



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 171 OF 2013

MEHTA ELECTRICAL LIMITED.....PLAINTIFF

- VERSUS -

CHINA OVERSEAS ENGINEERING GROUP CO. LIMITED.....DEFENDANT

RULING

1. The defendant, **CHINA OVERSEAS ENGINEERING GROUP CO. LIMITED**, has asked the court to set aside the judgement which was entered against it on 5th June 2013. The said judgement was entered by the learned Deputy Registrar after the defendant failed to file a Defence within the time prescribed by law.
2. It is the request of the defendant that it be given an opportunity to defend the suit.
3. Secondly, the defendant requests that this case be stayed, so that the dispute between the parties may be referred to arbitration. The basis for this request was that the contract between the parties had expressly provided that any disputes arising between them, would be resolved through arbitration.
4. According to the defendant, it was never served with the plaint and summons to enter appearance. That is what the defendant asserted in the body of the application.
5. In response to that assertion, the plaintiff emphasized the fact that the Plaint and Summons to enter appearance were duly served upon **LIU QICHANG**, the defendant's Managing Director.
6. The process server, **LAWRENCE GICHANA**, swore an affidavit of service, indicating that he effected service on 16th May 2013.
7. The defendant now states, in its submissions, that the person who was served with court papers did not appreciate what was handed over to him.
8. Mr. Qichang explained that he had not had any experience with the legal system in Kenya and, therefore, he did not know what he had been served with.
9. Whilst appreciating that Mr. Qichang is from China and that he therefore may have been unaware about how the legal processes operate in Kenya, it must be reiterated that Ignorance of the Law is no Defence.
10. Secondly, the failure to fully understand or to fully appreciate the nature of documents which were served upon the defendant's Managing Director, is definitely not the same thing as having not been served at all.
11. The Managing Director of a limited liability company is definitely one of the persons recognized by law, as having the requisite authority to receive summons. Order 5 Rule 3 of the Civil

- Procedure Rules expressly states that where a suit is against a corporation, the summons may be served on the secretary, director or other principal officer of the corporation.
12. Therefore, if the Managing Director was served, that would have been good service upon the defendant.
 13. The process server deponed that he tendered copies of the plaint and the summons to enter appearance, to the Managing Director. However, the Managing Director is said to have declined to sign the reverse of the principal copies of the documents.
 14. However, the Managing Director categorically denied having been served.
 15. I note that the facts spelt out in the affidavit of service, concerning the place and the date of service, were acknowledged by the Managing Director.
 16. The only issue about which the two persons have divergent comments is as to whether or not the process server left the documents with the Managing Director.
 17. On the one hand, the process server says that he tendered the copies to the Managing Director. I understand the act of “*tendering*” to mean handing over.
 18. However, the Managing Director categorically denied having received the documents. Indeed, he said that the process server did not leave any documents at the offices of the defendant.
 19. In the face of the contradictory depositions, I have no basis in law or in fact for choosing to believe either the process server or the Managing Director.
 20. Therefore, I cannot vouch for the validity of the judgment. On that basis, the judgement should be set aside.
 21. However, even in the event that it were to be held that the defendant had been duly served, that could not be an absolute bar to the court giving consideration to an application to set aside the judgement.
 22. In **AFRICAN LEATHER LIMITED Vs INTER REGION HIDES & SKINS LIMITED & 2 OTHERS Hccc No. 927 of 2009**, Mabeya J. cited the following words which were first stated in **PATEL Vs E.A. CARGO HANDLING SERVICES LIMITED [1974] E A. 75**, at page 76;

“The main concerns of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where there is a regular judgement, as is the case here, the court will not normally set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean, in my view, that the defence must succeed, it means, as SHERIDAN J. put it ‘a triable issue’, that is an issue which raises a prima facie defence and which should go to trial for adjudication?.”

23. It is the plaintiff’s case that there was no defence in this case. Therefore, the plaintiff was of the considered view that no useful purpose could be served by setting aside the judgement.
24. The plaintiff considers that to be even more so, when it is considered that the defendant’s Managing Director refused to sign an acknowledgement that he had been served. I understand the plaintiff to be saying that the defendant was not deserving of the court’s discretion because the defendant had deliberately sought to obstruct or to delay the course of justice.
25. In my considered view, when a party who was being served with pleadings or summons refuses to sign an acknowledgement of service, that fact cannot obstruct or delay the course of justice. Indeed, the person being served could choose to deliberately refuse to receive the documents which were being presented to him, but that cannot delay the course of justice. I say so because provided that the process server swore an affidavit of service to prove that he effected service, the court process could not be delayed or derailed by the lack of co-operation, by the person being served.
26. However, it also needs to be said that the plaintiff should effect service upon the defendant, so as to trigger the counting of the period available to the defendant to enter appearance and to file a defence. It is not good enough for the plaintiff to say that the defendant had become aware of the plaint and summons even though the defendant had not yet been served.
27. Order 6 Rule 1 of the Civil Procedure Rules states as follows;

“Where a defendant has been served with summons to appear, he shall unless some

order be made by the court, file his appearance within the time prescribed in the summons?.

28. And Order 7 Rule 1 provides as follows;

“Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service?.

29. In this case the defendant has provided the court and the plaintiff with a draft defence.

30. The defendant considers the defence as one which has a full answer to the plaintiff's claims. But the plaintiff considers the defence as constituting nothing but admissions.

31. Therefore, the plaintiff's view was that there was no dispute which could either be referred to arbitration or which could require the adjudication by the court.

32. In my reading of the draft defence I noted that the defendant concedes that there were some payments which it had not yet made to the plaintiff. However, the defendant went on to explain the reasons why it had not yet made those payments. The reasons were attributed to the failure by the Employer to pay the defendant, who would thereafter make payment to the plaintiff.

33. The defendant's position is that it was an express term of the contract between the 2 parties herein, that the plaintiff would be paid after the Employer had paid the defendant.

34. The plaintiff appears to accept that it was to be paid after the defendant had been paid. But the plaintiff insists that the Employer had already effected all the requisite payments to the defendant.

35. On the other hand, the defendant insists that the Employer was yet to effect some payments.

36. In the circumstances, the parties are at cross-purposes concerning payments due from the Employer. Therefore, there will be need for the parties to adduce evidence to support their respective positions.

37. The next question relates to the forum at which the parties would adduce evidence; is it the court or is it before an arbitrator?

38. The parties had, through a conscious decision, made it absolutely clear that if any disputes arose between them, such disputes would be resolved through arbitration.

39. The defendant has not yet entered appearance in this case. Therefore, by seeking an order that the dispute be referred to arbitration, the defendant is well within the requirements of Section 6 (1) (a) of the Arbitration Act.

40. Secondly, I have already held that there was indeed a dispute between the 2 parties.

41. In the result, I do now order as follows;

- a. ***The judgement entered against the defendant on 5th June 2013 is set aside forthwith. I also set aside all other consequential orders, including, but not limited to the Certificate of Costs dated 14th June 2013.***
- b. ***All further proceedings in this case are hereby stayed.***
- c. ***The matters in issue between the parties shall now be settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce, pursuant to Clause 19 of the Subcontract Agreement between the plaintiff and the defendant which is dated 15th July 2008.***
- d. ***The defendant will pay the costs of the application together with the thrown-away costs, if any.***

DATED, SIGNED and DELIVERED at NAIROBI this 21st day of January 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Khaseke for the Plaintiff

Miss Ndirangu for Kimani for the Defendant

Collins Odhiambo – Court clerk.