintiff, whereas the cheques show they were returned due to the insufficiency of funds in the account. Be that as it may, there is no indication that the 1st Defendant took prompt action with a view of rectifying the situation, granted that issuing a bad cheque is an infraction of the law (per **Section 316A of the Penal Code, Chapter 63 of the Laws of Kenya**). The tardiness of the 1st Defendant/Applicant was also evident when neither the Defendant nor his Counsel attended Court on **20 June 2016** for the hearing of the instant application. Indeed in the case of

Shah vs Mbogo & Another [1967] EA 116, the Court of Appeal held that:

"Applying the principle that the court's discretion to set aside an ex parte judgment is intended to be exercised to avoid hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused."

[14] In the result, it is my finding that no sufficient cause has been shown as to why the regular judgment entered herein should be set aside. Accordingly, I find no merit in the Notice of Motion dated **26 August 2014**. The same is hereby dismissed with costs.

Dated, Signed and Delivered at Nairobi this 15th day of July 2016.

.....

OLGA SEWE

JUDGE