



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

CIVIL SUIT NO. 31 OF 2010

WESTCON CONTRACTORS LIMITEDPLAINTIFF/RESPONDENT

VERSUS

**KENYA FERRY SERVICES
LIMITED.....DEFENDANT/APPLICANT**

RULING

The Defendant came before the Court by Chamber Summons dated **19th January, 2011** and brought under Order 10, rule 11 of the Civil Procedure Rules. The application carried two main prayers: (i) that the **ex parte** Judgment entered herein against the defendant, and all the consequential decrees or orders thereunder, be set aside; and (ii) that the defendant be granted leave to defend the suit.

Supporting grounds for the application were set out as follows:

- (a) *service of summons to enter appearance had been irregularly effected upon an employee of the defendant's who had no authority to accept service;*
- (b) *failure to take action, following the receipt of service of summons to enter appearance, was not intentional, and was not deliberate neglect on the part of the defendant;*
- (c) *irreparable and/or substantial loss and damage will be occasioned to defendant if there is no stay of execution of the decree flowing from the ex parte Judgment;*
- (d) *the principle of **audi alteram partem** will be offended if the defendant is not accorded an opportunity to be heard, and the suit determined on its merits;*
- (e) *the defendant has an arguable defence, which raises serious triable issues.*

Supporting evidence is provided in the affidavit of **Elijah Kitur**, the defendant's Company Secretary, dated **19th January, 2011**.

The plaintiff's Managing Director, **Francis Kamau Kahiu**, swore a replying affidavit on **31st January, 2011**, among other things, stating that "*the defendant has no defence at all to the plaintiff's claim*".

At the hearing of this application, learned counsel, **Mr. Nyongesa** appeared for the applicant, while **Mr. Mabeya** appeared for the respondent.

Mr. Nyongesa submitted that, while the applicant was not disputing the averment that service of the plaint had not been effected, the applicant had not been served through any of its principal officers;

service had been effected upon the secretary to the Managing Director who did not bring the same timeously before the Company Secretary; the Company Secretary, who received the papers on **24th November, 2010** was not aware that judgment had already been delivered and a decree issued in favour of the respondent.

The applicant's other argument was that this State agency was set up to serve the public interest and, therefore, should on that account, be allowed an opportunity to defend against a decree which landed it with the burden of paying Kshs. 8,157,328/80 with interest thereon at 12% per annum as from the date of filing suit (26th October, 2010), as well as costs in the sum of Kshs. 230,525/=.

Counsel urged that there were elements in the calculation of the decretal sum which were not rationalized – and so the applicant should not be constrained to pay them from public resource; for instance, interest said to be payable on the contract; rates of calculation of the interest being undisclosed.

Counsel urged that there were fundamental differences between the parties, sounding in law, which ought not to be hidden in the bare-faced interlocutory judgment recorded by the Deputy Registrar: as an example, it is contended that payment-due is signified, where there was no consideration in the form of work done for the applicant; and if any such work at all was done, it did not comply with the governing tendering procedures [as *per* the Public Procurement and Disposal Act (Cap. 412c, Laws of Kenya)]. The appellant urged that it was in the interests of justice that the dispute between the parties be determined on the merits. Counsel submitted that the defendant has a good defence, and should be given a chance to be heard. He asked that the default judgment be set aside, and leave to defend granted, in particular, as no prejudice would be caused to the plaintiff.

Learned counsel, **Mr. Mabeya** contested the application, relying on the replying affidavit. Firstly, counsel urged that the applicant's reliance on the claim of lack-of-service of suit papers, had no basis: “[*The process server*] met the secretary to the boss; she informed him she had authority to receive service; she received, signed and stamped. [He] went to the principal office, and properly served; service does not have to be upon the principal officer personally”.

Counsel submitted that the applicant had intentionally not responded to summons immediately on receiving service: for the applicant's lawyer was duly informed on **24th November, 2010** but then purported to file a reply on **26th November, 2010**; and after receipt of notice of entry of judgment, the applicant took as long as a month before filing the instant application seeking leave to defend. Counsel urged that the impression emerging is that the applicant is merely seeking to keep the respondent away from the fruit of the default judgment.

Responding to the submissions by the respondent's counsel, **Mr. Nyongesa** urged that the applicant's draft defence, annexed to the instant application, was not a document of mere denial, but one which laid before the Court a clear triable defence.

Upon reading the respondent's plaint of **26th October, 2010** and the applicant's draft statement of defence of **19th January, 2011**, and without trying to ascribe more merit to one set of pleading than the other, I find that issue is joined; which is the signal that a **triable case**, indeed, exists. But for a serious procedural lapse on the part of a party to such a cause, the Court must take the position that just results can only emanate from a hearing **on the merits**.

The applicant's failing in the matter is the delayed response, but by this Court's discretion, the two-month delay may be excused, for the more important object of having a fair hearing of the case.

Consequently, I hereby allow the application of **19th January, 2011** and specifically order as follows:

- (1) *The ex parte judgment entered by the Deputy Registrar on 23rd November, 2010 is vacated, along with all consequential decrees and orders thereto.*
- (2) *The applicant is granted leave to defend the suit herein.*

(3) *The applicant shall properly file and serve the statement of defence within 14 days of the date hereof.*

(4) *The costs of this application shall be in the cause.*

DATED and DELIVERED at MOMBASA this 27th day of May, 2011.

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J. B. OJWANG

JUDGE