



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NUMBER 156 OF 2008

MAGETA ENTERPRISES.....APPLICANT

VERSUS

TILAK COMPANY (LTD).....RESPONDENT

RULING

1. The Applicant who is the defendant in this suit Tilak Company Limited by its application dated 4th November 2014 a temporary order of injunction to restrain the plaintiff from wasting, transferring or selling suit property known as **Nakuru Municipality Block 11/195** pending inter parties hearing of this application, and a further order for unconditional setting aside of the Judgment of the court delivered on the 17th June 2011 and all consequential orders thereof. On the 4th November 2014 an Interim Order of injunction in terms of prayer Number 2 was granted .

2. The application is supported by an affidavit sworn on the 4th November 2014 by one Shamira Chepkemei Chelang'a, a director of the company from the 15th May 2013. She depones that the defendant company was owned by her late parents who died on 27th July 1996 (father) and 4th July 2011 (mother) and at that time she was a student and did not know the ongoings of the company as also the siblings were younger than her and all in school.

It is her averment that she came to discover that there was a case and that judgment was delivered by the court on the 17th June 2011 when her mother was bed ridden and died a few days thereafter. She further discovered that the company Advocates had ceased from acting for the company on the 23rd November 2010 after he served the application and hearing notice upon her mother by advertisement in the Newspaper as ordered by the court.

Pursuant to the Judgment obtained Exparte, the suit property in issue was transferred to the plaintiff when the defendants directors were both dead and that her mother who was bedridden the whole of 2010 and 2011 when she died could not have been served with the application by the Advocates to cease from acting and thereafter with the hearing notice by the plaintiff. She further states that there is a good defence on record and urges the court to set aside the judgment and be given an opportunity to be heard by the court.

3. The application is opposed by a replying affidavit sworn on the 26th November, 2014 by Kenneth Maweu Kasinga, a director of the plaintiff company, who concedes that he was not aware of the death of the defendants directors and states that no resolution by other directors was given to the deponent Director to swear the supporting affidavit. He also concedes that the company is the one that was sued and not the dead director Zaina Mukami Chelang'a. As to the issue of

service, he states that it was proper and that the Judgment obtained *ex parte* ought not be set aside as it has already been executed and the only recourse is an appeal, and that failure for the defendant to defend its case should not be visited on the plaintiff.

4. In its submissions by counsel, the Applicant/Defendant urged the court to allow the application, set aside the *ex parte* judgment and all consequential orders and grant an opportunity to the defendant to be heard on merit as there was a defence on record and good reasons as to why the defendant did not attend court during the hearing of the suit.

It was his submission that after the defendant's advocates, Okundi & Company ceased acting for the defendant, no proper service of the hearing Notice by the Plaintiff to the defendant was done. Indeed the plaintiff's advocates conceded that the Hearing Notices were addressed to the dead director - in the Newspaper Advertisements that is Zainab Mukami Chelang'a and not to the defendant company when she was on her death bed, to the extent that then the defendant was never served with the Hearing Notice and urged the court to set aside the *ex parte* judgment and all consequential orders flowing therefrom.

5. The Respondent/plaintiff's counsel submitted that they were not aware of the death of then surviving director to whom the Hearing Notices were addressed in the Newspaper advertisements. He who ever urged the court that the judgment was not *ex parte* *parse* as the mode of service was effected as ordered by the court. It was his submission that hearing concluded and judgment delivered on the 17th June 2011 before the director died on the 4th July 2011. He stated that the company ordinarily has other officials so death of the director should not bring the company to a standstill, that the judgment was executed and the suit property transferred to the plaintiff hence application is overtaken by events, and that the cause of action in respect of the suit has since changed as title deed – been issued to the plaintiff.

6. This court has considered the rival arguments by counsel and affidavit evidence on record.

In my view, the main issues for the court to determine are:

(a) Whether the Application dated 23rd November 2010 by Okundi & Company Advocates to cease from acting for the plaintiff was served upon the Plaintiff/Applicant.

(b) Whether, thereafter, the plaintiff did serve a Hearing Notice of the suit upon the Plaintiff Company.

(c) Whether all subsequent Hearing Notices by the plaintiff to the defendant by Newspaper advertisements were properly served upon the a plaintiff company.

7. By an application dated 23rd November 2010 Okundi & Co, Advocates for the plaintiff Company applied to cease from acting for the plaintiff company. The court gave leave to the Advocates to serve the Plaintiff by Advertisement in the Newspapers.

I have perused through the court proceedings. I have not seen an affidavit of service by the firm of Okundi and company Advocates of the application dated 23rd November 2010. No Newspaper advertisement has been filed or annexed by the Respondent/Plaintiff to confirm service. Indeed Mr. Kurgat, Advocate for the plaintiff conceded that when the application came up for hearing on the 8th December 2010, he did not oppose it and it was allowed. He then sought leave to advertise in the local dailies which leave was granted. When the matter was listed for hearing on the 4th April 2011 the plaintiff's Advocate, Mr. Kurgat told the court that the defendant was served, and the court proceeded to hear the plaintiff. There was no affidavit of service on record.

8. Having perused through the court file and having found no evidence of either service of the Application dated 23rd November 2010 by the Defendants Advocates of the application to cease

from acting and also the Hearing Notice by the plaintiff to the defendant company, I find that the defendant company was kept in the dark while the case proceeded. It was not aware that its advocates, Okundi & Company Advocates had ceased from acting for it nor of the hearing date. To that extent, the judgment flowing therefrom was irregular for no fault of the defendant. From the foregoing, it appears that the Advocates for both the plaintiff and the defendant misled the court by informing the said court that they had served the defendant, because if indeed service had been effected as ordered by the court by advertisement in the local Newspapers, cuttings of the same and affidavit of service to confirm would have been filed. The case proceeded in the absence of the defendant. It was condemned unheard.

9. Service of court process upon company is provided for under Order 5 rule 3 of the Civil Procedure Rules. An application for leave by an Advocate to cease acting for a party is governed by Order 9 rule 13 (1) rule (1) that reads:

“where an advocate who has acted for a party in a cause or matter has ceased so to act and the party has not given notice of change... the advocate may on notice to be served on the party personally or by prepaid post letter--- unless the court otherwise directs apply to the court by Chamber Summons for an order to the effect that the advocate has ceased to be the advocate acting of the party in the cause or matter and the court may make an order accordingly:

Provided that, unless and until the Advocate has -

- (a)
- (b) **Procured the order to be entered in the appropriate court.**
- (c) **Left at the said court a certificate signed by him that the order has been duly served as aforesaid shall be considered the advocate of the party to its final conclusion of the cause including any review or appeal.”**

10. The above legal provisions are clear that the Advocate who has applied to cease from acting for a party ought to serve the party personally or as may be ordered, by leave of court. In this case, the advocate was granted leave to serve the defendant through Newspaper advertisement. As I hence observed above, no evidence of such service was produced to the court, and none has been shown in this application. Service of court process to and by party is core to the process of fair and Just trial where all parties are given an opportunity to present their cases before the court on merit. Failure of service produces irregular results that are subject to setting aside.

Order 10 rule 11 of the Civil Procedure Code gives power to the court to set aside default judgments and any consequential decrees and or orders upon terms as are Just. This is at the discretion of the court as circumstances may present themselves.

See **Shah -vs- Mbogo** (1967) EA 116 and **Nyajugu Ltd -vs- BBK Ltd and Others HCCC No. 207 of 2008** where principles for setting aside exparte judgments were laid on grounds of none service of process. See also High Court, **Misc. Civil Appl. No. 77 of 2009 Grace Wambui -vs- Pholomena Wambua**. Going back to the factual aspects of the matter, the applicant deposed that from the period 2010 and 2011 the only surviving director of the company was sickly and indeed died a few days after the entry of the exparte judgment. In subsequent notices served by the plaintiff/Respondent, same were addressed to the Director, now deceased, Zaina Mukami Chelang'a.

11. The Defendant is a limited liability company. The said director Zaina Mukami was not sued in her personal capacity. The Newspaper Advertisements – the only ones produced were for Hearing Notices of applications subsequent to the judgment. It has not been explained why the notices were being addressed to the said Zaina Mukami instead to the company. These were

applications dated 16th January 2014 and 25th February 2014 – for orders to allow the Deputy Registrar of the court to execute transfer documents in respect of the suit property in favour of the plaintiff, and for an order of removal of a caution placed upon the property by a director of the plaintiff company. Zaina Mukami Chelang'a respectively. Both applications were allowed following which the suit property is said to have been transferred to the plaintiff. The plaintiff did not provide proof that the suit property has since been transferred in his favour.

12. Consequently, and for the above reasons and pursuant to the provisions of Section 1A, 1B and 3A of the Civil Procedure Act, I make the following orders:

(a) That the Judgment of this court (Justice W. Ouko, as he then was) dated 17th June 2011 and all consequential orders issued on the 17th January 2014 and 16th July 2014 by Justice Anyara Emukule and Justice H. Omondi respectively are hereby set aside.

(b) That the case be listed down for hearing *de novo* on merit on a date to be taken on priority basis.

(c) That the defendant/Applicant shall pay costs of this application to the Respondent/plaintiff.

Dated, signed and delivered in open court this 16th day of July 2015

JANET MULWA

JUDGE

In the presence of:

Muchela holding brief for Nyamweya for Defendant/Applicant

Morintant for Respondent

Court clerk – Linah.