



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 483 OF 2015

ATHI RIVER STEEL PLANT LIMITED.....PLAINTIFF

-VERSUS -

CHINA CONSTRUCTION ENGINEERING (K) LTD.....DEFENDANT

RULING

1. The application before me is for the setting aside of the orders which the court made on 8th October 2015.

2. The said orders were in the following terms;

“1. THAT the defendant do deposit in this court, the sum of Kshs. 16,923,710/- within the next TEN (10) DAYS.

2. THAT the said deposit will constitute a security for the due performance of such Decree as the defendant may ultimately be held liable to pay to the plaintiff.

3. THAT if the defendant should default in providing the deposit within the time stipulated, the plaintiff will be at liberty to effect attachment before judgement, so as to secure the said security.

4. THAT the plaintiff is required, as a pre-condition to the attachment before judgement, to provide an unconditional undertaking to pay to the defendant such compensation as the court may find to be payable, in the event that the defendant later proves that the orders herein were unwarranted, and that the said orders had caused the defendant to suffer loss and damage”.

3. The basis for asking the court to set aside those orders was that the defendant had not been served with Summons to enter appearance.

4. Secondly, the orders were said to be capable of causing untold injustice to the defendant, especially considering that the orders were made *ex-parte*.

5. The defendant insists that the plaintiff's claim was contested, and that the defendant had a good answer to the plaintiff's application dated 2nd October 2015.
6. It was the defendant's contention that the invoice issued by the plaintiff could not be verified as "true?", as it lacked an **ETR** receipt. Therefore, the defendant reasoned that it could not verify its tax obligations by virtue of making the payment for the sums demanded by the plaintiff.
7. The defendant pointed out that there was no basis to the allegations that it was no longer trading. Not only was the defendant said to be continuing to conduct business, but the directors of the defendant had just renewed their respective Work Permits in Kenya.
8. The defendant believes that the renewal of the directors' Work Permits is proof that the defendant and its directors were resident in and were carrying on business in Kenya.
9. In any event, the directors of the defendant were distinct from the defendant, which was a limited liability company.
10. The defendant exhibited documents embodying contracts between it and other persons in Kenya.
11. Given those ongoing contracts, the defendant explained that the deposit in court, of the substantial sum of money, would adversely drain away the funds which the defendant required for its day to day operations.
12. On the other hand, the defendant was for the view that if the orders in question were set aside, the plaintiff would not be prejudiced. Therefore, the defendant submitted that the interests of justice would only be served by setting aside the orders made on 8th October 2015, so that the application dated 2nd October 2015 could be heard on merit.
13. In a nutshell, the defendant was saying that if it was compelled to deposit in court, the sum in excess of Kshs. 16 million, its business would be compelled to close down. It would be unable to pay salaries to the staff and it would also be unable to conduct its other operations.
14. If such a thing happened, the defendant feels that that would constitute a serious miscarriage of justice.
15. But the plaintiff holds a contrary view. It points out that the defendant cannot now complain when it had chosen not to respond to the application dated 2nd October 2015.
16. The said application had been duly served upon the defendant, emphasized the plaintiff.
17. Secondly, the plaintiff submitted that whether or not the defendant had been served with Summons to enter appearance was not relevant to the application at hand.
18. However, the plaintiff also insisted that, in any event, the defendant had also been served with the Summons to enter appearance.
19. Another issue which was taken up by the plaintiff was that the defendant had severally admitted owing the sums claimed. Therefore, the defendant cannot be heard to now claim that it has a good defence to the application.
20. In determining the application, I note that the defendant had been duly served with the application dated 2nd October 2015.
21. The defendant did not need to be served with Summons to enter appearance, before it could be in a position to respond to the application.

22. Whether or not the defendant had been served with Summons to enter appearance was immaterial, for the purposes of the application.

23. In effect, I find that the defendant has not made available any reasonable explanation for its failure to respond to the application dated 2nd October 2015.

24. The defendant has also failed to tender any explanation for its absence from court on 8th October 2015, when the application came up for hearing.

25. If the defendant had come to court on 8th October 2015 it would have had its opportunity to try and persuade the court why it was not necessary for it to be compelled to deposit security in court.

26. The defendant could also have tried to persuade the court that the orders sought, if granted, could have the effect of shutting down the defendant's operations.

27. Those submissions appear, on the face thereof, to make some sense. But the defendant has failed to tender any explanation for failing to put forward those arguments when it was supposed to do so.

28. Nonetheless, I also find that there will be no prejudice to any of the parties if the court were to accord another opportunity to them, to go through the plaintiff's application anew. The reason for so holding is that the plaintiff is totally convinced that the defendant's admission of liability is so evident that nothing can stand in the way of the plaintiff's claim.

29. I do therefore, reluctantly, set aside the orders made on 8th October 2015 and direct that the application dated 2nd October 2015 be heard afresh.

30. However, the defendant will pay the costs of the application dated 16th October 2015, in any event.

31. The defendant will also pay to the plaintiff the thrown away costs. The said thrown away costs are all those that arose from the defendant's application dated 2nd October 2015, as well as the plaintiff's costs for the court session on 8th October 2015.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 14th day of March 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of:

No appearance for the Plaintiff

Wamae for the Defendant

Collins Odhiambo – Court clerk.