REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 200 of 2007

BETHWEL MUTAI……..…..……..PLAINTIFF

VERSUS

CHINA ROAD & BRIDGE CORPORATION…….DEFENDANT

RULING

This is an application to set aside a judgment in default of appearance. It is by the defendant described in the plaint as "a limited liability company registered and incorporated within the Republic of Kenya with the capacity to sue and be sued and with a principal place of business in Mombasa." The application is essentially brought under the provisions of Order IXA Rule 10, Order XXI Rule 22 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

The substance of the grounds in support of the application is that the defendant was not served with Summons to enter appearance and that it has a good defence to the plaintiff's suit. The application is further supported by an affidavit sworn by one Pei Yan the defendant's Project Manager of Maji ya Chumvi – Miritini Road junction, a project undertaken by the defendant. It is deponed in the affidavit *inter alia* that no proper or any service of the summons to enter appearance was effected upon the defendant and that one, Pauline, who allegedly received the summons is not known to the defendant. The Project Manager also swears that the defendant has a good defence to the suit and should be given a chance to be heard in the interest of justice. A draft of the proposed defence is however not annexed nor does the affidavit disclose the nature of the proposed "good defence."

The application is opposed and there is a replying affidavit sworn by the plaintiff. The primary grounds given in the said affidavit for opposing the application are that the defendant was served with summons to enter appearance through one Pauline a secretary to the defendant's manager who held herself out as having authority to accept service of process on behalf of the defendant and that the court was satisfied with that service and accordingly entered interlocutory judgment against the defendant in favour of the plaintiff. In the premises, according to the plaintiff, the interlocutory judgment and the subsequent one on formal proof are regular. In the plaintiff's view the defendant has no defence to his claim and if it had any it would have exhibited the same which it has not.

I have considered the application, the affidavits, filed, both in support of and in opposition to the application, and the submissions of counsel appearing. Having done so, I take the following view of the matter. The applicable principles are now well settled. They are that where there is no proper or any service of the summons to enter appearance to the suit, the resulting default judgment will be set aside *ex debito justitiae* on the application of the defendant.

On the other hand where the default judgment is regular i.e. where service of t he summons to enter

appearance is properly effected, the court has a wide discretion to set aside such judgment and any consequential decree or order upon such terms as are just. Those are the express provisions of Order IXA Rule 10 of the Civil Procedure Rules. In exercising its unfettered discretion to set aside or vary such a judgment, the court does so on terms that are just (See **Patel – v – E.A. Cargo Handling Services Limited [1975] EA 75).**

The wide discretion given to the court is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought to obstruct or delay the course of justice (See **Shah – v – Mbogo [1967] EA 116** cited in **Pithon Maina – v – Muku Mugira [1982-88] 1KLR 171**).

Further in exercising that wide discretion, the court should consider *inter alia* the facts and circumstances both prior and subsequent and all the respective merits of the parties. The question as to whether the affected party can reasonably be compensated by costs for any delay occasioned by the setting aside of the default judgment should be considered and it should be remembered that to deny a litigant a hearing should be the last resort of the court. (See **Sebei District Administration – v – Gasyali [1968] Ea 300**).

To conclude the state of the authorities on the subject, the words of Apaloo J. A. as he then was in **Philip Chemwolo & Another – v – Augustine Kubende [1982-88] 1 KAR 1036** are pertinent. The eminent Judge of Appeal rendered himself as follows:-

"**I think a distinguished equity Judge said 'Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on the merits'. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline".**

Applying those principles to the application at hand, I ask myself whether or not the defendant was served or properly served with summons to enter appearance. The plaintiff contends that he effected proper service upon the defendant at its Nairobi office on one Pauline a secretary to the defendant's Manager. I have perused the affidavit of service sworn by Albert Mutindi the process server. The affidavit is silent on how the process server identified the said Pauline. He deponed that the said Pauline identified herself to be the secretary to the Manager. The affidavit does not disclose the name of the Manager.

The defendant on the other hand denies being served with the summons to enter appearance. Its Project Manger denies the existence of a Pauline in the defendant's establishment and swears that the defendant's General Manager denied receipt of any court summons in respect of this case. So, it is the word of the plaintiff as against that of the defendant that the court has to resolve the dispute regarding service of the summons to enter appearance. None of the parties sought to cross-examine each other or the process server in order to resolve the conflict in the affidavit evidence. In the premises service of the summons to enter appearance upon the said Pauline is neither proved nor disproved.

That conflict notwithstanding, even if there was proof that Pauline was in the defendant's establishment as a secretary to a Manager, would service upon her be valid? I think not. She is described as a secretary to a Manager. A secretary to a Manager in my view is not a principal officer of the defendant and service upon such an employee would not be proper service in terms of Order V Rule 2 (a) of the Civil Procedure Rules.

In the end, I find and hold that service of the summons to enter appearance has not been proved upon the defendant. In the premises, I order that the default judgment herein be and is hereby set aside ***ex-debito justitiae.***

The defendant has not exhibited a draft of the proposed defence. The affidavit in support of this

application has not shown the sort of defence available to the defendant. So, if the default judgment had been regular, it is clear that this application would have failed. As the defendant has not indicated how it proposes to resist the plaintiff's claim, I make no order as to costs.

The defendant is ordered to enter appearance and file and serve the plaintiff with its statement of defence if any within 15 days from the date hereof.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 29TH DAY OF SEPTEMBER 2008.

F. AZANGALALA

JUDGE

Read in the presence of:-

Kosino holding brief for Khaminwa Dr. for the Plaintiff/Respondent.

F. AZANGALALA

JUDGE

29TH SEPTEMBER 2008