



IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 95 OF 2014

SHAILESH PATEL

T/A ENERGY COMPANY OF AFRICA ::::::::::: DECREE HOLDER

-VERSUS-

KESSELS ENGINEERING

WORKS PVT. LIMITED ::::::::::: JUDGEMENT DEBTOR

NZOIA SUGAR COMPANY LIMITED ::::::::::: 1ST GARNISHEE

CHEMILIL SUGAR COMPANY LIMITED ::::::: 2ND GARNISHEE

R U L I N G

1. The application before the court is a Chamber Summons dated **14th May 2014**. It is brought under Order 22, and 40 Rule 1 (a), Order 10 Rule 11 of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act.
2. The application seeks the following orders, namely:-
 1. *That this Honourable court in the first instance do certify this application as urgent.*
 2. *That a temporary injunction do issue against the Plaintiff, his servants and or agents restraining them from proclaiming attaching transferring and or the Defendant's credit creditors assets whatsoever pending determination of this application.*
 3. *That there be a stay of execution of the decree dated 5th May 2014.*
 4. *That the interlocutory judgement and ex-parte judgement entered and decree issued against the Defendant on the 5th day of May, 2014 be and is hereby set aside and the Defendant be allowed to file their defence within 15 days from the date of the Ruling of the court on this application.*
 5. *That the Defendants' statement of defence attached hereto raises triable issues.*
 6. *That the Judgement and decree entered on 5th May 2014 are defective, irregular and unilateral and be set aside forthwith.*
 7. *That the costs of this application be in the cause.*
3. The application is premised on the grounds set out therein and is supported by **affidavit** of **RAJESH SAWHNEY** sworn in New Delhi India, and dated **13th May 2014**. To the affidavit is attached a copy of the proposed defence as annexure RS- 1 AND RS – 2 being a requirement for

Polio Vaccination by the Government of India explaining why the deponent is not in Kenya at the time of executing the supporting affidavit.

4. The brief history of the application is as follows. By a Pliant dated and filed in court on 11th March 2014 the Plaintiff claimed a total sum of USD 916,164.00 from the Defendant allegedly arising from commission due to the Plaintiff from the Defendant pursuant to agreement between the parties which agreement was allegedly performed by the Plaintiff more particulars whereof are in the Pliant.
5. Upon the filing of the suit the Plaintiff, vide Notice of Motion application dated 11th March 2014 then sought the leave of the court to serve summons outside jurisdiction by sending the documents by DHL to the registered offices of the Defendants. That leave was allowed by court by the order issued on 14th March 2014 and the Defendant was given 21 days upon receipt of the same to enter appearance in the suit. The Defendant was served with summons and entered appearance in the matter through the firm of Gilani & Company Advocates on 7th April 2014, but failed to file a defence within the stipulated period. The Plaintiff then requested for Judgement on 2nd May 2014 for the sum of USD 916,164.00 together with interest and costs as prayed in the Pliant. That request was granted and a decree issued on 5th May 2014 for USD 916,164 together with costs and interest.
6. By a Notice of Motion application dated 6th May 2014 the Plaintiff sought the leave of the court to execute the decree forthwith before costs were taxed. Together with this application was an application for an order of Garnishee against the 1st and 2nd Garnishees. These applications were allowed. To date there are three Garnishees joined to the suit on allegations that they hold funds for the Defendant which funds should be attached to satisfy the decree herein. These Garnishee applications were stayed to pave way for the hearing and determination of this application which seeks to set aside the aforesaid judgment and decree. The said garnishees have not taken part in this application.
7. This application is opposed. The Plaintiff has sworn a replying affidavit dated 19th May 2014 and filed in court on 26th May 2014 with many annexures.
8. In his supporting affidavit, RAJESH SAWHNEY describes himself as residing at care of 1008, Pragati Tower, Rajendra Place, New Delhi -11008 India. He states that he is a Director of the Defendant Company and is competent to depone to matters before the court. The deponent states that the *ex-parte* judgement was irregular as the Defendant was not served with the Pliant as is required by law. He further depones that the attached proposed defence raises triable issues which require the suit to be heard and determined on its merits. The deponent states that the Plaintiff will not suffer any prejudice which in any event can be compensated for by costs, and that it is the Defendant's constitutional right to be accorded a fair hearing under Article 50 of the Constitution. The deponent avers that there was no contract for the claim in the Pliant, and that the claim was not a liquidated claim and ought to have been set for a formal proof. In denying that the Defendant was served with the summons, the deponent disparages the Return of Service filed by Robert Khamisi Mutuku as a sham and cannot be relied on as proof of service. However, while denying service the deponent does not explain why, and upon which instructions they entered appearance and having entered appearance, why the Defendant failed to file a defence. He does not explain why after allegedly realising that the Pliant was not among the served documents, he did not complain at the time of entering the appearance.
9. In response, the Plaintiff in his affidavit states that the Defendant was served on 15th May 2014 at about 3.30 p.m, through a process involving the court process server pursuant to leave of court for substantiated service. The deponent states that pursuant to that service the Defendant entered appearance but failed to file a defence within prescribed time. The Plaintiff believes that the Defendant failed to file a defence because the Defendant believed that any decree herein would be a paper decree as the Defendant has no property or assets in Kenya. The Plaintiff believes that it is the Garnishee proceedings herein that have alerted the Defendant to the seriousness of the claim. After asserting that summons were served and that the *ex-parte* judgement was regular, the Plaintiff then goes further in his affidavit to attempt to prove the case. This was not necessary at this stage.
10. With the leave of the court, parties filed written submission to the application which were highlighted before me. The Defendant/Applicant submitted that there was no credible evidence to support the entry of a final judgement in favour of the Plaintiff because the Plaintiff relied heavily

on the exchange of uncoordinated e-mails which could neither establish a contract or commission payable there under. Under the said circumstances only an interlocutory judgment could be entered subject to formal proof. It was submitted for the Applicant that the Defendant was not served with a copy of the Plaintiff, and that the *ex-parte* Judgment was irregular, and since the amount involved was colossal the same should be set aside to enable the parties reach the seat of Judgment on the merits of their case. Mr. Njuguna for the Applicant cited several authorities in support of his client's case. In the case of **CHARLES MWALIA – VS – KENYA BUREAU OF STANDARD, HCCC NO. 1058 OF 2000 NAIROBI**, Justice Ringera set aside a default judgement so that parties can approach the Judgment seat with the merits of their respective cases. In that case, the Judge had come to the conclusion that the *ex-parte* Judgment was irregular.

11. Mr. Njuguna also submitted that a liquidated demand is in the nature of a debt, that is, a specific sum of money payable under or by virtue of a contract. If the sum payable requires investigation beyond simple calculation, the amount is not liquidated and should proceed to formal proof. It was his submissions that since there was no contract under seal establishing a commission of 16.5%, the judgement could not have been a final judgement, but an interlocutory one requiring formal proof. Mr. Njuguna submitted that the entire process leading to the said judgement was irregular invalid and unlawful and that the only option is for this court to set aside the said Judgment.
12. Mr. Oriaro submitted on behalf of the Plaintiff/Respondent. He submitted that the Plaintiff was granted the leave to serve the Defendant outside through DHL. The Defendant acknowledged receiving two bundles and instructing the firm of Gilani & Company Advocates to act on its behalf. On 7th April 2014, the said firm of Advocates entered appearance on behalf of the Defendant. They failed to file a defence within the time allowed by the law hence the *ex-parte* judgment. This judgment, submitted Mr. Oriaro, was lawful and regular. Mr. Oriaro also submitted that the proposed defence is a sham and does not disclose a *prima facie* defence, there being no defence that can be successful, allowing the application would be a waste of precious judicial time, submitted Mr. Oriaro, and a tactic to merely delay the suit. Mr. Oriaro further submitted that if the court were to set aside the Judgment, it should be conditional, and that the entire decretal sum now due should be placed in an interest earning account in the joint names of the parties.
13. I have considered the application and opposing submissions. In my view, the following are the issues to be determined:-
 - i. ***Whether there was a proper service of summons.***
 - ii. ***Whether the ex-parte judgment was regular.***
 - iii. ***Whether, if I set aside the said Judgment, there should be conditions to it.***

14. In answer to the first issue, and as I have noted earlier, the Plaintiff sought the leave of this court to serve the process out of jurisdiction. That leave was granted, and the Plaintiff then served the process. The process server ROBERT K. MUTUKU filed an affidavit of service dated 30th April 2014 and filed in court on 2nd May 2014 confirming that indeed he served the Defendant via DHL COURIER SERVICES to their last known address in New Delhi India. The documents served were a Certificate of Urgency together with a Notice of Motion coming up for *inter-partes* hearing on 8th April 2014, the supporting affidavit together with annexure thereto, summons to enter appearance, a copy of the Plaintiff, verifying affidavit, the Plaintiff's list of witness and their Statements and Plaintiff's list of documents as a bundle from Messers Oriaro & Company Advocates. The Defendant confirms receipt of some of these documents pursuant to which the Defendant instructed an advocate to enter appearance. I have no reason to doubt that the process server served all the documents. In any event, the Defendant has not sought to cross-examine the process server on the said service. What anybody would wonder aloud is why the Defendant, acknowledging at least part service, and appointing an advocate to enter appearance, would fail to file a defence. The advocates could have asked for a copy of the Plaintiff either from the Plaintiff advocates or from the court. The allegation by the Defendant that the process herein was not served is not supported either by law or by logic. It is spurious and a flawed argument which I must reject. The Defendant must have had its own good reasons for its failure to file a defence. It is possible, as was submitted by the Plaintiff's counsel, that the Defendant believed that being out

- of jurisdiction, and having no assets within Kenya, the ultimate decree would be a paper decree and hence the Defendant's disinterest to defend the suit. It is also possible that the Defendant has only come out to defend the suit because of the Garnishee proceedings.
15. The second issue is whether the *ex-parte* judgement herein is irregular or invalid. It was submitted by Mr. Njuguna that since there was no contract, it was necessary to call the parties to give evidence and that the Judgement entered ought to have been interlocutory pending a formal hearing to establish either a contract or applicable commission. This submission could be right except that its substance does not apply to the facts in the Plaintiff's claim. The Plaintiff's claim is clear in the Plaintiff. It is a liquidated claim for USD 916164.00 together with interest and costs. It is not speculative. There is nothing to make the claim vague to require a formal proof. Since the matter was not defended, the issues of percentage of the commission or written contract became irrelevant. These are issues which are important only when there is a defence, or when there is a claim for damages for breach of contract. As far as the Plaintiff was concerned, its claim was based on a commission rate of 16.5% of the subject matter. Upon applying mathematics the claim was liquidated. In fact, the Plaintiff's claim arrived in court already liquidated. In the absence of a defence to it, there needed not be any further judicial process to validate it. In addition, I must also add that the said Judgement was regular judgement of this court and valid *ab initio* as it satisfied all the requirements of the law.
16. The third issue is whether if I set aside the said Judgement, I should attach some conditions to it. This court has a wide discretion in setting aside *ex-parte* interlocutory Judgements. In the case of **Patel – Vs – East Africa Congo Handling Services Limited [1974] E.A. 75**, it was held that a regular judgement will normally not be set aside unless the court is satisfied there is a defence on its merits. The main concern of the court is to do justice to the parties. I have looked at the proposed defence. It does not appear to me to address the issue in the same way the Defendant has addressed the issues in this application. It does not strike me to be a good defence. However, a good defence does not mean a defence which must succeed. It merely needs to satisfy the concept of a *prima facie* defence. I will therefore give it the benefit of the doubt.
17. This brings me then, to the conditions upon which this court can set aside the said Judgement. The discretion of the court is unfettered, but if the Judgement is to be set aside it must be done on terms that are just. The Defendant is not deserving of discretion because it has sought to obstruct or delay the court process. Despite receiving the Plaintiff's Notice of Motion dated 11th March 2014 asking for security the Defendant has not filed a response to date. Yet in paragraph 15 of the supporting affidavit the Defendant deposes that:-

“ . . . the application seeking security from the Defendant is ill-advised as the Defendant neither resides nor has any property in Kenya . . . ”

18. At paragraph 10 of the supporting affidavit the deponent states

“ THAT the Defendant neither resides nor works for gain in Kenya . . . ”

And at paragraph 11 the deponent gives reasons why it would be very difficult for the Defendant's agent to travel to Kenya due to restriction under the requirements for polio vaccination.

From the above it is clear that the Defendant has no interest in Kenya. It has no assets, and once it is paid for the contracts it is executing with Nzoia Sugar Company and Chemelil Sugar Company Limited it would care less whether the Plaintiff obtained Judgement against it or not. The interest of justice would not be served to set aside Judgement without security from the Defendant.

19. In exercising my discretion, to set aside the *ex-parte* judgement, I must state for avoidance of doubt that the Defendant has not convinced me as to why it failed to file a defence. No explanation is provided as to why a Memorandum of Appearance was filed. At no time did the lawyers of the

- Defendant complain that they lacked the Pliant and the Summons.
20. However, the lawyers have somehow managed to prepare a draft defence without the Plaintiff. This issue necessarily goes to the credibility of the Defendant. Lack of credible explanation could only mean an intent to obstruct or delay justice. The above misgivings notwithstanding, and in the exercise of my discretion, I also acknowledge that the Defendant has a constitutional right under Article 50 of the Constitution to a fair hearing.
21. The upshot of all these is that the Chamber Summons application dated 14th May 2014 is allowed in the following terms:-
- a. ***The interlocutory and ex-parte Judgement entered herein and the decree issued against the Defendant on 5th May 2014 be and is hereby set aside and the Defendant is allowed to file its Defence (copy whereof is attached to the application) within 15 days from today on the CONDITION that the entire decretal sum plus costs now due shall within 21 (twenty one) days from today be deposited in an interest earning account in the joint names of the parties advocates.***
 - b. ***That if the Defendant/Applicant fails to comply with order (a) above, the Plaintiff shall be at liberty to proceed with the execution process without any further hindrance.***
 - c. ***The costs of this application shall be for the Plaintiff/Respondent.***

Orders accordingly.

DATED, READ AND DELIVERED AT NAIROBI

THIS 31ST DAY OF JULY 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Njuguna for Applicant

Oriaro for Respondents

Teresia – Court Clerk