



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 366 of 2011

PANGAEA HOLDINGS LIMITED.....PLAINTIFF

-VERSUS-

HACIENDA DEVELOPMENT HOLDINGS LIMITED.....DEFENDANT

R U L I N G

1. Before the Court is a Notice of Motion dated **28th June 2012**. It is filed under **Sections 1A, 1B and 3A** of the **Civil Procedure Act, Order 9 Rules 9 (a), and 10, Order 10 Rules 10 and 11, and Order 51 Rule 1** of the **Civil Procedure Rules**. The application seeks the following substantive prayers:-

a) That Judgment entered on **22nd March 2012** against the Defendant in default of appearance and Defence and all consequential orders be set aside unconditionally.

b) That the Defendant/Applicant be allowed to enter Memorandum of Appearance and file it's Defence out of time.

c) That the matter be set down for hearing and determined on merit.

2. The application is supported by the annexed affidavit of **ADAM GEORGE HENRY TULLER** as well as a Further Affidavit sworn by the same person, who is described as the director of the Defendant and sworn on **18th June 2012** and **20th July 2012** respectively.

3. The application is based on the grounds that the Defendant has a good and reasonable defence which raises triable issues to the Plaintiff's claim and that the application has been presented in Court without undue delay. The applicant also states that they were never served with court papers regarding the suit nor were they notified of the hearing date of **14th March, 2012** and in the circumstances they were not aware of the Court proceedings which led to judgment being applied for and entered against them on **22nd March, 2012**.

4. The application is opposed vide the replying affidavit of **GRACE KANYIRI** dated **12th July 2012** and a supplementary affidavit of the same person dated **23rd July 2012**.

5. The brief background to the suit is that on or about the year 2008, at the request of the defendant, the plaintiff advanced to the defendant a loan amount of **Us Dollars USD 175,000.00** upon the mutual understanding of both parties that the said loan would attract an interest amount on the principal of 15% per annum. It was further agreed that the loan plus the interest accrued was to be repaid by the defendant within a period of one year. It is the plaintiff's contention that in spite of the expiration of the term of the loan of one year and despite several demands, the defendant has failed and or ignored to repay the said

loan amount plus interest accrued therefrom. On **22nd March 2012**, this court entered judgment against the defendant in default of appearance and defence hence the current application.

6. The Defendant/Applicant contends that contrary to the affidavit of service as sworn by Grace Kanyiri, Advocate, the Defendant has never been served in any way as claimed nor is the postal address of 14208-00800, Nairobi known to the Applicant. He further contends that Mr. Bruce Bouchard is his co-director in Hacienda Development Holdings Limited and both him and his wife, Diane Bouchard have been aware that the Defendant moved from Karen in Nairobi and has its offices at Mombasa since April 2007. It is averred that they both know his e-mail address, telephone number and the postal address in Mombasa. He further asserts that no prejudice will be caused to the Plaintiff if the Judgment and all consequential orders thereafter are set aside and that if the orders sought are not granted as prayed the Defendant stands to suffer substantial loss and untold embarrassment for an error not occasioned by itself.

7. It is the Plaintiff's case that orders to serve by way of substituted service were issued on **9th December 2011**. It is averred that the Plaintiff duly effected service by way of substituted service through registered post to the two last known addresses of the Defendant. It is further the Plaintiff's case that the pleadings served upon the Defendant at both addresses have never been returned by the post office for failure of delivery/service and the Plaintiff believes that the same were received by the Defendant. It was the Plaintiff's contention that it was upon the Defendant to satisfy the court that their registered postal address had been officially changed at the company's registry.

8. I have carefully considered the application herein, the affidavits both in support and opposition of the application. The main issue for determination is whether the defendant has established a case so as to enable this court set aside judgment in default of appearance and defence entered on **22nd March 2012**.

9. This court has unfettered discretion to set aside the ex-parte judgment, provided that in so doing, no injustice is occasioned to the opposing party. **Order 10, rule 11 provides that,**

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

Kimaru J, in FRANCIS KIMANI KARIUKI vs. HUDSON WAMABIRI KAMULAMBA [2005] eKLR, considered the well settled principles in **MAINA vs. MUGURIA [1983] K.L.R** where the **Court of Appeal** enunciated the principles to be considered when allowing an application to set aside ex parte judgment to be;

a. There are no limits or restriction on the Judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.

b. This decision is intended so as to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist a person who has sought, whether by evasion or otherwise, to obstruct or delay the course of justice. **SHAH VS. MBOGO [1967] E.A. 116** at page 123B, **SHABIR DIN vs. RAM PARKASH ANAND [1955]22 E.A.C.A.43**

c. A higher court shall not interfere with an exercise of discretion by a Judge unless it is established that the said Judge wrongly exercised his discretion (**MBOGO vs. Shah [1968] E.A. 93**)

d. The court has no discretion where it appears there has been no proper service (**KANJI NARAN vs. VELJI RAMJI [1954]21 E.A.C.A 20**)

e. The nature of the action should be considered, the defence if one has been brought to the attention of the court and whether the plaintiff can reasonably be compensated by an award of costs should the order setting aside be granted (**JAMNADAR SODHA vs. GORDANDAS HEMRA [1952]7 ULR**)

10. Applying the principles set out above, the court notes that the main issue in contention is whether the defendant was properly served with the court pleadings. It is contended by the defendant that they never

received any court pleadings from the plaintiff and that the plaintiff had been well aware of the company's place of business in Mombasa as well as his contacts. To this end, the plaintiff averred that they had effected service as prescribed in the Civil Procedure Rules and that it was for the defendant to satisfy the court that their registered postal address had been officially changed at the company registry. The defendant further contended that the registered post to the first address, that is P.O Box 14208-00800, was collected by one Daniel Musila of Ashwin Brothers as stated in a letter from Posta Kenya and attached to his further affidavit as "**Exhibit AT 1**". He averred that the principal place of business was a temporary office that was closed in 2009 since the real principal place of business was in Mombasa, a fact well known to the plaintiff.

11. I acknowledge that the company registry should be notified of change of address by a company. However, in the present case the plaintiff has not successfully rebutted the allegations that they knew of the plaintiff's place of business in Mombasa as alluded to by the defendant. There seems to be non-disclosure on the part of the plaintiff. Substituted service should only be resorted to after the party serving has explored all means available to them in effecting service and failed. In the circumstances, I am inclined to give the defendant the benefit of doubt on whether or not he received the court pleadings. I am also alive to the principle that no party should be condemned unheard. The defendant has also annexed a draft defence which in my view should be heard on its merits. In addition, the monies involved in this suit are colossal amounts.

12. In view of the foregoing, it would be in the interest of justice to grant the orders as sought by the defendant. In the upshot the defendant's Notice of Motion dated **28th June 2012** is hereby allowed in the following terms:-

- a)** The Judgment entered on 22nd March 2012 against the Defendant in default of appearance and Defence and all consequential orders are hereby set aside.
- b)** The defendant is hereby granted leave to file and serve its defence within seven (7) days from the date of this ruling.
- c)** The matter herein be set down for hearing within thirty (30) days from the date of this ruling.
- d)** The costs of this application shall be for the plaintiff.

It is so ordered

DATED, READ AND DELIVERED AT NAIROBI

THIS 6TH DAY OF OCTOBER 2012

E.K.O OGOLA
JUDGE

Present

Mr. Kanyiri for the Plaintiff

Billing for the Defendant

Teresia – court clerk