



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 16 of 2009

PETRO OIL KENYA LIMITEDPLAINTIFF

VERSUS

KENYA PIPELINE COMPANY LTD.....DEFENDANT

R U L I N G

Kenya Pipeline Company Ltd., the defendant herein, through the firm of Mohammed Muigai Advocates, wrote to this court complaining of the entry of an irregular judgment in default of appearance. The complaint is expressed in the letter dated 20th May 2009. This court called for the file to be placed before the resident judge for perusal.

I have perused the court file and it is apparent that this suit was filed on 6th April 2009 by way of a plaint of the same date. In the plaint, Petro Oil Kenya Ltd, the plaintiff herein, prayed for judgment against the defendant as follows:

- a) *Kshs.150,434,113.00 as per para 16 hereof;*
- b) *Alternatively, a sum of Kshs.150,434,113.00 as per para 17 hereof and*
- c) *General damages; and*
- d) *Interest at Commercial rates;*
- e) *Alternatively, a declaration that out of the total stocks of gasoil held by the Defendant, the plaintiff has title to and an immediate right of possession to 2000MT of Gasoil and that the Defendant is bound to hold the same to the Plaintiff's order; and*
- f) *An order restraining the Defendant, its servants or agents from releasing, transferring alienating or otherwise dealing with any gasoil in its possession in such a way as to reduce the overall stocks held by the Defendant to a level below 2000MT save with the Plaintiff's express written consent or by on order of this Honourable Court; and*
- g) *A mandatory injunction compelling the defendant to give immediate delivery of 2000MT of Gasoil to the Plaintiff; and*

- h) Damages in the sum of Kshs.20,522,313.00 being in respect of finance costs as well as loss of profits; and
- i) Costs and incidental to this suit; and
- j) Interest on the foregoing at commercial rates.

Summons to enter appearance was served upon the defendant's Company Secretary's office on 14th April 2009. The evidence of service is stated in the affidavit of service of Donald Okonda sworn on 16th April 2009. The record shows that the defendant entered appearance by filing the Memorandum of Appearance dated 27.4.2009 on the same date. The summons to enter appearance gave the defendant 15 days to enter appearance from the date of service. The summons was served upon the defendant on 14th April 2009. The last day to enter appearance fell on 29.4.2009. Pursuant to the provisions of order IXA rule 5 of the Civil Procedure Rules, the plaintiff applied for entry of judgment in default of appearance. The request dated 4th May 2009 was filed in court on 5.5.2009. The Deputy Registrar of this court proceeded to enter judgment in default of appearance on the same date. The suit has been fixed for formal proof on 5/6/09. In the last paragraph of the letter addressed to the Resident Judge, the defendant's advocates stated as follows:

"We respectfully request you therefore, to investigate the circumstances surrounding this highly irregular judgment as a matter of urgency, rectifying the same in order that justice may be done."

Having carefully examined the record, it is obvious that interlocutory judgment was entered before the lapse of the 15 days as prescribed by the summons to enter appearance. The Deputy therefore had no jurisdiction to enter appearance in the circumstances of this case. In short, the prescribed period had not Lapsed hence the interlocutory judgment is irregular. This court has jurisdiction to set aside such orders even *suo moto ex debito justitiae*. In exercise of the inherent power of the court I set aside the exparte judgment and grant the defendant an unconditional leave to defend the suit. I make no order as to costs. The Deputy Registrar to cause this order and or ruling to be served urgently on all parties involved in this dispute.

Dated and delivered at Mombasa this 28th day of May 2009.

J. K. SERGON

J U D G E

In open court in the presence of Mohamed Muigai & co. Advocates for Defendants

N/A for the plaintiff.