



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 89 OF 2019

CHINA WUYI (KENYA) COMPANY LIMITED.....PLAINTIFF

-VERSUS-

STEVE KITHI T/A STEVE KITHI & CO. ADVOCATES.....DEFENDANT

RULING

1. The Plaintiff, **CHINA WUYI (KENYA) COMPANY LIMITED** commenced this suit by way of a Complaint (fast track) dated 30th October, 2019 in which it sought for the following remedies against the Defendant, **STEPHEN NGOMBO KITHI T/A STEVE KITHI & CO. ADVOCATES:-**

a) The Defendant pay the Plaintiff a sum of Kshs.20,000,000/= together with interest from 18th April 2017, until payment in full at the interest rate of 14% per annum;

b) Special damages in the form of the following;

i. Refund of legal fees of Kshs.5,873,931/= incurred by the Plaintiff on the assorted sale.

ii. Refund of Kshs.300,000/= being expenses incurred by the Plaintiff in facilitating the transaction.

c) General damages for breach of contract, loss of investment opportunity and time expended on the transaction, and;

d) Costs of the suit and interest thereon until payment in full.

2. Simultaneously, the Plaintiff filed an application under Certificate of Urgency on even date seeking the following orders in the interim: -

a) The application be certified as urgent, service be dispensed with in the first instance and the same be heard ex parte.

b) The Defendant be ordered to deposit Kshs.20,000,000/= in a joint-interest bearing account held in joint names of the Plaintiff's advocate and the Defendant's advocate, pending the hearing and determination of this suit.

c) That in the alternative to (2) above, the Defendant be ordered to deposit Kshs.20,000,000/= in court as security until the suit is heard and fully determined upto and including satisfaction of the Decree that may be passed against him by the Honourable Court.

d) That in default of complying with (2) and or (3) above in 30 days from the date of the Order, the Defendant to lose the right to defend the suit and the Plaintiff be entitled to execute the Decree as a final Judgment of the court.

e) Any other or further relief that this Honourable Court may be pleased to grant.

3. The application is predicated on twenty (20) elaborate grounds which have been reiterated in the affidavit sworn by **LUO ZICHENG** and the annexures attached thereto.

4. On **4th December 2019**, the Defendant filed his defence in which he hotly contested all the allegations. He went on to file an amended defence dated **16th December, 2019** wherein he raised a Counter-claim introducing **PROPKEN (MAURITIUS) LIMITED** as a 2nd Plaintiff. In the Counter-claim, the Defendant prays for a raft of remedies expressed as alternatives to each other.

5. The Defendant opposed the Plaintiff's application dated **30th October, 2019** by filing Grounds of Opposition dated **14th January, 2019** together with a **Preliminary Objection** dated **20th January, 2020**.

6. In the Counter-claim, the Plaintiff filed a request for Judgment separately on **27th January, 2020**, the 1st Plaintiff sought for Judgment for Kshs. 65,106,000/= plus interest from **30th July, 2016**, while the 2nd Plaintiff sought for Judgment for Kshs.577,886,000/=.

7. On **3rd February, 2020**, the Defendant filed their **Preliminary Objection** to the Plaintiff and Plaintiff's application dated **30th October, 2019**, in which they objected to the main suit and the **Notice of Motion** separately. He sought for orders striking out the entire suit and the **Notice of Motion** application.

8. On **20th February, 2020** the Plaintiff in the main suit filed written submissions dated **19th February, 2020**, in opposition to the Preliminary Objection, and simultaneously filed Grounds of Opposition to the Defendant's Preliminary Objection dated **25th January, 2020**. On the same date, the Plaintiff filed a reply to the amended defence and defence to the Counter-claim dated **3rd February, 2020**.

9. After all the actions, the Plaintiff filed a **Notice of Motion** dated **18th March, 2020** under Certificate of Urgency seeking:

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a) Spent;

b) The Honourable Court be pleased to stay the execution of the Judgment entered on 3rd February, 2020 pending the hearing and determination of this application;

c) The Honourable Court be pleased to set aside the Judgment entered on 3rd February, 2020;

d) The Plaintiff's reply to the defence and defence to Counter-claim filed in this Court on 28th February 2020, be deemed to be properly on record and the Counter-claim heard on merit;

e) Costs of the application be provided for.

10. The same is predicated on sixteen (16) grounds and a nineteen (19) paragraphs affidavit sworn by **LUO ZICHENG** and annexures attached thereto.

11. On **27th May, 2020**, the Plaintiff filed another **Notice of Motion** application dated **25th May, 2020**, under Certificate of Urgency seeking for, among others, the following orders: -

a) Spent;

b) Spent;

c) That the Honourable Court be pleased to stay the execution of the interlocutory Judgment entered on 3rd February 2020, pending the hearing and determination of the application dated 18th March, 2020;

d) That the Warrant of Attachment of moveable property and the Warrants of Sale of the property in execution of Decree for money both issued on 2nd April, 2020 be lifted and set aside;

e) That this application and the Plaintiff's application dated 18th March 2020, be heard jointly on a priority basis and the date for hearing of the same be issued.

12. The application was placed before Honourable Justice P. J. Otieno on **27th May, 2020**, whereby the Learned Judge orders as follows: -

“That there being no threat of execution the application be served for hearing before Honourable Lady Justice Chepkwony on 29th July, 2020”.

13. The Plaintiff was served with Warrants of Attachment and execution together with the ensuing proclamation on **22nd May, 2020** and since the orders of injunction that had been sought for in the application dated **25th May, 2020**, had not been granted, the Plaintiff filed another **Notice of Motion** application dated **2nd June, 2020**. The same was considered by Honourable P. J. Otieno in Chambers and he ordered for the issuance of an injunction restraining the Respondent from further proceeding with the attachment and sale of the Plaintiff's property pending the hearing and determination of the Plaintiff's application dated **18th March, 2020**.

14. The Respondent is of a contrary view. He avers that the Applicant had instructed his former advocates to settle the decretal sum and not to file any Appeal. Therefore, this Appeal is an afterthought calculated to further delay the matter and deny him the fruits of the Judgment.

15. Dissatisfied with the ex parte Ruling by Honourable Justice P. J. Otieno, the Respondents/Defendants issued a **Notice of Appeal** dated **12th June, 2020**. And on **22nd July, 2020**, the Respondents proceeded to file several documents in reply as follows: -

a) Grounds of Opposition dated 20th June, 2020 to the Plaintiff's application dated 18th March, 2020.

b) Grounds of Opposition dated 20th May, 2020 to the Plaintiff's application dated 25th May, 2020.

c) Grounds of Opposition dated 20th June, 2020 to the Plaintiff's application dated 2nd June, 2020.

d) Replying Affidavit dated and sworn on 22nd July, 2020 to the Plaintiff's application dated 18th March, 2020.

e) A Replying Affidavit sworn on 23rd July 2020 and filed on 24th July, 2020 to the Plaintiff's application dated 2nd June, 2020.

16. The Plaintiff/Applicant opted to amend their Motion and filed an **amended Notice of Motion** application dated **18th August, 2020** in which it sought for the following orders: -

a) The Honourable Court be pleased to set aside the judgment entered on 3rd February, 2020.

b) That the defendant be granted Leave to file defence to the Counter-claim out of time and/or for filing a defence to the Counter-claim be enlarged.

c) That the Plaintiff's reply to defence and defence to Counter-claim dated 3rd March, 2020 and filed on 20th February 2020 be deemed to be properly on record and the Counter-claim heard on merit.

d) Costs of this application be provided for.

17. The same was supported by an **affidavit** sworn by **LUO ZICHENG** and the annexures attached thereto, and a further affidavit in support sworn on **21st September, 2020** together with annexures attached thereto.

18. On **21st August, 2020**, the Applicant filed its written submissions dated **18th August, 2020** with regard to its three (3) applications.

19. On **10th September, 2020** the Respondents equally filed their written submissions dated **7th September, 2020** in reply to the application dated **18th March, 2020** and another set of submissions dated **7th September, 2020** in opposition to the application dated on even date. Further, the Respondents filed a reply to the further **affidavit** dated **25th September, 2020** by way of written submissions dated **19th October, 2020**, to which the Applicant filed supplementary submissions in reply dated **23rd October, 2020**.

20. On **28th October, 2020**, the matter came up for hearing of all the pending applications and Counsel for the parties appeared before court. They each urged the court to rely on their rival written submissions and uphold their respective issues (positions).

ANALYSIS AND DETERMINATION

21. Having listened to the oral arguments of Counsel for both sides, I have **carefully read through the pleadings, documents and written submissions** filed in support of each party's position.

22. From a considered view of all the applications filed before this Court, the **main application for consideration is the amended Notice of Motion dated 18th August, 2020** filed by the Plaintiff in the main suit. This is so because the findings in the disputed issues therein will have the effect of disposing of the applications **dated 25th May, 2020 and 2nd June 2020**.

23. The first issue for consideration is whether there was proper service of the Counter-claim.

The ordinary service of Summons is governed by **Order 5** of the **Civil Procedure Rules**, and whenever there is an objection, at **Rule 5(3)**, it states as follows:-

"No objection may be made to the service of a summons on the grounds that the person who served the summons either was not authorized so to do, or that he exceeded or failed to comply with the authority in any way".

24. With great respect to the authorities cited in support of the objection to service in this instant case, the same do not support the reason why the Plaintiff did not file a defence to the Counter-claim.

25. In my view, Order 5 Rule 5(3) defeats the requirement for a licence to be annexed to the Affidavit of Service. It is a formality that does not go to the root of the matter of service.

26. Service of a Counter-claim is regulated by **Order 7 Rules 8, 9 and 10** of the **Civil Procedure Rules**. To demonstrate this, the said rules have to be set down in their verbatim enactment.

Order 7 Rule 8 of the **Civil Procedure Rules** provides that: -

Title of counterclaim

“Where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff, together with any other person or persons, he shall add to the title of his defence a further title similar to the title in a plaint, setting forth the names of all persons who, if such counterclaim were to be enforced by cross-action, would be defendants to such cross-action, and shall deliver to the court his defence for service on such of them as are parties to the action together with his defence for service on the plaintiff within the period within which he is required to file his defence”

27. My understanding of this rule is that a cross-suit can only add a Defendant(s). It adds parties whom a Plaintiff would claim against jointly with the initial Defendant, who is a Plaintiff in the cross-action. This is so because **Rule 9** of the same Order states as follows: -

“Where any such person as is mentioned in rule 8 is not a party to the suit, he shall be summoned to appear by being served with a copy of the defence, which shall be served in accordance with the rules for regulating service of summons.”

In addition, **Rule 10** goes on to state as follows: -

“Any person not already a party to the suit who is served with a defence and counterclaim as aforesaid must appear thereto as if he had been served with a summons to appear in the suit.”

28. **Order 7 rule (8)** of the **Civil Procedure Rules** is important in that the regularity of a Counter-claim depends on it. A defendant who wishes to rely on a Counter-claim ought to ensure that the threshold set by the rule is met.

29. The unique aspect is that, a Counter-claim can only add a Defendant who has similar characteristic as the Plaintiff who is a Defendant in the Counter-claim. It excludes parties who would otherwise be interested in the proceedings and those who require leave of court to be enjoined in the pleadings to sue through cross-suits. It is a measure put in place by the rules so as to protect certainty of claims.

30. The **Affidavit of Service** sworn by **FESTUS KOMBE** on **24th January, 2020**, states that service upon the Plaintiffs was by registered post, while service upon the Plaintiff's advocate was by **Nation Courier**. The deponent has annexed the evidence of service upon the advocate but has not shown evidence of registered post upon the Plaintiff. There is, however, the receipt of service upon the Plaintiff annexed vide the **affidavit** of **STEVE KITHI**, the Defendant/Plaintiff in reply to the **Notice of Motion** dated **18th August, 2020** at paragraph 32 thereof.

31. According to the Applicant, the Senior Officer had travelled out of the country and this is the reason for the delay in filing a defence to the Counter-claim.

32. The agony this Court is undergoing is whether the service by **registered post** satisfied the conditions set out by **Order 5 Rule 3(a) and (b)(ii)** of the **Civil Procedure Rules**. Under **Order 5 rule 3(a)** of the **Civil Procedure Rules**, the same may be addressed to any of the officers, the secretary, director or other principal officer of the corporation.

33. Under **Rule 3(b)(ii)**, if the server is unable to find any of the officers above, then service may be effected by “pre-paid registered post or by a licensed courier service provider approved by the court.

34. A prepaid post service has a certificate of posting and specifically directs service to the recipient who acknowledges receipt and evidence mailed back to the sender. It is not an ordinary registered post. The prepaid certificate of posting ought to be addressed to any of the Senior Officers of the corporation listed under the rule. It cannot be said to be correct if it addresses the Corporation itself.

35. What can be seen from the receipt is that it was addressed to the Corporation itself, not the officer of the corporation and it was not a prepaid certificate of posting.

36. The other aspect which was overlooked was that before serving by prepaid posting, one has to make attempts by serving the Defendant physically. **Order 5 rule 3(b)(i)** of the **Civil Procedure Rules** states as follows: -

“Subject to any other written law, where the suit is against a corporation the summons may be served—

3(a) ...

(i) By leaving it at the registered office of the corporation;

(ii) By sending it by prepaid registered post or by a

licensed courier service provider approved by the court to the registered postal address of the corporation; or

(iii) If there is no registered office and no registered office or physical 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.”

37. I have perused the **affidavit** sworn by **FESTUS KOMBE** on **12th October, 2020** and find that it does not mention any pre-efforts that were undertaken to ensure physical service had been made and the problems that were encountered to warrant an order to adopt an alternative mode of service of prepaid post.

38. I therefore find and hold that there was no proper service of the cross-suit upon the Plaintiff/Defendant and accordingly allow the **application dated 15th August, 2020 in terms of prayer Nos. 1, 2, 3 and 4.**

39. Having reached the above decision, I find that it will be an academic exercise to consider the merits of the defence which I find has heavily contested issues raised in the cross-suit.

40. As earlier indicated, the above mentioned finding has disposed of the **applications dated 25th May, 2020 and 2nd June, 2020**, which are intertwined.

41. The following orders therefore issue:-

a) Judgment entered on 3rd February, 2020 against the Defendant in the cross-suit be and is hereby set aside.

b) The reply to defence and defence to counter-claim be and are hereby deemed as filed within the requisite time and served upon the Plaintiff/ Defendant.

c) The warrant of attachment and sale of moveable property in execution of decree for money issued on 2nd April, 2020 be and is hereby lifted and set aside.

d) The application dated 2nd June, 2020 be and is hereby marked as spent and abides the findings herein.

e) The Defendant to the cross-suit be and is hereby awarded costs of the application dated 18th August, 2020.

f) The 1st Plaintiff to the cross-suit be and is hereby awarded thrown-away costs of Kshs.40,000/= and a set-off with costs of the application to the Defendant to the cross-suit.

g) Either party be at liberty to set down the suit for pre-trial directions within 60 days from the date of this Ruling.

h) Mention on 16th March, 2021 for further directions and orders.

It is so ordered

DATED, SIGNED and DELIVERED VIRTUALLY at MOMBASA this 13th day of January, 2021.

D. O. CHEPKWONY

JUDGE

13/01/2021

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all Judgments and Rulings be pronounced in open Court.

D. O. CHEPKWONY

JUDGE