



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 848 OF 2010

CAPE SUPPLIERS LIMITED ::::::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

SINOHYRDRO CORPORATION LIMITED ::::::::::::::: DEFENDANT

R U L I N G

1. The application before the Defendant's Amended Notice of Motion dated 16th July 2012 and filed in court on 17th July 2012. The application seeks the following orders:-

1. *The application be certified as urgent and be heard on priority basis.*
2. *Pending the hearing and determination of this application inter-partes, this honourable court be pleased to issue an order staying the execution and/or further execution of the decree issued by this court on 2nd December 2011 and all the consequential orders including but not limited to attaching and selling the movable property of the Defendant.*
3. *Pending the hearing and determination of this application inter-partes, this honourable court be pleased to issue an order restraining the Plaintiff's agents and/or auctioneers, Ms Keysian Auctioneers from releasing to the Plaintiff, any money obtained from the Defendant in execution of the decree.*
4. *This Honourable court be pleased to set aside and/or vary the Judgement in default of appearance entered against the Defendant herein on 14th July 2011 and the final judgement dated 22nd September 2011, and the consequential decree or orders made therefrom.*
5. *The Defendants be given an opportunity to unconditionally defend the suit against it on merits.*
6. *The costs of this application be provided for.*

2. The application is premised on the several grounds set out therein and the affidavit of **XIAN ANQUAN** also sworn on **16th July 2013**.

3. The brief background of the application is as follows. The Defendant's Company incorporated in China and duly registered in Kenya and at all times material to this suit they have been involved in a number of construction projects notably the Nairobi-Thika Superhighway having been contracted by the Government of Kenya. On or about 21st June 2012 persons who identified themselves as agents of M/s Keysian Auctioneers visited the offices of the Defendant along Thika Road. The said auctioneers served the Defendant with a copy of a warrant of attachment of a decree of movable property. The warrants were allegedly in execution of a decree in High Court Civil Case No. 848 of 2010. Previously the Defendant had never been served with summons to appear nor pleadings filed in court against the Defendant corporation specifying the nature of claim against it. Equally, the Defendant had not been served with any proclamation by the said auctioneers. The said auctioneers were indeed threatening to

immediately cart away vehicles and construction machines belonging to the Defendant. The Defendant allegedly acting in fear and duress due to the threats, paid the auctioneers through RTGS system a sum of Kshs.8,614,892/= (being the decretal sum) together with another sum of Kshs.860,000/= being the auctioneers costs. The Defendant later made attempts to its bankers (CFC Stanbic Limited) to stop the RTGS payment to enable it ascertain with the court records on the nature of the claim and orders that might have been made against it. It was however late as the money had already been credited at the Auctioneers bank account. Later, the Defendant instructed its advocates who ascertained with the court records, the proper position leading to the filing of the application now pending before the court.

4. The application is opposed vide a Replying Affidavit of **PETER KINARO** filed in court on **24th May 2013**. In the said affidavit, the application is opposed on grounds *inter-a-alia* that:-

- ***The summons herein were properly served.***
- ***The judgement in default of appearance and defence was entered and the execution process proceeded procedurally.***
- ***When proclamation was done against the Defendant, the Defendant paid the whole decretal sum voluntarily to avoid attachment and that no threats, duress or intimidation was used and that the Defendant wrote a letter marked as 'DW 3' directing it back to pay the decretal sum and the auctioneer fee.***
- ***That this matter is now concluded and this action is an afterthought.***
- ***That the claim is due.***

5. Parties filed written submissions in this matter which I have carefully considered. This is an application to set aside a default Judgement. Where it is established that there was no proper service of summons, the law is that the court has little option but to set aside such Judgement *ex-dibito justiticiae*. Where it is established that the Judgement was served, this court has the unfettered discretion to set aside the default judgement in such terms as may be just and expedient. Accordingly I raise the following issues for determination by this court:-

- i. ***Whether the Defendant was properly served.***
- ii. ***Whether the Defendant have a viable defence.***
- iii. ***Whether this court can exercise its discretion in favour of the Defendant.***

6. According to the court file the sequence of events are as follows:-

- i. ***The suit was filed in court on 8th December 2010 and summons to enter appearance issued on the 14th December 2010.***
- ii. ***A request for judgement was filed in court on 24th June 2011.***
- iii. ***A Judgement in default of appearance was entered on 14th July 2011.***
- iv. ***A decree was issued on the 2nd December 2011.***

7. I have considered the affidavit of served by **DONALD OKONDA** filed in court on **24th June 2011**. I have also considered his **supplementary affidavit** dated **1st July 2011** and filed herein on 24th May 2013. The first issue which I raise is why the supplementary affidavit of service was necessary. This question is pertinent because the supplementary affidavit of service does not raise any issue which is not in the affidavit of service. I have also considered the Applicant's submissions contained in paragraphs 14 and 15 of the written submissions to the effect that Mr. Sha mentioned in both the affidavit of service and the supplementary affidavit of service could actually be Mr. Xia Anquan who has deponed to the supporting affidavit in this application. While I may be wrong, I am rather convinced that the said Mr. Sha is actually Xia Anguan, and if that is correct, then it is clear that at the time the process server alleges to have served the Defendant with the summons, Mr. Xia Anquan was out of the Republic of Kenya and therefore the process server could not have served him as alleged. I have looked at the passport of Mr. Xia Anquan displaced at pages 23 and 24 of the supporting affidavit and I am satisfied that Mr. Xia Anguan

was not in Kenya during that time.

8. That however, does not mean that there is no Mr. Sha who was served by the said process server, except that the Defendant categorically states that they have in their employment nobody going by that name. What the above scenario creates is a situation of doubt. I actually cannot tell whether the Defendant was served in the circumstances, and considering that the said service was allegedly not accepted, it is not possible to make a finding in this regard. As I said earlier, the supplementary affidavit of service serves no purpose as it does not give any additional information on service.

9. It is easier therefore, to give the benefit of the doubt to the Applicant and conclude that since the service of summons herein is in doubt, the Defendant was not properly served with summons to enter appearance.

10. However, it cannot escape the attention of this court that when the Defendant was served with the proclamation of attachment, the Defendant swiftly paid the amount due plus auctioneers fees, and even wrote a mail to its bank authorising payment. That was on 21st June 2012. It is only on 27th June 2012 that the Defendant instructed its advocates to file these proceedings and challenge the Judgement in default. While the Defendant has a right at any time to take an action as it deems fit, it does not escape the attention of this court that the Defendant in more than one way nevertheless acknowledged that he owed the decretal sum to the Plaintiff, the above doubt about service of the process notwithstanding. Further, it is noteworthy that prayer 2 and 3 of the application had been overtaken by events the moment the Defendant paid out the decree as stated above. To salvage the court process, the Applicant then amended the Notice of Motion and created paragraph 3A in which the Applicant seeks that this court be pleased to issue an order that the Plaintiff do refund to the Defendant a total sum of Kshs.9,474,893/= comprising the decretal sum of Kshs.8,614,892/= and the auctioneers fees and/or costs of Kshs.860,000/= received from the Defendant on behalf of and/or under the instructions of the Plaintiff. This prayer acknowledges that the matter before the court was concluded and decretal sum paid and the court became *'functus officio'*. That would be the position had there been on the court record an unequivocal proof of service of summons. The Defendant has acted in a manner to show clearly that it had admitted the claim. The payments were made without force or duress or any threats. A letter was written to the Defendant's bank authorising payment in complete admission of liability, and these proceedings are to me an afterthought.

11. With the foregoing in mind, I make the following orders:-

- 1. The sum of kshs.9,474,982 paid to the Plaintiff shall be deposited in an interest earning account in the names of the parties advocates, and shall act as security for this suit. The said deposit shall take place within 10 days from the date hereof.***
- 2. The Defendant is herewith given an opportunity to defend the suit on its own merits.***
- 3. Costs shall be in the cause.***

DATED, READ AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Gachie for Plaintiff

Ndirangu holding brief for Wanga for Defendant

Teresia – Court Clerk