REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 345 OF 2010

ATHUMANI ABDUL RAMOLE

GCR INDUSTRIES LIMITED
…….…… PLAINTIFF

VERSUS

PETER MWANGI GICHUNG'WA

T/A TRADE BUREAU DE CHANGE

METROPOLITAN BUREAU DE CHANGE
…….. DEFENDANTS

R U L I N G

1. Before this Court is the Defendant's Notice of Motion dated 5th November 2012 brought under the provisions of **Order 10 rule 11** and **Order 51 rules 1 and 3** of the *Civil Procedure Rules, 2010*. The Application seeks a stay of execution of the Decree herein pending the hearing and determination of this Application. It also seeks the setting aside of the default Judgement entered herein on 28th March 2011. The Applicant also seeks leave to enter an appearance and file his Defence and Counterclaim. The Application is predicated on the following grounds:

> **"1. The Plaintiffs have obtained interlocutory Judgment through fraud and have commenced execution against the Applicant.**
>
> **2. The nature of the application and the interest of justice demands that this application be heard exparte in the first instance as to proceed in the ordinary way would entail the applicant being subjected to further mischief and loss based on a fraudulent process.**
>
> **3. That the Applicant has never been served with the court process in this suit.**
>
> **4. That the affidavit of return of service contains manifest untruths.**
>
> **5. That the Plaint herein contains manifest untruths.**
>
> **6. That an auctioneer has purported to proclaim against Trade Bureau De Change, where the Applicant used to be a shareholder/director.**

7. The Applicant has a viable Defence and counter claim against the 1st Plaintiff.

8. The Plaintiffs are Tanzania Citizens and have no known assets in Kenya.

9. That it is in the interest of justice and the expedient resolution of this matter that the court does grant the orders prayed".

2. The Application was supported by the Affidavit of the Applicant **Joseph Mwangi Gichung'wa** sworn on 5th November 2012. There was some confusion as to whether **Joseph** or **James Mwangi Gichung'wa** was the Applicant herein. The said Affidavit repeated much of what was contained in the Grounds in support of the Application but, more importantly, the deponent emphasised that it was true that he owed the first Plaintiff the sum of US dollars 18,617.00 arising from a sale transaction for industrial sugar. This was after he had paid to the first Plaintiff other sums in connection with the foreign exchange transactions. In response to the Application, the Plaintiffs filed Grounds of Opposition dated 14th December 2012. They detailed the Grounds as follows:

"1. The said Notice of Motion Application is incompetent for having been brought by a firm of advocates who are neither formally on record nor seeking the leave of this Honourable Court to come on record, despite Judtment having long been entered.

2. The said Notice of Motion Application is incompetent for having been brought by an individual who, by his own assertion is neither a party to this suit nor seeking the leave of this Honourable Court to be joined in this suit in whatever capacity he deems fit, despite Judgment having long been entered And consequently the Applicant as a Party is non-suited and can have no audience before this Honourable Court.

3. The said Notice of Motion Application is incompetent for seeking to stay execution of the Judgment by a party who is a stranger to the suit outside the provisions of the Civil Procedure Act as related to Objection Proceedings.

4. The said Notice of Motion Application is incompetent for seeking to set aside the Judgment without annexing any Draft Defence to enable this Honourable Court to determine whether there are any triable issues to warrant setting aside of the default Judgment.

5. The Applicant is Estopped by record from bringing this application to set aside Judgment by virtue of his admission THAT:

a. **He owed the Plaintiff the sum of US$ 18,617/= as at 18th September, 2009 in paragraphs two (2) and twenty seven (27) of his Supporting Affidavit;**

b. **Messrs.s Fantasy Auctioneers had warrants for recovery of the admitted sum of US$ 18,617/=, when in fact the suit and the default Judgment entered was for the sum of US$ 22,321/= and any Warrants issued could only have been for this amount as set out in the Decree annexed as "JMG-7".**

c. **He negotiated with Messr.s Fantasy Auctioneers and gave them post-dated cheques when in fact the cheques are all payable to Steve Kithi & Co., Advocates And the Consent Letter dated 3rd June, 2011 annexed to JMG-10 is between the Defendant and the firm of Steve Kithi & Co. Advocates.**

d. **The Consent Letter dated 3rd June, 2011 annexed to JMG-10 is valid in so much as at no point in his twenty-nine (29) paragraph supporting Affidavit does he dispute the signature**

appended thereon as being his.

e. **The authenticity of the Consent Letter dated 3rd June, 2011 annexed to JMG-10 being in question, it follows that the proviso to clause I thereof remains in force vis-à-vis the Decretal sum of US$ 22,321/= plus interest, and not the sum of US$ 18,617/= admitted in the Consent.**

5. The said Notice of Motion Application is an afterthought brought only because:

a. **The Applicant had not factored in the accrual of interest expenses on the Decretal Sum, which interest expenses the Plaintiff had waived as part of the Consent dated 3rd June, 2011, but which reverted in full in the event of the Defendant defaulting on any one of the agreed installments, which default the Defendant has admitted to in paragraph four (4) of his Supporting Affidavit and the Defendant is therefore liable to satisfy the Decretal Sum in full plus interest;**

b. **Despite the Appellants/Applicant having been aware of entry of Judgment since the 2rd June, 2011, no steps were taken to set aside the Judgment within any reasonable time, until the Plaintiff/Respondents initiated execution on the un-balance of the Decree plus interest.**

6. The Defendant's averment that the Plaintiffs are Tanzanians seeks to equate lack of citizenship to lack of right(s) and invidiously invites this Honourable Court to deny the Plaintiffs Justice and abuse it own process".

3. The first Plaintiff, **Athumani Abdul Ramole** swore a Replying Affidavit dated 18th February 2013. In that Affidavit, the deponent detailed that he had entered into a foreign exchange transaction with the Defendant on 22nd February 2008 in Nairobi. The transaction involve the payment to the Defendant of Shs. 1,562,470/- in consideration of the Defendant's agreement on undertaking to pay the second Plaintiff the sum of US dollars 22,321.00 at an exchange rate of Shs. 70/- to the US $. Indeed a cheque was drawn by the Defendant, presented to the second Plaintiff's bank in Moshi, Tanzania on 28th April 2008, which was returned unpaid marked "stopped by drawer". The Plaintiffs then filed this action and judgement was duly entered. Later in June 2011, the parties agreed to a consent involving the payment of agreed instalments by the Defendant to the Plaintiffs. Such involved the issuance by the Defendant to the Plaintiffs' advocates 6 cheques dated 6th of June 2011, 30th of July 2011, 30th of August 2011, 30th of September 2011, 30th October 2011 and 30th November 2011. However, in July 2011, the Central Bank of Kenya introduced a new cheque system known as the "Cheque Truncation System" ("CTS") wherein all of the old cheques were required to be replaced with new. The Defendant did issue fresh cheques as per CTS but they all bounced resulting in this suit being filed.
4. In his submissions for the Defendant/Applicant, Mr. Mwenda pointed to the annexures to the Supporting Affidavit of the Applicant which showed that the cheques issued to the Plaintiffs were not issued by the Defendant but by the Applicant and Metropolitan Bureau De Change and as a result, the Defendant herein was non-suited. This submission was hotly denied by Mr. Kithi, learned counsel for the Plaintiff, who maintained that there was no such averment either in the Application or the Affidavit in support. Continuing with his submissions, Mr. Mwenda noted that on the issue of service of Summons, there were two different Affidavits of Service the first dated 17th June 2010 and the second dated 8th September 2010, the same were contradictory. The times of service on the Defendant were different. He noted that paragraph 10 of the Supporting Affidavit admitted the debt of US$18,617 but the same had been paid. The deponent to the Supporting Affidavit detailed that he was not dealing with the first Plaintiff as regards the foreign exchange transaction but in respect of the sale and purchase of industrial sugar. It was for that reason that he paid that debt when approached by the auctioneers with the Warrants from Court. The Defendant denied all knowledge of the second Warrant in the amount of Shs. 2,015,466.20 maintaining that he paid the first Warrant for Shs. 425,211/60. That second Warrant contained an entry for taxed costs of Shs. 400,000/- but, as per the Certificate of Costs, the same had been taxed at Shs.

132,950/20. The second Warrant referred to an agency named Eshikoni which, obviously the Defendant had no knowledge. In counsel's opinion the execution process was fatally flawed, the judgement in default was obtained through fraud and should be set aside. The Applicant had maintained that he was never served with the Summons and other documents which was the reason why he did not file a Memorandum of Appearance. The Memorandum of Appearance that appears as exhibit "JMG 8" is not his although the company's named therein are his.

5. In his turn, Mr. Kithi for the Plaintiff/Respondent submitted that in looking at the Application, the Defendant was named as Peter Mwangi. However at page 1 of the Affidavit in support, the deponent is detailed as Joseph Mwangi. Further down in the said Affidavit the deponent is detailed as James Mwangi but the execution clause reads Joseph Mwangi. Counsel further submitted that the Application before the Court was brought by a person who, by his own admission, says that he is not a party to the suit. As a result, he has no capacity in which he brings the Application before Court. The Applicant had shown no authority from the two companies which he maintains is his, to bring the Application before Court. However, the main complaint by the Applicant is that he was never served with the Court process. Indeed, the Affidavits of Service indicate that service was effected on Peter Mwangi yet counsel from the bar had detailed that there is no such person. Mr. Kithi then asked the question as to whether this Court can set aside a judgement on an Application before it by a party who maintains that he is not a party to the suit and that he was never served? Counsel maintained that the Applicant had failed to show any sort of nexus as between himself and the Defendant, who was an individual who had been sued with trading names. If the Applicant had not been served, it stood to reason that he was not a party to the suit. The Applicant had made no distinction as between the setting aside of a default judgement or setting aside of an execution procedure. In the view of counsel, the current Application before Court was not a proper application at all. He noted that counsel for the Applicant had stressed three issues. Firstly, that the Applicant was never served. Secondly, that he never filed Memorandum of Appearance and thirdly, he did not sign any consent. Counsel noted that the six postdated cheques, which were later replaced as per paragraph 10 of the Replying Affidavit, were drawn by Joseph Mwangi. He asked the question why Joseph Mwangi was drawing cheques to cover the debt of Peter Mwangi?
6. As far as the application to set aside the default Judgement herein was concerned, Mr. Kithi noted that a draft Defence had not been annexed to the Supporting Affidavit. It was incorrect that the default Judgement was entered taking into account the contents of the Affidavits of Service. Such was entered in default of Defence as a Memorandum of Appearance had already been filed. Counsel submitted that if the Court believed that the person who filed the Memorandum of Appearance and the Application before Court was one and the same, then it should have no difficulty in deciding the Application. If however, the Court believed that he was not one and the same person, then the Applicant should have filed an application to be enjoined to this suit. Finally, in reference to paragraph 7 of the Replying Affidavit, the default Judgement amount would become payable in the event that any one instalment was not paid. The Plaintiff/Respondent had annexed a number of cheques to the Replying Affidavit which had been returned unpaid although some had been paid on re-banking. It was as a result of such non-payment that the whole decretal sum plus interest thereon became due and payable.
7. In his short rejoinder, Mr. Mwenda pointed out that the correct name of the Applicant was detailed in the jura to the Application. The Applicant had admitted a relationship between himself and the first Plaintiff but, in so admitting, the debt had been paid in full. As regards the failure to annex a draft Defence, the issue was the question of service. If the Court finds that there was proper service, the Applicant would then have to prove that he has an arguable Defence on the merits. In his view, counsel considered that the issue of attaching a draft Defence was to introduce a technicality. The issue as to how the Applicant came to know of the Judgement having been entered was disclosed in the Replying Affidavit. As to the question of whether there was an issue confusing the two Applications being the one to set aside the judgement and the second to set aside a faulty execution, counsel noted that the setting aside of a judgement would take care of the faulty execution. The Applicant was asking the Court to set aside the Judgement as there were clear issues that needed to go to trial. Finally, he noted that the Applicant had indicated that the threatened execution was being carried out against both his companies – Trade Bureau de Change and Metropolitan Bureau de Change. The Applicant had not clearly stated that the cited Defendant

Peter Mwangi Gichengwa does not exist.

8. The Plaint dated the 19th May 2010 quite clearly details Peter Mwangi Gichung'wa trading as Trade Bureau de Change/Metropolitan Bureau de Change as the Defendant herein. The Affidavit of Service of the Court process sworn by one **Titus Mbivi** on 17th June 2010 details that he as the process server proceeded to the Defendant's offices at St Ellis House (formerly Cotts House) on 26th May 2010. On finding that the Defendant was not there, he returned the next day, 27th May 2010 at around 10.15 a.m. He then detailed that the Defendant had come out of his office and had reluctantly accepted service of the Court process but declined to sign the process server's copies. Then, on the Court record, there is what is described as a Supplementary Affidavit of Service dated 8th September 2010 but only filed herein on 20th September 2010. Without detailing why such Supplementary Affidavit was necessary, the same process server/deponent detailed that he had arrived at the Defendant's office premises at 3.30 p.m. He went on to say that he knew the Defendant as he had been pointed out to him by the advocate on record for the Plaintiff, on an earlier occasion. The process server went on to record that the Defendant had accepted service of the Court process but declined to sign on the original.
9. The other document of note on the Court file is a Memorandum of Appearance dated 12th of October 2010 detailing that Peter Mwangi Gichungwa was acting in person. Contrary to what Mr. Kithi had submitted before Court, there is a Request for Judgement dated 17th June 2010 as against the Defendant who had failed to enter Appearance. Further, Judgement was entered on 28th March 2011 but, by that time, the Defendant had filed his Memorandum of Appearance as aforesaid and, as a result, Judgement would seem to have been entered in default of Defence.
10. Having perused the Court file there was indeed some hesitation on the part of the Deputy Registrar in response to the Plaintiffs' Request for Judgement dated 17th June 2010. In handwriting, the Deputy Registrar detailed the following comment on the said Request on 28th June 2010:

"Who identified the Defendant to the process server? (Order 5 Rule 15). Service improper".

Thereafter, and as per Exhibit "JMG 6" to the Affidavit in Support of the Application, the firm of Steve Kithi & Co would seem to have written to the Deputy Registrar on 21st September 2010 a letter which noted that the request for Judgement filed on 18th June 2010 having been rejected on the grounds that there was no mention of who had identified the Defendant, the firm enclosed the said Supplementary Affidavit of the process server, as above. Even on that letter the Deputy Registrar has noted in handwriting:

"EO *see paragraph (3) of the supplementary affidavit. In which occasion was the defendant pointed out to the process server. He does not say the defendant is personally known to him. Fresh service to be effected. 8/10/10".

There then followed a fresh Request for Judgement dated 2nd November 2010 which was after the said Memorandum of Appearance had been filed. This Request asked for Judgement against the Defendant who had failed to file and/or serve any Defence. The Deputy Registrar's note this time round was as follows:

"(2) this is an attempt to escape orders dd 8/10/10. Denied the request and order compliance 29/11."

Thereafter, there is a further note from the Deputy Registrar dated 22nd March 2011 which reads:

"**E. O. Orders dd 29/11/10 vacated as I see memo. filed on 12/10/10."**

It seems therefore that there was considerable reluctance on the part of the Deputy Registrar to enter Judgement in this matter. However, in view of the filing of the Memorandum of Appearance as indicated above, Judgement was finally entered on 28th March 2011.

11. The Applicant has indicated that the said Memorandum of Appearance is not his although the companies named therein were his. I have carefully perused that document and it clearly details

"trading as". To my mind that indicates that the names of the businesses are exactly that, not registered companies. Indeed I found it surprising that the Applicant failed to exhibit any documentation in relation to either the "businesses" or "other companies". I would have expected him to show to the Court exactly what his connection was to those named "parties". The Applicant has admitted in the Affidavit in support of his Application that he had conducted business with the Plaintiff but seemingly in connection with the importation of industrial sugar rather than exchanging monies. However and to my mind, the said Application brings nothing but confusion to the existing situation as per the Court file. I do not consider that the Applicant and the named Defendant PETER MWANGI GICHUNGW'A are one and the same person without any proof thereof brought before this Court. As a result, I find no merit in the Application and dismiss it accordingly. In my view, the Applicant is not properly before this Court in that he has failed to enter Appearance despite maintaining that the aforesaid Memorandum of Appearance was not filed by him. Neither has the Applicant come before this Court as an Objector and further, Judgement having been entered, there is no Application on the court file from the Applicant's advocates that they should seek leave to come on the Court record. As a result, although in normal circumstances I would award costs to the Plaintiff herein, there would seem to be little point in so doing as regards the said Application.

DATED and delivered at Nairobi this 13th day of February 2014.

J. B. HAVELOCK

JUDGE