



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 285 OF 2015

ZINGO INVESTMENTS LIMITED.....PLAINTFF

VERSUS -

MARTIN FRANCIS.....1ST DEFENDANT

WEST ASIA EXPORT LIMITED.....2ND DEFENDANT

RULING

1. This Ruling is in relation to 2 applications. The said applications are dated 22nd December 2015, and 13th April 2016, respectively.
2. The defendants have asked the court to set aside the judgement which was entered against them on 7th October 2015.
3. Pending the hearing and determination of the application to set aside the judgement, the defendants sought and were granted an order for stay of execution.
4. The order for stay of execution was granted on 23rd December 2015, and it was on the following terms;

“1) The application dated 22nd December 2015 is fixed for *inter-partes* hearing on 2nd February 2016.

2) The Applicant is directed to deposit into court, the sum of Kshs. 10,000,000/- within the next 30 days.

3) There shall issue forthwith an order of stay of further execution of the Decree. However, the said stay shall be conditional upon compliance with order (2) above.

In the event that the Applicant does not deposit Kshs. 10,000,000/- into Court within 30 days, the Decree-Holder will be at liberty to proceed with further execution, without any further orders.

4) The Applicant’s attached goods shall continue to remain so attached until and unless the

Applicant deposits into Court the sum of Kshs. 10,000,000/-”.

5. The defendants second application seeks the review or the setting aside of the orders made on 23rd December 2015.
6. In the first instance, the defendants insist that they were never served with the Plaint and Summons. They also state that the plaintiff never served them with a Notice of Entry of Judgement.
7. The 1st defendant, **MARTIN FRANCIS**, is the Managing Director of the 2nd defendant, **WEST ASIA EXPORT LIMITED**.
8. Martin deponed that he knew the plaintiff through its Managing Director, **ROBERT NJOKA MUTHARA**.
9. According to Martin, he introduced Robert to the Company named **BLUE METAL IMPORTS & EXPORTS** and that thereafter, the plaintiff entered into a contract with the said Blue Metal Imports & Exports.
10. It is the contention of Martin that his only role in the contract was that of a **CONTACT PERSON** for Blue Metal Imports & Exports. In that capacity, Martin concedes having met with Robert , to negotiate.
11. Martin says that Robert imposed a condition, requiring Martin to guarantee payment to the plaintiff. Martin issued post-dated cheques to the plaintiff, but he says that the cheques were not supposed to be banked.
12. The cheques issued by Martin were for the sum of Kshs. 21,123,652/-, which was equivalent to USD 231,619.13.
13. The plaintiff banked the cheques which Martin had issued. When the cheques were dishonoured, the plaintiff lodged a criminal complaint with the police.
14. The police charged Martin with 10 counts of Issuing Bad Cheques contrary to Section 316A as read with Section 316 C (4) of the Penal Code. The said criminal case was still pending at the Makadara Law Courts, Nairobi.
15. According to Martin, he had not ever been served with the Plaint and Summons, even whilst the plaintiff had been talking to him.
16. On the other hand, Robert insists that he is the person who pointed out Martin, when the process server went to effect service upon Martin.
17. On a balance of probability, I find the deposition of Robert more worthy of belief. I so find because it would not make sense for the plaintiff’s Managing Director to have held meetings with Martin, and to have even discussed the debt with him, but then, somehow overlooked to serve him with the Plaint and the Summons.
18. I also find, on a *prima facie* basis, that by providing guarantees to the plaintiff, in the form of post-dated cheques, the 1st Defendant appears to have consciously chosen to assume liability arising from the contract which gave rise to this case.
19. Thirdly, the defendants conceded that they had instructed the Law Firm of **ALPHONCE MUTINDA & CO. ADVOCATES**, to act for them in this case.
20. Advocate Alphonce Mutinda swore an affidavit on 20th April 2016, in support of an application by his Law Firm, which was seeking leave to cease acting for the Defendants.

21. First, that affidavit is a confirmation that the Law Firm of Alphonse Mutinda & Co. Advocates were duly instructed by the defendants.

22. Secondly, because the said Law Firm had been instructed by the defendants, it had actual authority to represent the defendants.

23. Thirdly, Advocate Alphonse Mutinda deponed that Advocate **FARADAY NYANGORO** was an Associate in his Law Firm. The said advocate Nyangoro was duly instructed by Advocate Alphonse Mutinda to handle the case when it came up in court on 23rd December 2015.

24. In effect, when Advocate Nyangoro attended court on 23rd December 2015, he had authority to represent the defendants.

25. But Martin insists that he never instructed Advocate Mutinda to tell the court that the defendants owed the sums claimed by the plaintiff.

26. Much as the Law Firm of Alphonse Mutinda & Co. Advocates had actual authority to represent the defendants, I find it more probable than not, that when Advocate Nyangoro told the court that the defendants admitted liability and also that they could pay the sums claimed within 30 days, he did not have the authority of his client to do so.

27. I so find because the affidavit sworn by Martin, in support of the application dated 22nd December 2015, was inconsistent with the admission of liability, and the commitment to settle the sums claimed.

28. In the event, justice demands that the orders made on 23rd December 2015 be set aside.

29. Meanwhile, as I have held that the defendants were duly served, the judgement on record is regular.

30. But there is no legal bar to the court setting aside a regular judgement, if such a step would be in the interests of justice. Order 10 Rule 11 of the Civil Procedure Rules provides thus;

“Where judgement has been entered under this Order the court may set aside or vary such judgement and any consequential decree or order upon such terms as are just”.

31. In the circumstances, I do now order that the judgement be set aside, together with the Decree and all actions consequent upon such judgement and Decree.

32. However, as the judgement had been entered regularly, following the defendants failure to enter appearances, I order that the defendants will meet the costs of the applications dated 22nd December 2015 and 13th April 2016. I so order because the plaintiff cannot be condemned to pay costs for applications which have come about through no fault on its part.

33. For the avoidance of any doubt, the costs payable by the defendants shall include the Court Broker who had commenced the execution of the Decree.

34. Finally, the Defendants are directed to file and serve their Defences within the next 7 days.

DATED, SIGNED and DELIVERED at NAIROBI this 29th day of September 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Mureithi for the Plaintiff

Magara for Ochich for the 1st Defendant

Magara for Ochich for the 2nd Defendant

Collins Odhiambo – Court clerk.