REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 547 of 2007

EPCO BUILDERS LIMITED……PLAINTIFF

VERSUS

GEOMAPS AFRICA LIMITED……..……DEFENDANT

R U L I N G

The Applicant who is the Defendant in the suit has filed a Chamber Summons application dated 17th July, 2008. It is expressed to be brought under Order IXA rule 10 and 11, Order XXI rule 25 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. There are two substantive prayers sought. One prayer seeks an order setting aside the judgment entered against the Defendant in default of defence together with all the consequential orders. The second order seeks to have the Defendant granted unconditional leave to defend the suit.

Ms. Muchui for the Defendant relied on the grounds on the face of the application and the supporting affidavit sworn by LENNY KIVUTI, a Director of the Defendant Company.

The application was opposed. The Plaintiff Company filed a replying affidavit sworn by RAMJI DEVJI VARSANI, the Managing Director of the Plaintiff Company. Mr. Ouma for the Plaintiff relied on this affidavit to oppose the application.

I have considered the arguments by both counsel expressing their clients position to this application. There are however undisputed facts. It is not disputed that after the Defendant was served with summons to enter appearance and the plaint, the Defendant Company filed an appearance simultaneously with an application seeking to stay proceedings and to have the matter referred to arbitration. There is no dispute that the Defendant's application was heard and dismissed by the court on the 5th May, 2007. The Plaintiff then on the 12th May, 2007 wrote to the court requesting for judgment in default of defence. The request was ascended to and judgment entered against the Defendant on 22nd May, 2008.

The first issue before the court was whether the exparte judgment entered herein was premature. Even though the exparte judgment was entered on the 16th day from the date the Defendant's application for the suit to be referred to arbitration was dismissed, it is quite evident from the record that the request for the exparte judgment was made 7 days after the said dismissal, which request was itself premature.

The first issue is whether the judgment entered in default of defence was premature. The Defendant argues that it was premature on the basis of the dismissed application seeking to have the suit stayed and the matter referred to arbitration. Ms. Muchui for the Defendant argued that the moment the application was filed, time stopped running. Mr. Ouma agreed with the submissions but varied that position on the basis that once the said application was dismissed, time started running again. I agree with the position taken by Mr. Ouma. Section 6(1) of the Arbitration Act stipulates as follows:

"***6.(1)A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration unless it finds -***

(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."

The plain reading of that section is very clear that once an application to refer a matter to arbitration is rejected, the orders staying the proceedings must also go with the application. For the instant case, the moment the application to stay the proceedings was dismissed, time for the filing of the defence started running immediately from the date of dismissal. The Defendant had therefore 14 days from 5th May, 2007 to file its defence. Those days lapsed on the 19th May, 2007.

I note from the record that the Defendant did not file any defence even by the 22nd May, 2007, when the exparte judgment was entered. Even though the judgment was requested prematurely, it was entered in good time. I noted from Mr. Ouma's submissions that he thought that the other two issues for the court to consider is whether the Plaintiff's claim was liquidated and whether the Defendant was a party to the contract giving rise to the suit. The issue to be considered goes a little more deeper than that. The issue is whether judgment entered was interlocutory or a final one and whether the Deputy Registrar could enter final judgment in the matter, in default of the defence. It is not disputed that the Plaintiff's claim against the Defendant lies in contract demonstrated in paragraph 10 and 14 of the plaint. A liquidated demand is defined in the Supreme Court of Practice vol. 1 1985 as follows:

"***A liquidated demand is in the nature of a debt i.e. a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter or arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure requires investigation beyond mere calculation, then the sum is not a "debt or liquidated demand", but constitutes "damages" …. The words "debt or liquidated demand" do not extend to unliquidated damages, whether in tort or contract, even though the amount of such damages be named at a definite figure."***

Whether the Defendant was liable to pay the sum claimed by the Plaintiff under the terms of the relevant contract is a matter of evidence. The Plaintiff was undeserving of a final judgment at this stage as it needed to formally prove its claim as against the Defendant. The learned Deputy Registrar entered a final judgment. He had therefore no power in law or under the rules to enter such judgment. The exparte judgment entered against the Defendant was therefore irregular and should be set aside *ex debito justitiae*.

The final issue to decide is whether the Defendant's draft defence raises triable issues and whether the Defendant should be given leave to defend the suit. The Plaintiff's Advocate has already identified a triable issue in the pleadings, but I noted a few more. Whether the Plaintiff had a privity of contract with the Defendant and connected to it, who is the owner of the suit property and whether the Plaintiff has sued the correct parties are all triable issues. The presence of a triable issue gives the Defendant a right to defend the suit.

Having come to the conclusion I have of this application, I believe that the appropriate orders to make are the following:

That the application dated 17th July, 2008 be and is hereby allowed in the following terms.

(i) The final judgment entered in default of defence together with all consequential orders be and is hereby set aside.

(ii) The Defendant be and is hereby granted unconditional leave to defend the suit.

(iii) The Defendant is granted 14 days to file and serve its statement of defence.

(iv) The Defendant shall pay to the Plaintiff thrown away costs assessed at Kshs.20,000/- within 30 days from the date of this ruling.

Dated at Nairobi this 17th day of October, 2008.

LESIIT, J

JUDGE

Ruling read and signed in the presence of:

Ms. Muchui for the Applicant

N/A for Mr. Ouma for the Respondent

LESIIT, J

JUDGE