REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 412 OF 2014

SATBACHAN SINGH LALL.....…...….PLAINTIFF

- VERSUS -

SATPAL SINGH JOWHAL……..DEFENDANT

RULING

1. On 29th October, 2014 the learned Deputy Registrar entered Judgement in favour of the plaintiff, on the grounds that the Defendant had failed to Enter Appearance.

2. Thereafter, the Court issued a Decree on 6th November, 2014.

3. On 17th November, 2014 the Defendant brought his current application, seeking to stay the execution of the Decree. The Defendant also asked the Court to set aside the Judgement, together with all other consequential orders.

4.The primary reason that was advanced by the Defendant was that he had already filed a Memorandum of Appearance on 8th October 2014. Therefore, as far as the Defendant was concerned, it was not right for the court to enter judgement on the basis of a failure to Enter Appearance, when the Defendant had actually done the needful.

5. According to the Defendant, he entered appearance through the firm of P.M. Kamaara & Associates Advocates.

6. As appearance was entered on 8th October 2014, the defendant contends that it had 14 days from that date to file his defence.

7. Therefore, when the defence was filed on 22nd October 2014, the defendant submits that the said defence was filed within the time stipulated by law.

8. In the result, as the court entered Judgement on 29th October 2014, the defendant believes that the said Judgement was not regular.

9. When the defendant learnt about the Judgement, he quickly inquired from P.M. Kamaara & Associates Advocates what could have happened. The said advocates disclosed to the defendant that they had, inadvertently, failed to serve the Memorandum of Appearance.

10. The defendant then checked for the Memorandum of Appearance, in the court file.

11. It transpired that the court file did not contain the Memorandum of Appearance.

12. Nonetheless, after serving the defence upon the plaintiff's advocates, the defendant submitted that it was wrong for the plaintiff to proceed with the process of executing the Decree.

13. It was for that reason that the defendant asked for a stay of execution.

14. The defendant submitted that unless execution of the decree was stayed, he would suffer irreparable harm and injury.

15. The defendant also invited the court to set aside the judgement, which he considers to be irregular.

16. In my understanding, the defendant considers the irregularity to stem from 2 reasons, as follows;

> ***"a)The defendant had already filed a Memorandum of Appearance by the time the court entered judgement on the grounds that there was no appearance;***
>
> ***b) The claims against the defendant were not for a liquidated nature. Therefore, even if the defendant had not yet entered appearance or filed a defence, the court should not have entered a final judgement, from which a Decree could be extracted".***

17. In response to the application, the plaintiff says that she is unaware whether or not the Law Firm of P.M. Kamaara & Associates Advocates did enter appearance on 8th October 2014.

18. The one thing that the plaintiff was very sure about was that the Memorandum of Appearance was not served upon her lawyers until 20th November 2014.

19. In the light of the fact that the plaintiff had not been served with the Memorandum of Appearance by the time the court granted judgement, the plaintiff submitted that the court was right to have entered judgement, as there was no Memorandum of Appearance on the court record.

20. The plaintiff wrote to the learned deputy registrar, to inquire about the Memorandum of Appearance; the Notice of Change of Advocates; and the Written Statement of Defence, which the defendant's lawyer had served upon them.

21. Mr. E.A.A. Obendo, the Executive Officer of the Commercial and Admiralty Division at the Milimani Law Courts wrote back to M/s Ameka & Company Advocates on 14th November 2014. He informed the said advocates that the Memorandum of Appearance; the Notice of Change of Advocates; and the Written Statement of Defence were not on the court file.

22. On his part, the defendant deemed the absence of those documents from the court file as constituting collusion between the staff at the Court Registry, with the advocates for the plaintiff.

23. The advocates representing the plaintiff, understandably, took great exception to the suggestion that they had worked in cahoots with the staff at the Court Registry to remove documents from the court file.

24. At the moment, the Court has seen copies of the Memorandum of Appearance, the Notice of Change of Advocates, and the Written Statement of Defence, which the defendant annexed to his supporting affidavit. However, the originals of those documents were not on the court file.

25. On the face of the respective documents, are affixed the impression of the Court Stamp, showing that the Memorandum of Appearance was filed on 8th October 2014, and that the Defence was filed on 22nd October 2014.

26. This court was not provided with evidence to prove that those documents were forgeries. Therefore, on a prima facie basis, I find that the said documents are genuine.

27. Being of that persuasion, it would follow that after Entering Appearance on 8th of October 2014, the defendant had 14 days to file his defence.

28. As the defence was filed on 22nd October 2014, that means that the said defence was filed within time, as stipulated by Order 7 Rule 1 of the Civil Procedure Rules.

29. The defendant served the Defence and the Notice of Change of Advocates upon the plaintiff's advocates on 27th October 2014. By that date, the court had not yet granted judgement in favour of the plaintiff. It was not until 2 days later that judgement was entered. That would imply that by the time the court was entering judgement, the advocates for the plaintiff had already been served with the defence. That may, at the first instance, appear to be strange.

30. However, it is important to bear in mind the fact that the Request for Judgement was filed in court on 15th October 2014. In other words, by the time the plaintiff applied for judgment, in default of appearance, the defendant had not served the plaintiff with the Memorandum of Appearance.

31. I find that the plaintiff cannot therefore be faulted for applying for judgement on 15th October 2014. I so find because the plaintiff could not have known that the defendant had entered appearance before service was duly effected upon the plaintiff.

32. On the other hand, the defendant entered appearance within the time allowed by law, but he did not serve the plaintiff. For some inexplicable reason, the process server went to the wrong building, to serve the plaintiff's advocates. Obviously, the advocates were not at the Panafric Insurance Building Hurlingham, Nairobi, where the process server went to effect service. M/s Ameka & Company Advocates had offices at Mpaka Plaza, Mpaka Road, Westlands, Nairobi.

33. Order 6 Rule 2 (3) of the Civil Procedure Rules provides as follows;

> ***"Where the defendant appears by delivering the memorandum of appearance as required under subrule (1) he shall within seven days from the date on which he appears serve a copy of the memorandum of appearance upon the plaintiff and file an affidavit of service".***

34. The defendant failed to serve the plaintiff with the memorandum of appearance within 7 days of filing.

35. According to the plaintiff, it was necessary for the defendant to seek leave from the court to enlarge time for the service of the Memorandum of Appearance.

36. On my part, I do not think that there was need to seek an extension of time to serve the Memorandum of Appearance.

37. The failure to file the Memorandum of Appearance on time, allowed the plaintiff to apply for judgement.

38. Similarly, if the plaintiff was not served with the Memorandum of Appearance, he would be entitled to assume that the defendant had not entered appearance. He would then be entitled to apply for judgement in default of appearance.

39. In this case, therefore, the plaintiff was right to have assumed that no appearance had been entered, as she had not been served with a Memorandum of Appearance within the time stipulated.

40. But the truth is that the defendant had entered appearance. Indeed, the court has been provided with a

court receipt dated 8th October 2014, which was said to have been issued when the defendant entered appearance. The authenticity of that receipt has not been challenged. Therefore, on a prima facie basis, I find that the receipt, coupled with the duly stamped Memorandum of Appearance confirms that the defendant entered appearance on 8th October 2014.

41. In the circumstances, the defendant had upto 15th October 2014, to file his defence.

42. By applying for judgement on 15th October 2014, the plaintiff must be deemed to have moved the court prematurely. However, the plaintiff cannot have known that she was acting prematurely because she had not been served with the Memorandum of Appearance.

43. Another question that arises in this case is what happens if a defendant has filed a defence without having entered appearance: can the court enter judgement in default of the appearance?

44. In my humble opinion, when a party had filed a defence, the court should not proceed to enter judgement even when that defendant had not entered appearance.

45. The court cannot ignore a defence which was on record, on the grounds that the said defence was not preceded with a Memorandum of Appearance.

46. Another issue of concern in this case is that the court entered judgement as prayed in the plaint, which therefore made it possible for a Decree to be extracted.

47. In effect the judgement was for;

> **"a) The balance of the purchase price in the sum of Kshs. Kshs. 50,000,000.00.**
>
> **b) The loss of investment by way of interest upon the balance of the purchase price sum from 30th January, 2012, to date of plaint, in the sum of Kshs. 21,527,625.20/-.**
>
> **c) Interest on the total sum of Kshs. 71,527,625.20 as general damages on compound basis at commercial rates or such other rate as the court may apply from the date of filing suit until payment in full.**
>
> **d) Costs of this suit.**
>
> **e) Any other or further relief that this Honourable Court may deem fit to grant"**

48. Clearly, prayer (c), above, is cited as being General Damages. Therefore, the plaintiff appreciated that that claim was not for a liquidated amount. For that reason, it would have been necessary for the plaintiff to lead evidence to prove her claim for the General Damages, before the court could determine whether or not the same could be awarded.

49. In the circumstances, it was wrong for the court to have entered a final judgement for all the claims in the plaint, when the plaintiff had acknowledged that one of the reliefs she was seeking was General Damages.

50. In **TRUST BANK LIMITED Vs ANGLO AFRICAN PROPERTY HOLDINGS LIMITED & 2 OTHERS, Hccc No. 2118 of 2000,** Ringera J. (as he then was) stated as follows;

> ***"A claim does not become a liquidated demand simply because it has been quantified. To qualify as a liquidated demand, the amount of a claim must be shown to be either already ascertained or capable of being ascertained as a mere matter of arithmetic. I adopt the***

following definition of a debt or liquidated demand from THE SUPREME COURT PRACTICE [1985] VOLUME 1, at page 33;

'A liquidated demand is in the nature of a debt, i.e. a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a "debt or liquidated demand", but constitutes "damages"….

The words "debt" or "liquidated demand" do not extend to unliquidated damages, whether in tort or in contract, even though the amount of such damages be named at a definite figure".

51. On the basis of that definition, I find that the relief in prayer (b) of the plaint, is also not a liquidated demand. That is therefore another reason why the learned Deputy Registrar erred by granting a final judgement.

52. For all those reasons, the judgement entered on 29th October 2014 was irregular. It must therefore be set aside.

53. In the result, I allow the application dated 17th November 2014, and set aside the Judgement against the defendant.

54. As regards the costs of the application, I find that the failure by the defendant to serve the Memorandum of Appearance, was a major contributor to the events that culminated in the court granting judgement against him. Therefore, it would be unfair to saddle the plaintiff with the costs which have arisen from a default of the defendant.

55. I order that each party should pay his or her own costs, of the application.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **23rd day** of **June** 2015.

FRED A. OCHIENG

JUDGE

<u>Ruling read in open court in the presence of</u>

Mrs. Ameka for the Plaintiff

Nzioka for Kiprop for the Defendant

Collins Odhiambo – Court clerk.