



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 303 OF 2014

RADHESHYAM TRANSPORT LTD..... PLAINTIFF

VERSUS

CORPORATE BUSINESS CENTRE LTD..... DEFENDANT

RULING

1. The subject matter of this ruling is the motion dated 19.10.2015 taken out by Corporate Business Centre Limited, the defendant herein. In the aforesaid motion, the defendant sought for the following orders inter alia:
 1. ***THAT this application be certified as urgent, and heard ex-parte in the first instance***
 2. ***THAT Murgor & Murgor Advocates be allowed to appear on record and make this application on behalf of the defendant***
 3. ***THAT this honourable court does order that the purported process server, Mr. Dickson Musyimi., appear at the inter partes hearing of this application, for cross examination of his affidavits of service sworn on 14th April 2015, and 3rd September 2015.***
 4. ***THAT pending hearing and determination inter partes of this application, an order be issued restraining the plaintiff/respondent by itself, its agents, auctioneers, employees or proxies from executing for recovery against the defendant/applicant the amount indicated in the warrant of sale of movable property dated 16th September 2015, or any portion thereof.***
 5. ***THAT pending hearing and determination inter partes of this application this honourable court be pleased to stay the execution of the judgment, decree and warrants of attachment and sale of movable property, herein.***
 6. ***THAT this honourable court be pleased to set aside its judgment against the defendant/applicant herein dated 11th May 2015 and the decree and warrants of attachment and sale of the defendant/applicant's property.***
 7. ***THAT this honourable court be pleased to stay all further proceedings in this suit pending reference of the dispute to arbitration.***
 8. ***THAT the proceedings between the plaintiff and defendant herein be referred to arbitration in accordance with the provisions of section 6 of the Arbitration Act and clause 45 agreement and conditions of contract for building works (AAK) which governs the relationship between the plaintiff/respondent and defendant/applicant.***
 9. ***THAT an injunction do issue to restrain the plaintiff/respondent, its appointed auctioneers or court brokers appointed by it or any person whatsoever for it or on its behalf from threatening, harassing and/or in any way intimidating or procuring the threatening, harassment and intimidation of the defendant/applicant, its Directors, officers, employees, servants or agents or any visitor of the plaintiff to the suit premises pending the hearing and determination of its application and proceedings***

10. ***THAT an injunction do issue to restrain the plaintiff/respondent's appointed auctioneers or court brokers or any person whatsoever for it or on its behalf from interference in any way with the defendant/applicant property pending the hearing and determination of this application and proceedings.***
11. ***THAT this honourable court does order the plaintiff/respondent, to refund to the defendant/applicant kshs.6,00,000/= forcefully and unlawfully obtained from the defendant/applicant's director on 15th October 2015, under duress.***
12. ***THAT the plaintiff/respondent's do pay the defendant/applicant's cost of this application.***

2. The motion is supported by the two affidavits sworn by Kiran Patel. When served, Radheshyam Transport Ltd filed the replying affidavit of Ravji Lalji Kerai to oppose the motion.

3. I have considered the oral submissions of learned counsels from both sides. I have also considered the material placed before this court. It is the submission of Mr. Mungai, learned advocate for the defendant that the relationship between the plaintiff and the defendant is governed by clause 45.0 of the Agreement and Schedule of Conditions of Building Contract (AAK) and Bills of Quantities which provides that in case of any dispute or difference the same be referred to Arbitration. It is said that the plaint does not mention such a clause. The defendant avers that no summons to enter appearance was served hence the exparte judgement in default of appearance was irregularly obtained. The plaintiff on the other hand avers that there was no written contract between the parties though there was passage of documents descriptive of the construction site and a bill of quantities intended to estimate the expected works to be carried and their value. The defendant was emphatic that no written agreement was executed between the parties to the said works. The plaintiff further argued that the alleged form of agreements and schedule of conditions of Building Contract was not signed by the parties and as such it did not govern the terms of the parties' engagement, hence there was no agreement that the dispute between the parties would be resolved by arbitration. The plaintiff further argued that the summons were duly served upon the applicant's director, Kivan Patel. The deponent of the replying affidavit averred that he was informed by Dickson Musyimi that the signatures in the various affidavits of service are his.

4. From the submissions and the material placed before this court three issues have emerged for the determination of this court vide this motion.

- i. **Whether or not service of summons was effected?**
- ii. **Whether or not there is any discrepancy in the signatures appended to affidavit of service of Dickson Musyimi and what is the effect?**
- iii. **Whether the parties entered into a written contract, if yes whether the same has an arbitration clause?**

5. The question as to whether or not the defendant was served with the summons to enter appearance can be answered by examining the relevant affidavits. The record shows that judgment in default of appearance was entered against the defendant on 11.5.2015 pursuant to the request for judgment dated 23rd April 2015. The aforesaid request was accompanied by the affidavit of service sworn by Dickson Musyimi sworn on 14 April 2015. According to the aforesaid affidavit of service, Dickson Musyimi avers that he was directed by Mr. Wachira the learned advocate for the plaintiff to visit Farm Auto Spares where the defendant's managing director worked. The process server stated that he was ushered into the offices of Kivan Patel by Lydia Wangechi, where he allegedly served him with the summons. Prima facie, it would appear the process server served the summons upon Mr. Kivan Patel. However this court has been asked to compare the process server's signature appended to an affidavit of service of 3rd September 2015 and that of 14.04.2015. In the affidavit of 3rd September 2015, the process server claims he visited the same offices and this time round he served the receptionist of Farm Auto Spares. It is admitted by Ravji Lalji Kevai that the signatures in the two affidavits are totally different but he avers that the process server informed him that the signature are his. In my view I do not think the plaintiff appreciated the consequence of such discrepancies. It behoved upon the plaintiff to secure an affidavit from the process server to shed light on how he signed such vital documents using

different signatures. This creates doubt as to whether or not summons were served. The plaintiff obtained judgment using an affidavit which is in doubt. I have entertained some doubt as to whether or not service of summons was effected.

6. The other question which was ably presented is whether or not there was a written agreement. A reading of the pleadings and the documents exchanged between parties will reveal that indeed the parties did not execute a written agreement. What is apparent is that the parties exchanged documents. Those documents include agreement and conditions of contract for buildings which in article 45 (1) the provision of any dispute being referred to arbitration. By a letter addressed to the firm of Wachira Ndungu & Co. Advocates the defendants advocates talks of any dispute arising from the aforesaid agreement should go to arbitration.
7. In my view, though there was no written agreement executed, one can easily infer that from the conduct of the parties and from the correspondences exchanged, that the parties intended to refer any dispute arising from their relationship to arbitration. The plaintiff correctly stated that no written agreement was executed but it failed to disclose the fact that all indications are that they intended to refer their disputes to arbitration.
8. In the end, I am convinced that in the circumstances of this case that there was no credible service of summons. Consequently the motion dated 19.10.2015 is well founded. It is allowed in terms of prayers 6, 7, 8 and 11 save that costs shall abide the outcome of the suit.

Dated Signed and Delivered in open court this 20th day of November, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

.....for the Defendant