



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO 32 OF 2013

ATLAS COPCO CUSTOMER FINANCE LTD.....PLAINTIFF

VERSUS

POLARIZE ENTERPRISES LIMITED..... DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Chamber Summons application dated and filed on 13th August 2013 was brought under the provisions of Order 40 Rule 1, 2 and 5 and Order 22 Rule 22 and Order 10 Rule 11, Section 3A of the Civil Procedure Rules and other enabling provisions of the law prayer Nos (a), (b) and (c) are spent. It sought the following remaining orders:-
 - a. **Spent**
 - b. **Spent**
 - c. **Spent**
 - d. **THAT the interlocutory judgment that was entered against the Defendant/Applicant be set aside and the Plaintiffs/Respondents or their agents, assignees, or and employees be restrained from selling, advertising for sale or and disposing or interfering with applicant motor vehicle KBN 281 D or any of the applicants goods pending the hearing and determination of this suit.**
2. The grounds under which the application was based can be summarised as follows:-
 - i. **THAT the Affidavit of service was falsified as the Plaintiff was never served with the pleadings in this matter.**
 - ii. **THAT the Plaintiff was not served with any proclamation by Keysian Auctioneers and only became aware of the suit herein when its motor vehicle registration No KBN 281 D was attached on 8th August 2013.**
 - iii. **THAT the said motor vehicle was the only tool of the Plaintiff which was engaged in the business of drilling boreholes in Kenya and that if it was not released, the vehicles entire system was likely to collapse as a result of which the Plaintiff would suffer loss and damage.**

AFFIDAVIT EVIDENCE

3. The said application was supported by the affidavit of James K Mutia, the Plaintiff's Managing

- Director. It was sworn and filed on 13th August 2013. He denied that the Defendant was ever served with any documents and contended that the Defendant would never have ignored the Plaintiff's claim which was more than Kshs 40,000,000/= or the Notice of Entry of Judgment if the same had been served upon the Defendant.
4. He said that he was aware that the firm of M/S Walker Kontos & Co Advocates issued a demand letter for the sum of \$ 126,570.07 but averred that the Plaintiff had not yet responded to the Defendant's request regarding harmonisation of the amounts payable.
 5. He deponed that the Defendant had a good defence. He attached a draft Defence which was marked as "LKM 6" and prayed that the default judgment be set aside to enable the Defendant defend the suit.
 6. In its Replying Affidavit sworn on 3rd September 2013 by Joseph Muchina, the Defendant's Business Controller and filed on 4th September 2013, the Plaintiff said that its officers had inspected the subject motor vehicle and found the same to have been in a very poor condition. However, it was its contention that the said vehicle could stay for a long period without operation provided that the fluid was refilled before operating the same in future. It said that the poor state of the said vehicle was in breach of Condition 12 of Appendix 1 to the Supplier Credit Agreement that stipulated that the Defendant was to maintain and repair the vehicle so that it could remain in good operating condition and appearance.
 7. The deponent stated that the Summons to Enter Appearance, Plaintiff and Notice of Entry of Judgment were served upon the Plaintiff. He added that James Mutia had not denied that his name was Jimmy Mutia or that the telephone number given in the Affidavit of Service was not his or that the Defendant's offices were situated at Mirage Plaza 1st Floor Mombasa Road where he was served with the said documents.
 8. He said that there was a meeting between the Plaintiff and the Defendant about payments pursuant to which the Defendant issued the Plaintiff with cheques totalling \$ 10,000. However, the said cheques were dishonored by the Defendant's bank and they were now in the Plaintiff's possession.
 9. It was his further contention that the Defendant had not deposited into court or paid the sums that were not in dispute and that the Defendant having failed to demonstrate that it would suffer irreparable loss that could not be compensated by way of damages and the fact that the Defendant was guilty of material non-disclosure of facts and contractually bound to honour all the covenants in the Supplier Credit Agreement, its application was without merit and ought to be dismissed with costs.
 10. On 14th November 2013, the Defendant filed a Further Affidavit. It was sworn on 13th November 2013 by the said James Mutia. He averred that there were many issues in contention which necessitated that each party be given a chance to be heard. He added that this court had power to order that the Defendant furnish security before making an order for restitution of property under Order 22 Rule 22 (3) of the Civil Procedure Rules.
 11. In a Supplementary Affidavit sworn by Faustus Alunga Mulama on 19th November 2013 and filed on the same date, the deponent was emphatic that his Affidavits of Service filed on 19th April 2013 and 18th July 2013 evidenced how the said James Mutia was served and that the Plaintiff's averments that it was not served with the court documents were not true.

LEGAL SUBMISSIONS BY THE DEFENDANT

12. In its written submissions dated 30th November 2013 and filed on 2nd December 2013, the Defendant submitted that this court could grant injunctive orders under Order 40 of Civil Procedure Rules, 2010, stay the execution of a decree and set aside the interlocutory judgment under Order 22 Rule 22 and Order 10 rule 11 of the said Rules.
13. It relied on the cases of **Joseph Mbau Gitau vs Joreth Limited and Another (2013) eKLR**, **Church Commissioners of Kenya vs Julia Ayego and 4 others (2006) eKLR** and **Erastus Adero Gog vs Nicodemus Waite and 2 others (2006) eKLR** where the common thread was that if there were triable issues in a Defence, it was in the interests of justice that a Defendant be given an opportunity to file its Defence.
14. In his oral submissions, counsel for the Defendant added that the contract was frustrated by acts beyond the Defendant's control as the machine and accessories arrived in Kenya in two (2)

different containers.

LEGAL SUBMISSIONS BY THE PLAINTIFF

15. The Plaintiff's written submissions were dated 16th December 2013 and filed on 24th January 2014. It argued that the Defendant was served with the court documents and that the Defendant's Defence was a sham and a denial of the debt as the Defendant had made false promises of payments and issued bouncing cheques.
16. The Plaintiff referred the court to the cases of **Benson Mwaringa vs Rhoda Gali Kazungu (2010) eKLR** where the court held that a person who comes with unclean hands is not deserving of the court's discretion and **KCB Limited vs Philemon K Kiano and Another (2006) eKLR** where the court refused to set aside the interlocutory judgment as service was affected.
17. It therefore urged this court not to exercise its discretion in setting aside the interlocutory judgment herein as there were no triable issues raised in the Defence. Counsel for the Plaintiff also emphasised its arguments when it orally highlighted the Plaintiff's written submissions.

LEGAL ANALYSIS

18. The first thing that this court wants to point out is that there was an Arbitration Clause in the Supplier Credit Agreement Appendix 1. It does not have an execution page signifying that the parties had entered into the same. However, as the same was not dispute, this court can only make an inference that the said Agreement was fully executed by the parties.
19. Clause 31 on the Supplier Credit Agreement Appendix 1 deals with the Applicable law and Arbitration. It stipulates as follows:-

“All disputes arising out of or in connection with this Agreement shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with said rules. The arbitration shall take place in Stockholm, Sweden be held in English, and the substantive law of Sweden shall govern. Notwithstanding the above, the Supplier shall always be entitled to seek payment for clear and overdue claims through a court or other authority in Sweden or elsewhere”.

20. Clause 44 of the General Conditions for the Supply of Mechanical, Electrical and Electronic Product Brussels, August 2010 as regard disputes and applicable law provided as follows:-

“All disputes arising out of or in connection with the contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said rules”.

21. This court has found it necessary to look at the question of jurisdiction as that definitely goes to the root of this matter. It is evident that the Supplier could seek payment for clear and overdue claims through a court or other authority in Sweden or elsewhere. Accordingly this court is satisfied that it has jurisdiction to entertain the matter herein.
22. It is also important to point out that, the court would still have had jurisdiction to deal with this matter as there are no orders in place, staying the proceedings herein as would have been envisaged in Section 6 of the Arbitration Act Cap 49 (laws of Kenya).
23. The court now wishes to turn its attention to the issue of service of the Summons to Enter Appearance and Plaintiff and the Notice of Entry of Judgment.
24. According to the Affidavits of Service sworn by Faustus Alunga Mulama on 16th April 2013 and 16th July 2013, Jimmy Mutia, a director of the Defendant was the one who was said to have been served with the said documents. This is also what is stated in the Supplementary Affidavit also sworn by Faustus Alunga Mulama on 19th November 2013. The Defendant contended that the averments in those affidavits were untrue.
25. It must be noted that failure to acknowledge receipt of court process is not sufficient proof that service was not effected and as was rightly pointed out by the Plaintiff, it is a common occurrence amongst debtors. On the hand, a debtor may not have acknowledged receipt of court process

- because such process may not have been served upon him. These are the two (2) sides to the coin.
26. In a case where it is one party's word against the other, great assistance is given to the court when a process server is cross-examined on the contents of an Affidavit of Service. In the absence of oral evidence, the court is left with little option but to rely on the documentation that is placed before it to make a determination as to whether or not service of court process was effected.
 27. In an email dated 29th September 2011 by the Defendant to the Plaintiff, the court notes that the same was signed by Jimmy Muita, Sales Director. The Supplier Credit Agreement on page 4 of the Plaintiff's Replying Affidavit gives his telephone contact as 0722-525172 which is the same telephone contact in the aforesaid Affidavit of service sworn on 16th April 2013 and filed on 19th April 2013.
 28. As was submitted by the Plaintiff, this court has noted that the Defendant did not deny or rebut the Plaintiff's assertions that the mobile telephone number indicated in the aforesaid Affidavit of Service belonged to James Mutia. It did not also deny that its offices were situated on 1st Floor Mirage Plaza, Mombasa Road, Nairobi.
 29. In the circumstances foregoing, in the absence of any evidence to the contrary, this court finds that the Defendant was duly served with the court process. The interlocutory judgment entered herein cannot therefore be set aside on this ground.
 30. Having said so, it behoves the court to move another step to establish whether there were triable issues raised in the draft defence.
 31. In paragraph 3 of the draft defence the Defendant stated that the agreement was for the purchase of 1XTH10LM Waterwell Rig for \$ 309,572 and drilling tools and accessories for \$ 99,454.97 and an estimated cost of freight for \$ 25,000 giving a total of \$ 434,027.67. In the Supplier Credit Agreement dated 8th August 2012, the Equipment referred to is 1XTH10LM Waterwell Rig at a price of \$ 434,027.67. It does not refer to drilling tools and accessories. It was the Defendant's contention that the said drilling tools and accessories were not supplied by the Plaintiff contrary to the Supplier Credit Agreement which forced it (the Defendant) to purchase the same at its own cost.
 32. This court is of the view that the questions of what the equipment consisted of and who was responsible for its clearance at Mombasa Port leading to its sale by public auction are triable issues that cannot be answered by way of affidavit evidence.
 33. This issue of the drilling tools and accessories is very critical as it is evident from Exhibit "LKM 4" attached to the Defendant's Supporting Affidavit that the Plaintiff executed an agreement dated 2nd May 2012 indicating that, following the auction of the drilling tools and accessories by Kenya Customs and Excise Department, the Plaintiff would meet part of the loss amounting to \$ 54,000. This was not an aspect that was taken into account and/or alluded to in the Plaint filed on 18th December 2012 or the demand letter dated 9th July 2012 from M/S Walker Kontos & Co Advocates to the Plaintiff marked as "LKM 5".
 34. Going further, it is not lost to the court that the said letter demanded a sum of \$ 126,570.07 from the Defendant. This is a different figure from what is shown in the Plaint. In the said Plaint, the Plaintiff was claiming a sum of \$ 441,819.55 being the total amount overdue as at 30th November 2012 together with overdue interest at 2% per month and a further fixed contract interest at 11% on total amount overdue as from 30th November 2012 until full payment.
 35. The fixed rate of 11% was conditioned to the present agreement being duly signed and returned the Supplier prior to 28th May 2010 and the same was clearly shown. However, the basis of the charge of overdue interest of 2% per month is not shown in the Supplier Credit Agreement.
 36. The elaborate computation of interest is an issue that this court would want to interrogate further to satisfy itself that the same tallies with the sum claimed in the Plaint. This is particularly important because the Plaintiff's advocates had claimed a different figure about five (5) months before the suit herein was filed and the margin between the two (2) figures was very substantial.
 37. For the foregoing reasons, this court finds that there are triable issues that need to be resolved in a full trial thus necessitating the interlocutory judgment herein being set aside.
 38. Be that as it may, the court is not satisfied that the Defendant is not indebted to the Plaintiff. Indeed, in paragraph 8 of its Supporting Affidavit the Defendant did state that once proper account is taken, it would be in a position to pay the balance.
 39. The court is of the view that it was superfluous for the Defendant to have brought its application

- under so many orders. It does appear to the court that it was chancing on whatever order would be favourable to them.
40. Under all the orders that the Defendant has sought a relief, the court can exercise discretion in the Defendant's favour but upon such term as the court would deem just.
 41. If the court were to proceed under Order 22 Rule 22 of Civil Procedure Rules, 2010 and which it thinks was not a correct provision to come under, the Defendant would have been expected to provide security for restitution of its property. The Defendant had sought the release of the motor vehicle pending the hearing and determination of the application. As the vehicle was not released during the pendency of the application herein, the prayer was spent. There was no extension of the said prayer pending the hearing and determination of the suit. Parties are bound by their pleadings and this court can only grant prayers that have been sought by parties.
 42. If the court was to proceed under Order 10 Rule 11 which this court believes ought to have been the correct procedure, it would still have had power to order terms which it felt were just in the circumstances before it set aside the interlocutory judgment herein.
 43. On this ground and bearing in mind that this court has inherent power under Section 3A of Civil Procedure Act Cap 21 (laws of Kenya) to make such order as may be necessary for the ends of justice, this court could very well order that the Defendant deposits the decretal sum while parties litigate the matter herein.
 44. However, the court cannot order the Defendant to deposit monies in a joint interesting account in the names of its advocates and those of the Plaintiff as the Plaintiff would still be in possession of the said motor. It would be double jeopardy for the Defendant.
 45. Indeed, this court finds itself in a dilemma because if it cannot order for restitution of the motor vehicle when the same has not been sought by the Plaintiff. If at all, the proper way of couching the orders would have been to also seek a prayer for the release of the subject motor vehicle and provide security pending the hearing and determination of the suit herein.
 46. The court cannot purport to assume to know what the Plaintiff was actually seeking in its application as there is a lot of confusion. In view of the fact that the orders sought by the Defendant were not properly couched, this court can only grant the orders as sought to avoid descending into the arena of the dispute between the Plaintiff and the Defendant.

DISPOSITION

47. Accordingly, having found that the Defendant's Notice of Motion application dated and filed on 13th August 2013 is merited, this court hereby grants prayer No (d) and (e) of the said application with a rider that, the Defendant is hereby directed to file and serve its Defence within fourteen (14) days from the date hereof. All consequential orders issued herein pursuant to the entry of the interlocutory judgment are also set aside.
48. Costs in the cause.
49. Orders accordingly.

DATED SIGNED and DELIVERED at NAIROBI this 31st day of March 2014

J. KAMAU

JUDGE