



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL, COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 190 OF 2005

RELIABLE ELECTRICAL ENGINEERINGPLAINTIFF

VERSUS

MANTRAC KENYA LIMITED.....DEFENDANT

RULING

1. Judgement on the defendant's Counter Claim for Euros 77,653.38 was entered by Consent on the 7th December 2006. That consent was recorded before Court presided over by Justice Maraga (as he then was, now a Court of Appeal Judge).

2. The Notice of Motion dated 25th August 2006 is filed by the Plaintiff who seeks the following prayers:

Pending the hearing and determination of this application of this application, this honourable Court be pleased to order a stay of execution of the decree dated 21st March 2014 and all consequential order herein.

3. My comments on that prayer are in two folds.

4. Firstly the decree the defendant is executing against the Plaintiff was issued on 21st February 2007 and not on the 21st March 2014 as stated in the Plaintiff's Notice of Motion under consideration.

5. Secondly, the Plaintiff by the above prayer sought stay "pending the hearing and determination of" the Notice of Motion. That Notice of Motion was finally heard before me on 23rd June 2015. It shall be determined by this Ruling. The stay therefore can only be until this Ruling is delivered. The Plaintiff is bound by the terms of the prayer it presented in its application. That position is rudimentary in Law, that a Party is bound by its pleadings. I refer to the case **ADETOUN OLADEJI (NIG) LTD -Vs- NIGERIA BREWERIES PLC S.C. 91/2002**. This case was relied upon by our Court of appeal in the case **INDEPENDENT ELECTORAL and BOUNDARIE COMMISSION & ANOTHER -V- STEPHEN MUTINDA MULE & 3 OTHERS** where the judges of appeal referred to the judgment of Pius Aderemi J.S.C. thus;

".....it is now a very trite principle of law that parties are bound by their pleadings and that any

evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

Another judge in that case stated:

“In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

6. It follows that in whichever way this Ruling goes the Plaintiff stay of execution will be vacates.

BACKGROUND

7. The Plaintiff by this action sought order of specific performance to compel the defendant supply of four generators as agreed by contract.

8. The defendant filed a defence and counter claim. By its Counter claim it alleged the Plaintiff's cheques for the total amount of Euros 77,679.21 had been dishonoured. It therefore sought judgment for that amount plus interests and costs.

9. By a Notice of Motion dated 25th August 2006 the defendant sought the Plaintiff defence to its Counter Claim be struck out and judgment be entered for the defendant for Euros 77,638.38.

10. As stated above on 7th December 2006, Parties by consent had judgment entered in favour of the defendant against the Plaintiff for Kshs. 77,653.38 together with interest. The costs of the Counter claim were held in abeyance. It is that judgment that is the subject of the Plaintiff's application for stay of execution.

NOTICE OF MOTION DATED 22ND APRIL 2014

11. The Plaintiff by that Notice of Motion seeks stay of execution on four main ground viz:

- ***That the Plaintiff was not served with the Notice to Show Cause.***
- ***That the process server lied in his affidavit of service.***
- ***That there was an order that defendant's costs be held in abeyance.***
- ***That the Suit has not been finalized and the Parties advocate's hold in their joint account Euros 50,000.***

12. I can confirm that the defendant execution process does not include costs of the Counter Claim as alleged above by the Plaintiff.

13. The Plaintiff did not lay a basis why execution should be stayed. The opening of a joint account for the deposit of Euros 44,334 was ordered by this Court on 31st March 2006 as a condition to the granting of mandatory injunction compelling the defendant to release the generators to the Plaintiff. That being so it cannot be said to be a basis to stay of execution of decree in favour of the defendant.

14. Two grounds having failed there remains two grounds which in reality are one. That the Plaintiff was not served with the Notice to Show Cause which led to the proclamation of its goods.

15. The Plaintiff's application is supported by the affidavit of Mohamed Ali Salim, one of its directors. He deponed that contrary to the affidavit of service sworn by Alex Philip Nzuki on 18th March 2014, he was not served with the notice to Show Cause and consequently he did not attend the hearing of that notice on 21st March 2014. The reason he gave for stating he could not have been served with that notice was because he on 7th March 2012 (note, not 2014) had travelled to Nairobi from Mombasa.

16. Alex Philip Nzuki stated thus in his affidavit of service:

- *That on 10th day of March 2014, I received copies of NOTICE TO SHOW CAUSE dated 12th day of November 2012 with an Hearing Notice appended thereon for hearing on 21st day of March 2014 for the Firm of HAMILTON HARRISON & MATHEWS ADVOCATES through MOGAKA OMWENGA & MABEYA ADVOCATES with specific instructions to effect service upon RELIABLE ELECTRICAL ENGINEERING LTD and S. RUWA & CO. ADVOCATES.*
- *That on the same day as per instructions and directions given by the advocates for the plaintiff I proceeded to the offices of RELIABLE ELECTRICAL ENGINEERING LTD adjacent to Makupa Police Station. On arrival at around 10.30am, I met the plaintiff's claims manager MR. SALIM who was personally known to me having served him previously with other court documents. I introduced myself to him and the purpose of my visit after introduction, I tendered to him personally a copy of notice to show cause which after pursuing he acknowledged the service for and on behalf of the company but declined to append his signature on my service copy on grounds that he has to go and see the company's lawyer MR. S. RUWA & CO. ADOVCATES for further direction.*
- *That at about 11.45, I proceeded to EXIDE BUILDING, 1st FLOOR along Jomo Kenyatta Avenue and served the firm of S. RUWA & Co. Advocates with a copy of the Notice to Show Cause which they acknowledged but the secretary declined appending her signature without a consent from his boss.*

17. It needs to be mentioned that the plaintiff's application is also supported by an affidavit of ZENA FARAJ MAHRUS, who describes herself as the secretary at the firm of S. Ruwa & CO. Advocates. She deponed

“That at no time has a person in the (sic) of Alex Philip Nzuki approached me in our office to serve us with the Notice to Show Cause.

That the affidavit of service of one Alex Philip Nzuki is false and he is lying the (sic) honourable court.”

18. The court ordered Alex Philip Nzuki to be cross-examined on his affidavit of service. On being cross examined by Counsel for the plaintiff he was adamant that he served the notice upon Mr. Salim, whom he had previously served with court documents on 10th March 2014. He was also adamant that he served the secretary of S. RUWA & Co. advocates. My observation of Nzuki was that he was a truthful witness. I believed him.

19. The Plaintiff's reliance on an electronic airline ticket issued under the Letter Head of Bunson travel Service did not discharge its burden of proof.

20. It did not discharge that burden firstly because the ticket shows Mr. Salim Mohamed travelled to Nairobi on 7th March 2012 not 2014.

21. Secondly, it did not discharge the burden because the Plaintiff did not provide proof of actual travel by Mr. Salim Mohamed. The plaintiff should have provided a boarding pass to prove actual travel. An airline ticket does not prove one actually travelled. It is the boarding pass and dare I say other confirmation from the airline that he actually boarded the plane that would suffice. This is particularly because electronically, one can print a boarding pass but not actually travel.

22. The Plaintiff's Notice of Motion dated 22nd April 2014 fails for the reasons stated above.

CONCLUSION

23. The Notice of Motion dated 22nd April 2014 is dismissed with costs to the defendant. The stay previously granted to the Plaintiff is hereby vacated.

DATED and DELIVERED at MOMBASA this 24th day of September, 2015.

MARY KASANGO

JUDGE

24.9.2015

Coram

Before Justice Mary Kasango

Court Assistant:-

For the Plaintiffs:-

For the Defendants:-

Court:

Ruling delivered in their presence/absence in open court.

MARY KASANGO

JUDGE