REPUBLIC OF KENYA

HIGH COURT OF KENYA AT KAKAMEGA

CIVIL CASE 25 OF 2007

DEROS CONSTRUCTION CO. LTD. :::::::::::::::::: PLAINTIFF

V E R S U S

MUNICIPAL COUNCIL OF VIHIGA :::::::::::::::::: DEFENDANT

R U L I N G

The application before me is for the setting aside of the ex-parte judgement which was entered against the defendant. The applicant also asks that the Decree and all the consequential orders arising there-from be set aside.

It is the defendant's prayer that after the judgement and the decree have been set aside, the defendant should be granted leave to file its defence.

Meanwhile, pending the hearing and determination the application, the defendant sought and was granted an order staying execution of the decree.

It is the defendant's contention that their advocates did enter appearance timeously. However, the said advocates were unable to file the defence because the court file went missing.

The defendants say that their advocate did visit the offices of the plaintiff's advocates, with a view to ascertaining if the said advocates had an idea about the whereabouts of the court file. The advocate who was then acting for the defendant was, reportedly, told that the plaint had been amended, and that the Amended Plaint would be served on the defendant's advocates in due course.

However, the defendant says that thereafter, it was never served with the Amended Plaint. Instead, the defendant was to later learn that the case proceeded exparte.

As the defendant feels that it has a credible defence to the plaintiff's claim, the defendant submitted that unless the judgement was set aside, it would suffer irreparable loss.

On the other hand, the defendant's view was that the plaintiff would not be prejudiced by an order setting aside the judgement, because the plaintiff could be compensated with costs.

In answer to the application, the plaintiff submitted that the claim against the defendant was for a liquidated sum, which did not therefore need to go to trial. I believe that the plaintiff had in mind the provisions of Order **9A** rules **3** and **9** of the Civil Procedure Rules. Pursuant to those rules, the court shall, on request from the plaintiff, enter judgement against the defendant for the liquidated demand and

interest thereon, if the defendant did not file a defence timeously.

However, rule **3 (2)** of Order **9 A** makes it clear that;

"***Where the plaint makes a liquidated demand together with some other claim and the defendant fails, or all the defendants fail, to appear as aforesaid, the court shall, on request in Form No.26 of Appendix C, enter judgement for the liquidated demand and interest thereon as provided by sub-rule (1) but the award for costs shall await judgement upon such other claim.***

That sub-rule is applicable, with modification, where the defendant has failed to file a defence.

In this case, the plaint was for a liquidated claim together with;

(i) an alternative prayer for the value of the work which the plaintiff had done; plus

(ii) an order restraining the defendant from disrupting the activities of the plaintiff under the contract.

I believe that it is because the plaintiff appreciated the fact that its claim was not only for a liquidated sum that in the request for judgement dated 10th July 2007, the plaintiff asked the court to enter interlocutory judgement.

In my considered opinion, the defendant's contention, regarding the non-availability of the court file, holds water. I so find because there is a letter in the court file dated 21st May 2007, which was filed by M/S J. J. Masiga Advocates, complaining that the plaintiff's advocates were;

"***unable to trace the Court file in the Court registry to enable us serve the application, plaint and summons to enter appearance as ordered."***

Therefore, the defendant's explanation, for the failure to file the defence, is plausible.

Furthermore, whether or not the plaintiff was formally served with the memorandum of appearance was not of any consequence in this case. I say so not because there was no need to serve the memorandum of appearance, but because it is clear that the plaintiff did become aware that the defendant had entered appearance. That fact can be discerned from the plaintiff's request for judgement, in which they state that the defendant had failed to file his defence within the prescribed time, after they had entered appearance on 16th June 2007.

Of course, the date cited by the plaintiff does not tally with the court records, which show that the defendant entered appearance on 31st May 2007. But that does not alter the fact that the plaintiff had become aware that the defendant had entered appearance before the plaintiff filed its request for judgement.

As the defendant had entered appearance, and because the plaintiff's claim was not limited to the liquidated sum claimed, the plaintiff ought to have set down the rest of the claim for trial, on notice to the defendant.

In this case, there is on record a minute signed by the learned deputy registrar on 2nd April 2008. The said minute is in the following terms;

"**EX PARTE JUDGEMENT**

Defendant, the Clerk to Municipal Council of Vihiga having been duly served and having entered appearance and failed to file defence and on application of the advocate for the plaintiff, I enter judgement as prayed."

As the request for judgement was limited to only the liquidated amount, and as the plaintiff clearly sought an interlocutory judgement, that implies that the balance of the plaintiff's claim remained outstanding.

Therefore, when the learned deputy registrar granted costs of the suit, he flouted the provisions of Order **9A** rule **3 (2)** of the Civil Procedure Rules. The award of costs was supposed to await judgement upon the balance of the plaintiff's claim.

Furthermore, by asking for interest to be awarded on the liquidated sum from January 2007, the plaintiff was introducing into its claim, something which was neither in the original plaint or the Amended Plaint. That action constituted an amendment to the plaint, but without complying with the rules governing amendment. It ought not to have been granted.

For all those reasons, I allow the application dated 30th August 2008. The exparte judgement entered against the defendant is set aside, together with all other consequential orders flowing therefrom. The defendant is granted leave to file its defence within the next 15 days from today.

The costs of the application, and all the thrown away costs shall be awarded to the defendant in any event, because I can find no reason to deprive the successful party the costs of its application.

Dated, Signed and Delivered at Kakamega, this 5th day of February 2009

FRED A. OCHIENG

J U D G E