



REPUBLIC OF KENYA

IN THE CO-OPERATIVE TRIBUNAL AT NAIROBI

TRIBUNAL CASE NO.609 OF 2017

BIASHARA SACCO SOCIETY LIMITEDCLAIMANT

VERSUS

PETER KAMAU NDIRITU.....RESPONDENT

RULING

The Matter for determination is an application dated 24.6.19 seeking the following orders:-

1. *Spent*

2. *That this honourable Tribunal be pleased to set aside, vary and/or review the proceedings and consequential orders made by this honourable Tribunal on 12th March 2018 allowing the claimant's/respondent's request for judgment in default of appearance.*

3. *Spent*

4. *That upon granting prayers 2 and 3 hereinabove this honourable tribunal be pleased to and hereby do grant leave to the respondent/applicant herein to file the requisite response to the main claim brought against him by the claimant/respondent herein.*

5. *That upon granting prayers 2,3, &4 hereinabove this honourable court be pleased to and hereby admit the claim for directions and fix an early hearing date for the same.*

6. *That the costs of this application be provided for.*

Based on the grounds on the face of the application and supported by an affidavit of ANTONY KINYUA advocate. The same is opposed vide the grounds of opposition filed on 3.6.2019 based on the following grounds:

1. *That the Respondent/Applicant's application dated 24.6.19 herein is merely meant to delay the cause of Justice.*

2. *That the Respondent/Applicant's application dated 24.6.19 is misconceived, mischievous, in bad faith, is frivolous and vexatious.*

And the replying affidavit of H.S.MSHILA filed on 4th July 2019. The application was canvassed by way of written submissions.

The applicant filed their written submissions on 30.9.19.

The claimant obtained an ex-parte judgment yet he was never served with any document only for the respondent to learn of this matter upon his arrest in execution of the orders of 14.6.2019.

That the whole claim is res-judicata, a similar suit *OTHAYA PMCC 29/15* having been dismissed by a competent court on 19.1.17.

That the claimant had never appealed against the same dismissal, and the orders have never been reviewed and the present claim is neither an appeal nor an application to set aside/review/vary the said dismissal orders.

That the claimant has admitted the respondent is not a member but merely a customer.

That in the circumstances, the relationship between the claimant and the respondent makes the suit not fall under the provisions of section 76 of the Cooperative Society Act hence the tribunal has no jurisdiction in the matter and similar suit was dismissed at the Magistrates Court.

That therefore the application should be allowed, ex-parte judgment set aside and the suit be dismissed for want of jurisdiction.

The respondent filed written submission on 7.10.19 and the claimant submitted that the suit filed in OTHAYA was dismissed for non-attendance therefore it is not *res-judicata*.

That the claimant falls within the definition under section 76 of Cooperative Society Act since he registered and was issued with an account/membership number and accessed loan facilities which are only available to the members.

That the Magistrate Courts at Othaya therefore had no jurisdiction, hence the issue of *res-judicata* is misplaced.

That the supported affidavit deponed by an advocate who has stated issues of fact, which are disputed. Therefore, the said affidavit has not probative value and the facts which have sought to be proved.

That therefore the said supporting affidavit should be registered for having deponed facts which are not within the advocates knowledge.

That the claimant was duly served as per the affidavit of service dated 13.12.17 and 2.8.18 and there was no request to cross examine the process server of the said affidavit.

That the applicant has no defence against the claim which would raise any triable issues.

That it has not been disputed that the respondent was granted credit facility of Kshs.430,000/=yet he failed to honor the repayment.

That the applicant did not attach any defence or draft defence in support of the application to set aside the ex-parte judgment.

The respondent therefore seeks for the dismissal of the application.

We have carefully considered the submissions of the parties, the pleadings on record, we have noted the loan application form account. The statements and the statement of claim filed on 24.10.17. We note that the respondent was a member No. 22531860 with an account No.6432-23-00043/2008-03-00189 as per the application form which indicates that the account was opened on 13.5.10 and the loan application form is dated 12.10.12 with the respondent having Self Beba deposit of estimated value Kshs.260,039/=. The amount of loan approved was Kshs.41,500/= with a repayment period of 9 months of instalments of Kshs.5138/= including interest rate of 1.1% per month. The loan-letter of offer and acceptance dated 19.10.12 was clear on this. We, therefore note that the claimant was a member as per the said documents hence falls under the jurisdiction of the

tribunal enumerated in Section 76 of Co-operative Society Act.

We have also noted the plaint filed, dated 11.8.2015 for PMCC 29/2015 and the submissions that the said suit was dismissed for non-attendance as pleaded paragraph 12 of the statement of claim on the issue that suit is **res-judicata**, we note that hearing **inter alia** stated that the respondent is a member of the claimant. It goes without saying the Magistrate's Court had no jurisdiction to hear and determine this matter hence the issue of res-judicata does not arise in this circumstance.

We also further note that the suit was dismissed for non-attendance Section 7 Civil Procedure Act is clear on the definition **res-judicata**.

That a court of competent jurisdiction, speaking upon the matter in question which directly and substantially in issue, has been directly and substantially in issue in a former suit between the same parties or between parties under whom they claim on litigating under the same title, directly having pronounced the matter in question in the suit cannot be brought to trial in a subsequent suit.

We note that the Magistrate Court had no jurisdiction in the 1st instance and did not direct its mind to address itself on sustainability in the matter hence this suit cannot be held **res-judicata**.

On the issue of setting aside of the ex-parte judgment, it was held in the case of *SHAH .VS. MBOGO (1967) E.A 116*. It was held that the court must be satisfied about one of the things;-

(a) Either the defendant was not properly served with the summons.

(b) Or that the defendant failed to appear in court at the hearing due to sufficient cause.

In this case the applicant/ respondent alleges that he was not served and this allegation has been brought forward by the advocate who has sworn the affidavit in support of the application, yet the 'purported facts' were not within the knowledge of the said advocate who deponed the supporting affidavit. The issue of service in a '**matter of fact**'.

We are not told why the applicant did not depon the affidavit. It is trite law that a deponent deposits matters that are within their knowledge which matters they can be examined upon. Advocates can only depone legal issues and matters within their knowledge. This is to avoid a situation where the advocate may be called for cross examination as a witness on the matters deposit.

We also note the affidavit of service of SAMWEL WACHIRA MBUTHIA who deponed the affidavit of service that on 15.11.17 he received the summons and on 8.12.2017, served the respondent at his place of business and that the respondent was pointed out to him by MARY NJERI KIEMA a credit officer of the claimant. The said process server was not called for cross examination on his affidavit of service filed on 17.1.18.

We also note that the respondent in their application did not file a defence or a draft defence to enable the tribunal to determine whether such defence or draft defence raises triable issues for determination to warrant setting aside of the ex-parte judgment.

We also note that this application was brought about at the execution stage and was filed on 24.6.19 yet the judgment was entered on 12.3.18. There was inordinate delay by the applicant and even though they have purported that the respondent was not duly served these are mere allegations which are not merited and do not meet the threshold as discussed above to warrant setting aside the ex-parte judgment.

In totality therefore, we find that the application dated 24.6.19 has no merit and it is accordingly dismissed with costs.

The claimant can therefore proceed with the execution.

Read and delivered in open court, this 7th of **November** 2019.

In the presence of:

Claimant: None-appearance

Respondent: None-appearance

Court Assistant: Leweri and Buluma

B. Kimemia - Chairman-signed

R. Mwambura – Member-signed

P. Swanya - Member-signed



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