



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 59 OF 2013

DEVELOPMENT BANK OF KENYA LIMITED ::::::::::::::: PLAINTIFF

-VERSUS-

RIVA OILS CO. LIMITED ::::::::::::::: 1ST DEFENDANT

EZEKIEL KARISA KITSAO ::::::::::::::: 2ND DEFENDANT

SAMUEL KAZUNGU KAMBI ::::::::::::::: 3RD DEFENDANT

DAVID KOMEN TUITOEK ::::::::::::::: 4TH DEFENDANT

R U L I N G

INTRODUCTION

1. The application before the court is a Notice of Motion dated 8th April 2015 filed by the 3rd Defendant on 5th May 2015 under Order 12 Rule 7, Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act. The application seeks as the main prayer an order:-
 0. *That the interlocutory judgment entered herein on 2nd April 2013 against the 3rd Defendant and the subsequent decree of 5th April 2013 and all other subsequent and consequential orders and proceedings arising therefore be and are hereby set aside.*
2. The application is premised on the grounds that:-
 1. *That in the interlocutory judgment entered herein on 2nd April 2013 in favour of the Plaintiff/Respondent (“the Respondent) against the 3rd Defendant/Applicant (“the Applicant”), the Applicant was ordered to pay the Respondent a sum of Kshs.304,906,835.40 together with interest at 17 per cent per annum from 28th February 2010 until payment in full.*
 2. *That as a consequence of the said interlocutory judgment of 2nd April 2013 and resultant decree issues on 5th April 2013, Respondent has instituted Bankruptcy proceedings against the Applicant being Milimani HC Bankruptcy Notice No. 2 of 2015; Samuel Kazungu Kambi and Development Bank of Kenya Limited.*
 3. *That the Bankruptcy proceedings aforesaid are premised on an interlocutory judgment not*

- known to the Applicant since the Applicant has never been served with any notice of the alleged interlocutory judgment as by law required.*
4. *That further, the Applicant has never been served with any summons to enter appearance and/or any pleadings in this suit or at all to warrant the institution of the said Bankruptcy proceedings and/or execution of the said interlocutory judgment which is irregular in all respect and ought to be set aside ex-debito justitiae.*
 5. *That the interlocutory judgment of 2nd April 2013 against the Applicant is irregular in all respects and should be set aside ex-debito justitiae and the suit proceeds to full trial inter-partes.*
 6. *That the Respondent has never taken any steps at all to notify the Applicant of this case and /or the interlocutory judgment of 2nd April 2013 and all subsequent proceedings thereto for over three (3) years now as by law required and in the circumstances, it is in the best interest of justice that the said interlocutory judgment and all subsequent and consequential orders and proceedings be set aside.*
 7. *That the Applicant only became aware of the interlocutory judgment of 2nd April 2013 on 26th March 2015 when he was served with a Bankruptcy Notice in Milimani HC Bankruptcy Notice No. 2 of 2015; Samuel Kazungu Kambi and Development Bank of Kenya Limited.*
 8. *That by virtue of passage of such a long duration of time, the Applicant is justifiably apprehensive that there is a deliberate attempt on the part of the Respondent to have an unfair advantage over the Applicant by concealing the said judgment and instituting bankruptcy proceedings even before exhausting the obvious remedies of execution available in law before Bankruptcy proceedings can be instituted.*
 9. *That no prejudice will be occasioned upon the Respondent by the setting aside of the interlocutory judgment of 2nd April 2013 and the resultant decree issues on 5th April 2013 and consequential orders and proceedings against the Applicant and in any event an award of costs shall suffice as recompense to the Respondent for any loss that may be occasioned bearing in mind the Respondent's conduct in this case.*
3. The application is also supported by affidavit of **Samuel Kazungu Kambi**, the Applicant herein, sworn on **8th April 2015**, who deponed that in an interlocutory judgment entered herein on 2nd April 2013 in favour of the Respondent. He was ordered to pay the Respondent a sum of Kshs.304,906,835.40 together with interest at 17 per cent per annum from 28th February 2010 until payment in full. The Applicant annexed a copy of decree issued on 5th April 2013 as "SKK 1".
 4. That following the said interlocutory judgment of 2nd April 2013 and resultant decree issues on 5th April 2013, Respondent instituted Bankruptcy proceedings against the Applicant being **Milimani HC Bankruptcy Notice No. 2 of 2015; Samuel Kazungu Kambi and Development Bank of Kenya Limited**. The said bankruptcy proceedings aforesaid are premised on an interlocutory judgment not known to the Applicant since the Applicant allegedly has never been served with any notice of the alleged interlocutory judgment as by law required. The Applicant further deponent that he has never been served with any summons to enter appearance and/or any pleadings in this suit or at all to warrant the institution of the said Bankruptcy proceedings and/or execution of the said interlocutory judgment which is irregular in all respect and ought to be set aside. The Applicant believes that the interlocutory judgment of 2nd April 2013 against him is irregular in all respects and should be set aside *ex-debito justitiae*.
 5. The Applicant further states that the Respondent has never taken any steps at all to notify him of this case and /or the interlocutory judgment of 2nd April 2013 for over three (3) years now as by law required and in the circumstances, it is in the best interest of justice that the said interlocutory judgment and all subsequent and consequential orders are set aside. The Applicant states that by virtue of passage of such a long duration of time, states that he is apprehensive that there is a deliberate attempt on the part of the Respondent to have an unfair advantage over him by concealing the said judgment and suddenly instituting bankruptcy proceedings prematurely. The Applicant claims that he stands to suffer prejudice in the event that this Application is not certified urgent, heard immediately and allowed since the Respondent will proceed with the Bankruptcy suit aforesaid thus occasioning the Applicant substantial loss and damage when indeed he has a

- good defence to the Plaintiff's claim.
6. The application is opposed by the Plaintiff through the replying affidavit sworn by **Celestine Aoko Otieno** on **4th May 2015**. The deponent states that there is an interlocutory judgment entered against the 1st Defendant but no attachable assets have been located or found to settle the decree. As against the 2nd and 4th Defendants the Respondent obtained summary judgment on 19th June 2013 and none of them has appealed against that ruling. Again no assets have been traced to settle this decree.
 7. The Respondent states that the 3rd Defendant was duly served with the summons to enter appearance and all relevant pleadings per the Affidavit of Service sworn by Simon Mbinda and filed herein, copy is annexed and marked "**CAO-1**".
 8. The Respondent's case is that the entry of judgment against the Defendants including the 3rd Defendant was widely published in the local media (*See an article appearing in the Daily Nation report of 4th August 2013, copy is annexed and marked "CAO-2"*). Soon after the said publication in the daily newspaper, the Defendants allegedly approached the Plaintiff with a proposal that they be allowed time to sub-divide and sale a portion of L.R. No. 12785-Giriama Ranch in Kilifi to settle the decretal sums, copies of the letters dated 20/8/2013, 22/8/2013, 30/8/2013 and 19/9/2013 showing negotiations, are annexed and marked "**CAO-3**". However that was not to be, and owing to the passage of time without payment of the decretal sum the Plaintiff decided to proceed with the recovery of this decretal sum and by its letters dated 30/1/2015 and 9/3/2015 the Plaintiff issued a final demand to the Defendants. (*See annexure "CAO-4"*). In reaction to the said final demand, the 3rd Defendant called for a meeting at his offices on 8th Floor, NSSF Complex in which meeting the 3rd Defendant sought more time to settle the decretal sum. The Applicant was also reminded that the bank had allowed him almost 2 years to settle the decree and time could no longer be extended in the absence of settlement. The Applicant was informed that the Bank was considering bankruptcy proceedings if the decree is not settled. It is the Respondent's case that the Applicant undertook to send the bank his written proposal within a week. However, this was never to be as the Applicant filed this application challenging the existed of the judgement vide a letter dated 17/3/2014. (*See annexure "CAO-5"*). The Plaintiff then took out a Bankruptcy Notice No. 2, 3 and 4 of 2015 against the 2nd to 4th Defendants, but is unable to locate attachable assets of the Applicant that would satisfy the decree and cannot be blamed for executing the judgment in the manner adopted.
 9. It's the Respondent's case that the Applicant has not shown any defence to the Plaintiff's claim herein and the application is neither merited nor serious. It is the Respondent's case that the Applicant does not deny that he was a director of the 1st Defendant and that he guaranteed the full repayment of the money advanced to the 1st Defendant.
 10. The parties herein filed submissions which I have carefully considered. The brief background to the application is that the Plaintiff advanced loan facilities to the 1st Defendant which facilities were secured by personal guarantees of its directors, the 2nd to 4th Defendants. There was a default in repayment, and the Plaintiff brought this suit to enforce payment. It is alleged that the Defendants were all served by summons but the 1st and 3rd Defendants did not enter appearance. Summary judgment was entered against the 2nd and 4th Defendants, while default judgment was entered against the 1st and 3rd Defendants. The 1st Defendant does not contest the default judgement but the 3rd Defendant has brought this application seeking stay of execution after the Plaintiff took out bankruptcy proceedings in Bankruptcy Notice Number 2 of 2015.
 11. From the submissions of the parties, two main issues arise for determination by this court, and these are:-
 - a. ***Whether the application is fatally defective.***
 - b. ***Whether service of Summons to Enter Appearance was effected upon the Applicant to sustain the processes of execution herein.***
 12. In response to the first issue, the Respondent submitted that the Applicant has brought the present application under Order 12 rule 7 of the Civil Procedure Rules seeking to set aside a default judgment on the premises that he was never served with Summons to enter appearance in the proceedings. The Respondent submitted that Order 12 deals with setting aside interlocutory judgments entered for non-attendance by a defendant. Proceedings under Order 12 presuppose a defendant who has entered appearance and has a defence on record but fails to attend court for the

hearing. It is the Respondent's case that the relevant order for setting aside a default judgment entered for non-appearance for the alleged reasons adduced by the Applicant is Order 10 Rule 11 and that proceedings contemplated under Order 10 and guiding principles to be applied by Court while dealing with an application thereunder are fundamentally different from proceedings contemplated under Order 12 and the two orders cannot be interchanged as the Applicant herein has done. For this reason, the Respondent submitted that the Applicant's application is fatally and incurably defective for being anchored on the wrong provisions of the law and the Plaintiff prays that the same be dismissed. The Respondent further submitted that failure to attach a draft defence is also fatal to the application.

13. In my view, the Respondent is right in citing the above provisions of the law. I agree that the correct order for this application is Order 10 Rule 11. However, the citing of Order 12 and not order 10 does not of itself invalidate the application. It has to be noted that the fundamental objectives of the Civil Procedure Rules cited in Sections 1A, 1B and 3A of the Civil Procedure Act have not escaped this court, which is mandated to do justice without too much reliance on the technicalities of procedure. That reasoning also applies to the alleged failure to annex a draft defence. It is the duty of this court, where circumstances are appropriate, to put less emphasis on the rules and procedures of technicality so that substantive justice may be done to the parties seeking justice before the court. Of importance here is that the Applicant is required to pay a decretal sum of Kshs.304,060,835.40 together with interest at 17% per annum from 28th February 2010. Because he has not done that the Plaintiff has already filed Bankruptcy proceedings against the Applicant who is a Cabinet Secretary, and whose career is on the roll should the bankruptcy proceedings proceed. In these circumstances, it is only fair that the Applicant's duty to pay the decretal sum is determined, not by way of any application of technical procedures, but by the application of substantive law. In this regard, I reject the submission by the Respondent that the current application is fatally defective.
14. The second issue is whether summons were served upon the Applicant. The Applicant has denied that he was served with summon to enter appearance, this, despite communications which emerge later that he was indeed aware of the judgement. The Respondent has availed communicators to the effect that he Applicant was aware of the judgment and at one time even entered into negotiations on how to settle the decree. The Respondent even annexed a newspaper report reporting the judgment against the Applicant. What I can state in that regard is that where a party disputes summons, and it is proved that summons were never served, a party would not be bound by subsequent negotiations which appear to give credence to his knowledge of the suit. Service of summons goes to the root of any court process. A party which is sued has a fundamental right to be served with summons to enter appearance. There is no shortcut to this requirement, and even if a party later on becomes aware of the suit and judgement, a party may enter in any subsequent negotiations on the decree without dropping his fundamental rights to be served with the process.
15. In this regard, the Applicant has denied service of the summons herein, and has shifted the burden of proof to the Respondent to prove service of summons. On the issue of service of summons, Simon M. Mbinda swore an affidavit of service on 28th February 2013 which was filed in court on 20th March 2013. He narrates how he allegedly served the summons herein. At paragraphs 5 and 6 of the affidavit of service, the deponent states as follows:-

"5. That I then proceeded to 6th floor room 615 of Afya House and upon arrival I found the name of the 3rd Defendant written on the door. I then proceeded to enter the 3rd Defendant's office where I found a secretary at the reception and upon introduction and explaining to her the purpose of my visit she also introduced herself to me as Hellen. She then requested me to allow her make copies of summons to enter appearance and the Plaint to enable her fax the 3rd Defendant at Mombasa to enable the 3rd Defendant give instructions on the way forward and go back after two days as the 3rd Defendant was likely to be in office on 26th February 2013.

6. That on 25th February 2013 I again proceeded to the 3rd Defendant's office at of Afya House 6th floor room 615 and upon arrival I found his secretary Hellen who recognised me and told me that the 3rd Defendant had authorised her to accept service on his behalf. I then rendered the summons to enter appearance and plaint upon Hellen the 3rd Defendant's secretary who accepted service on behalf of the 3rd Defendants but refused to acknowledge receipt at the copy

returned herewith duly served.”

16. Clearly, the attempted service herein was not upon the Applicant but upon a M/s Hellen, who is purported to be the Applicant’s agent or Secretary. The Secretary accepted service, but declined or refused to acknowledge receipt. At the one hand it is deponed by the process server that the said agent accepted service, but at the same time refused to acknowledge the same. The process server then concluded that he had effected service on 25th February 2013. His conclusion was wrong.
17. The law on service of process allows service upon an agent who is authorised to accept service. Under, Order 5 Rule 8 (1), Civil Procedure Rules, 2010 provides that:-

“Wherever it is practicable, service shall be made on the Defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.”

18. It is clear from the Affidavit of Service sworn by Simon M. Mbinda on 28th February 2013 that service of the Summons to Enter Appearance and the Complaint was never effected upon the Applicant personally. The said Affidavit states at paragraph four (4) that service of the Summons to Enter Appearance was effected upon the Applicant’s secretary by the name of “Helen” who apparently accepted service but did not acknowledge receipt. Further, there is no evidence on record to show that the said “Helen” was an authorized agent of the Applicant to receive service of court documents and as such, the purported service was not proper service. To this end, it is obvious that the manner in which service is alleged to have been effected upon the Applicant is contrary and inconsistent with the provisions of Order 5 rule 8 (1) of the Civil Procedure Rules, 2010.
19. The requirements for service on a party through an agent, were stated in the case of ***Kimeu -vs- Kasese [1990] KLR 32*** as cited in the case of ***Boniface Ooko Ganda -vs- Stanlry Maina & Another [2005] eKLR*** where the Honourable Justice Bosire, as he then was, held that:-

“Whenever it is practicable, service of summons and any other process shall be made on the defendant in person unless he has an agent empowered to accept service, in which case service on the agent may be effected.”

The learned judge went further to hold that-

“It is not the relationship of the person served to the Defendant but that he was in fact authorised to receive service. Also that the Affidavit of Service should specifically state that that person was authorised to receive service.”

20. In the case of ***Boniface Ooko Ganda vs. Stanley Maina & Another [2005] eKLR*** the court reiterated the sentiments in the Kimeu case aforesaid on the issue of service through an agent and went on to hold that:-

“From the records in the file, there is no evidence that the 2nd Defendant (the 1st Defendant’s driver) was an authorized agent of the 1st Defendant to receive service of court documents. I find that the 2nd Defendant was not an agent of the 1st defendant, authorised to accept service, and the purported service was therefore not proper service...the Judgment entered herein and all consequential orders be and are hereby set aside.”

21. It is trite that the burden of proving service of summons upon the Defendant lies with the Plaintiff and it is the Plaintiff’s process server who should provide proof of service upon the Defendant. That burden of proof cannot in any way whatsoever shift to the Defendant. The Applicant has categorically stated that he was never served with the Summons to enter Appearance and the Respondent has failed to rise up to the challenge to prove service as by law required.

22. In the case of ***National Bank of Kenya vs. Puntland Agencies Limited & 2 Others [2006] eKLR*** the court stated that:-

“Once service was denied by a Defendant the evidential proof shifts to the Plaintiff to prove service was in fact effected.”

On any allegation that a summons has not been properly served, the court may examine the serving officer on oath or cause him to be so examined by another court in accordance with Order 5 Rule 16 of the Civil Procedure Rules, 2010.”

The Court further held that:-

“for the Court to validate a mode of service other than personal (which is mandatory), the person alleging proper service must have and prove in his return of service or otherwise the following:-

1. ***Time when service was effected on the said person.***
2. ***The manner in which summons were served.***
3. ***The name and address of the person identifying the person served.***
4. ***The exact place where service was affected.***
5. ***Must state in the affidavit that the person served is known to the person the summons is meant for if the person is not known to the process server.***
6. ***If no personal service the person serving should indicate the relationship between the person, served and the person summons were directed at.***
7. ***The source of the information in paragraph 6 must be also stated.***
8. ***That indicate that he/she required his/her signature and response (whether signed and/or refused to sign.***

Non-compliance with any command of the above [Order 5, Rule 15] would make any such service fatally, defective. If there is no proper service there can be no regular judgment. The basis of the judgment is whether the service was proper. The foundation is the proper service and if the foundation is faulty then the house built thereon cannot stand, definitely it would fall . . .“

23. Proper service of summons to enter appearance in litigation is a crucial matter in the process whereby the Court satisfies itself that the other party to litigation has notice of the same and therefore chose to enter appearance or not. In the case of ***John Akasirwa Vs Alfred Mai Kimuso Civil Appeal No. 16/1999*** as cited in the National Bank of Kenya case above noted, the Court of Appeal held that:-

“The ideal form of service is personal. It is only when the defendant cannot be found that service on his agent empowered to accept service is acceptable.”

24. In this matter, the lady served with the Summons to Enter Appearance was the Applicant’s secretary. There is no evidence on record to show that indeed the said Helen was first of all a secretary to the Applicant, and an agent of the Applicant authorized to receive service of court documents on his behalf. It is clear from the foregoing that the process server made no enquiry whatsoever whether the Applicant herein could not be found when he proceeded to serve the Summons to Enter Appearance upon the said “Helen”. This kind of service cannot be said to have been in compliance with the Civil Procedure Rules, 2010 and was therefore defective service and contrary to law. In any event, the Applicant is a prominent Kenyan and is one of the longest serving Members of Parliament and a person looking for his whereabouts would not have a lot of difficulty as he was the Member of Parliament for Kaloleni Constituency for quite some time and is currently the Cabinet Secretary for the Ministry of Labour, Social Securities and Services. The Respondent’s process server did not indicate in his Affidavit of Service aforementioned what attempts he made to serve the Applicant personally before attempting to serve his alleged agent. In view of the foregoing, the purported service of summons upon the Applicant’s Secretary was invalid and of no consequence. That being so, the interlocutory judgment entered herein against the 3rd Defendant was irregular and cannot stand.

This was the decision in the case of **Eliakana Omuchilo vs. Ayub Machiwa[1965]** (Pages 15 – 19 of the Bundle of Authorities annexed hereto) Harris J held as follows regarding the entering of an interlocutory judgement:-

“The procedure of entering judgement in default of appearance is an arbitrary and drastic remedy the granting of which imposes upon the Plaintiff the necessity to ensure that service of the summons with a copy of the plaint attached , has been duly effected in compliance with the rules.“

25. Before leaving this section, it is important to note that the interlocutory judgement of Kshs.304,906,835.40 with interest therein at 17% per annum is not a small sum. A plaintiff seeking to bind the Defendant to that kind of judgment must show a clear service of summons. If there is a doubt, a court of law has no option but to set aside such judgement. In this particular case, the said judgment has now occasioned the Bankruptcy proceedings stated herein. Obviously, the judgment has prejudiced the Applicant who, as a Cabinet Secretary stands to lose his career if the bankruptcy proceedings go ahead. I am therefore satisfied that the Plaintiff has not proved that summons herein were served upon the Applicant as required by law. I am also satisfied that while the Plaintiff/Respondent shall not suffer any prejudice, the Defendant/Applicant stands to suffer irreparable damage to his career should this court fail to allow the application.

26. In the upshot, the 3rd Defendant's/Applicants' application herein is allowed as follows:-

- a. *The interlocutory judgment entered herein on 2nd April 2013 against the 3rd Defendant and the subsequent decree of 5th April 2013 and all other subsequent and consequential orders and proceedings therefrom be and are hereby set aside.*
- b. *That the 3rd Defendant/Applicant shall file his defence to this suit within 7 days from today.*
- c. *That the costs of this application shall be in the cause.*

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI

THIS 6TH DAY OF OCTOBER 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Hayote holding brief for Ojiambo for the Plaintiff

M/s Mumbe holding brief for Nyachoti for the Defendants

Teresia – Court Clerk