



Agni Enterproses Limited v Top Steel Limited & another (Civil Case 91 of 2019) [2023] KEHC 18274 (KLR) (24 February 2023) (Judgment)

Neutral citation: [2023] KEHC 18274 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 91 OF 2019
DO CHEPKWONY, J
FEBRUARY 24, 2023**

BETWEEN

AGNI ENTERPROSES LIMITED PLAINTIFF

AND

TOP STEEL LIMITED 1ST DEFENDANT

BRAINSTORM INTERNATIONAL LIMITED 2ND DEFENDANT

JUDGMENT

1. The plaintiff Company filed Plaintiff dated November 8, 2019 seeking the following orders against the 1st and 2nd defendants:-
 - a. An order of an injunction restraining the 1st and 2nd defendants from harassing and/or demanding further payments from the plaintiff until the accounts herein have been reconciled.
 - b. An order that the 1st defendant provides a detailed account of monies paid and that the demands by the debt collectors is illegal, null and void as the matter has not been adjudicated in court.
 - c. Costs be granted to the plaintiff of this court (sic)
2. The plaintiff states that it was supplied goods by the defendants to the sum of Kshs.23,500,000/= a fact that is not disputed. In an effort to recover the debt, the 1st defendant appointed a debt-collector by the name, Haluwa Debt Collectors on February 6, 2019. It also appointed the 2nd defendant as a debt collector.
3. On May 29, 2019 respectively. On July 8, 2019, the plaintiff and the 1st defendant agreed to settle the entire debt through a debt acknowledgment agreement whereby the plaintiff would give off 5.5 Acres from Plot No.MN/IV/335, CR. No.21104 to be full and final settlement of the debt claimed by the



- 1st defendant. the plaintiff continued making payments to the 1st defendant through the 2nd defendant pending the sub-division of the aforestated plot.
4. On October 22, 2019,, while the process was still on-going, the 1st defendant via an email of October 22, 2019 requested the plaintiff to stop payments to the 2nd defendant without any reconciliation of accounts.
 5. According to the plaintiff, that there is need for accounts to be undertaken to ascertain the amounts received by the 2nd defendant and another entity M/S Haluwa Debt Collectors because the 1st defendant is still demanding for its monies.
 6. The Plaint is opposed by the 1st defendant through its statement of Defence and Counter-claim dated December 9, 2019. It admits there is a debt owed and that it has received money from the plaintiff subject to proof. It denies that it had not authorized the 2nd defendant to receive monies from the plaintiff on its behalf and thus asserts that the suit is a non-starter, discloses no cause of action and only meant to aid the Plaintiff in avoiding its legal and contractual obligations and ought to be struck out.
 7. In the Counter-claim, the plaintiff states that the 1st defendant is indebted to it to the sum of Kshs.25,000,000/= of which the sum of Kshs.23,500,000/= is admitted in the Plaint and in a debt acknowledgement agreement of November 8, 2019. The plaintiff by Counter-claim admits receipt of Kshs.2,865,000/= and cites a hand-written agreement at Page 10 of the List of Documents and stated that the sum of Kshs.2,865,000/= has not been remitted by the 2nd defendant. it goes further to state that the balance due and what is owed by the 1st defendant to the Counter-claim is paid to the 2nd defendant, but not remitted to the 1st defendant/plaintiff by Counter-claim.
 - d. Interest at court rates on (a) and (b) from July 8, 2019 (being the date of acknowledgement of debt) until payment in full.
 - e. Interest at court rates on (c) from date of filing the Counter-claim until payment in full.
 - f. Costs; and
 - g. Any other remedy that the honourable court deems fit and just to grant.
 8. The plaintiff/1st defendant has disputed the Counter-claim by its Reply dated December 17, 2019, reiterated the Plaint and generally denied fresh allegations.
 9. The 2nd defendant has not defended the suit nor the Counter-claim. It is worth-noting that Summons to enter Appearance were sent by registered post to the 2nd defendant.
 10. The matter was set down for hearing whereby the Plaintiff and the 1st defendant called one witness each to testify in their behalf. the 2nd defendant did not file any response nor call any witness to testify in its behalf.
 11. Before delving into the merits of this suit, the court has to satisfy itself that service upon the 2nd defendant was properly effected. From the record, it is indicated that service upon the 2nd defendant was effected by way of registered post. I have perused the affidavit of service sworn by counsel Grace A. Okumu on January 20, 2020 in which it is indicated that a number of documents were sent by registered post to the two Corporations. Among them are Summons to enter appearance and a court Order.
 12. The law regulating service upon Corporation is Order 5 Rule 3 of the [Civil Procedure Rules](#), 2010 for local Corporations and Order 5 Rule 22 of the [Civil Procedure Rules](#), 2010 for International



defendants. Order 5 Rule 3 sets down steps that a Process Server must follow in order for the service to be effective. It clearly states as follows:-

- a. On the Secretary, Director or other Principal Officer of the Corporation; or,
- b. If the Process Server is unable to find any of the Officers of the Corporation mentioned in Rule 3(a)-
 - i. By leaving it at the registered office of the Corporation;
 - ii. By sending it by pre-paid registered post or by a licenced courier service provider approved by the court to the registered postal address of the Corporation; or,
 - iii. If there is no registered office or no registered postal address of the Corporation, by leaving it at the place where the Corporation carries on business, or,
 - iv. By sending it by registered post to the last known postal address of the Corporation.

Order 5 rule 22 on the other hand states:

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13. What is conveyed by these provisions of the law is the requirements in the first place, a party serving should establish who the Principal Officers of the Corporation required to be served are and this can be done by obtaining information from the Registrar of Companies. In this case, if the Corporation is in Kenya, a copy of CR-12 Form showing who the Directors, Secretaries and/or Auditors or Chief Accountant or legal officers of the Corporation are. The form also carries information as to the registered office location, address and more other relevant information. It is at this point that a process server will look for that officer in the Company and effect service upon him or any of them.
14. Where one fails to find any of the officers of a Corporation under (b) they may effect service by either of the four (4) ways according to law. Where the Process Server elects to leave it at the place where the registered office is located, then he/she must demonstrate that fact by pointing out that information in the CR-12 Form annexed to the affidavit. Where the party elects to use registered, licenced courier service provider, then an approval of court is required, that is to say, an application for leave serve by registered post or to engage the services of the courier is required; and where there is no registered office or registered postal address of the Corporation, then service is where it carries on business or by sending by registered post to the last known postal address of the corporation as a last resort.
15. The court notes that there is a difference between prepaid registered post and registered post. Prepaid registered post envelopes include postage, tracking and signature on delivery. The Corporation offering the service will also acknowledge the item immediately the same was posted. It is in the method used in Kenya, then an acknowledgement of delivery is returned and should form part of the documents a Process Server should file. Registered post is simply sent to the last known address and when it is not delivered, it will be returned as an uncollected item hence it is a last resort where all other methods have failed.
16. In this case, the plaintiff has annexed a receipt dated November 20, 2019 time 15.50Hrs when the documents were received by Postal Corporation of Kenya at Mombasa to send to the 2nd defendant. It was sent to Brainstorm International. The affidavit has not explained anything to demonstrate an effort to contact the officers of the Company, or whether the failure of other steps or modes of service provided for were undertaken before the last resort was opted for as the mode of service in the circumstances. The court Order which was annexed was not leave of court to serve the parties by



substituted service, but it was an order limiting the time/period within which service was to be effected upon the parties.

17. In the circumstances, this court finds that it has not been sufficiently demonstrated that service was not effected upon the 2nd defendant and therefore the suit against it cannot be deemed to have complied with procedural requirements of service hence the 2nd defendant cannot be condemned unheard. This is in line with the provisions of article 50(2) of the Constitution of Kenya, 2010 which provides a raft of rights a Defendant (party) is entitled to before any hearing takes place and Judgment/decision passed against such party. In the case of Agricultural Consulting Ltd v National Irrigation Board [2020]eKLR, Majanja, J. emphasized the need to comply with Order 5 Rule 3 of the Civil Procedure Rules, 2010 where at Page 2 Paragraph 6 of the Judgment, the court made an observation that before resorting to any other mode of service, an attempt to serve Principal Officers, that is to say, the Directors, the Secretary or any other Principal Officer, must be demonstrated to have failed. Associating itself with the said reasoning, this Court finds that service on the 2nd defendant was not effected. thus, the 2nd defendant was not properly invited to submit itself to the jurisdiction of this court hence no orders can be made against it.
18. Having found that the 2nd defendant was not served with the pleadings herein, the court is left with the determination of the case between the plaintiff and the 1st defendant, in terms of whether the plaintiff has proved its case against the 1st defendant. The plaintiff's case is that he owes the 1st defendant Kshs.23,500,000 as pleaded in Paragraph 4 of the Plaintiff dated 8th November, 2019 on account of goods supplied to it. It states that the difference was paid to a debt collector and it had proposed to settle the debt with land measuring 5.5 acres to be hived from Plot No.MN/IV/335 CR. No.21104. According to the Plaintiff, even with the said proposal, it confirmed making payments to the 2nd defendant which had been appointed by the 1st defendant as Debt collector. The arrangement was stopped by the 1st defendant vide an email of October 22, 2019. Because of the above, it seeks for an account to be undertaken to ascertain the amount owed and whether it is still owing the 1st defendant any monies at all.
19. The 1st defendant denied the claim vide its Defence and Counter-claim dated December 9, 2019. It stated that the plaintiff has admitted a debt of Kshs.23,500,000 less what it has paid and avers that what it claims to have paid under paragraph 7 is vague hence the suit is a non-starter. It denies ever receiving the sum of Kshs.2,865,000/=. Therefore, the 1st defendant states that the balance of Kshs.20,865,000/= is undisputed and Judgment be entered against the plaintiff in summary.
20. The Counter-claim was defended generally through Reply to Defence and Defence to Counter-claim dated December 17, 2019.
21. The court notes that nothing has been said on whether the alleged sub-division of the land that had been offered in settlement of the debt went through or failed. It was incumbent on the plaintiff to shed light on whether it was relying on the same or it was abandoned. It was incumbent on it to ascertain the amount it claims to have paid while offering to pay the difference pending the remedy of account. The plaintiff is seeking for accounts to be undertaken based on the scanty data it provided. But, the plaintiff has failed to show that on several occasions, it paid out money to the entities it has mentioned which it accuses for failing to remit the same to the 1st defendant. In the absence of such data from which a dispute directly arises, it is a course that cannot resolve the dispute before court. As a matter of fact, this court finds that the plaintiff has failed to prove its case on a balance of probability.
22. Turning to the Counter-claim, as noted earlier in this Judgment, the plaintiff has confirmed the sum of Kshs.20,635,000/= as the amount undisputed. The Defence to the Counter-claim dated December 17,



2019 does not specifically dispute the allegations in the Counter-claim, the plaintiff having previously agreed to settle the debt by surrendering 5.5 acres of land vide a debt acknowledgement Agreement and where the supply of goods is admitted and a settlement Agreement confirmed respectively. The other fact that supports admission is the plea at Paragraphs 4 and 6 of the Plaintiff. The plaintiff ought to have gone beyond mere denials. In the Reply and Defence to Counter-claim, and allegations of raising substantial issues of facts worth of determination. In view of this, the Court finds and holds that the claim for Kshs.20,635,000/= has not been challenged and the 1st defendant is entitled to the same.

23. In the circumstances, the following orders issue:-

- a. The plaintiffs' suit vide Plaintiff dated November 8, 2019 be and is hereby dismissed with costs and interest thereon from the date of Judgment.
- b. Judgment be and is hereby entered in favour of the 1st defendant on the Counter-claim in the sum of Kshs.20,635,000/= with interest from the date of filing the Counter-claim.
- c. Costs on the sum of Kshs.20,635,000/= in the Counter-claim.
- d. Interest on (c) from date of Judgment.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 24TH DAY OF FEBRUARY , 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

No appearance for and by the Plaintiff

M/S Ongeso holding brief for 1st Defendant

No appearance for and by 2nd Defendant

Court Assistant – Martin Mwenda

