REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 106 of 2008

CREATIVE INNOVATIONS LIMITED ……....…..……PLAINTIFF

VERSUS

PETROLUBE KENYA LIMITED…….……...…1ST DEFENDANT

PAWS AFRICA SAFARIS LIMITED……2ND DEFENDANT

ROBERT CULLENS MURIMI……..……3RD DEFENDANT

TOLBERT NGURU MURIMI……..……4TH DEFENDANT

R U L I N G

This is a Chamber Summons application dated 12th September, 2008 expressed to be brought under Order XXI Rule 22 and Order IXA rule 10 of the Civil Procedure Rules Section 3A of the Civil Procedure Act. It seeks the following orders:

3. That the judgment in default of appearance and defence entered herein and all consequential orders be set aside.

4. That the Defendant's/Applicant statement of defence attached hereto be deemed duly filed

5. That cost of this application be in the cause.

There are seven grounds on the face of the application as follows:

(a) Any delay to hear this application will defeat the object which it is brought under.

(b) The Plaintiff/respondent has obtained exparte judgment in default of appearance and defence and is in the process of executing the said judgment.

(c) The warrants of attachment have been issued and the Plaintiff's attachment of the defendant's property is imminent.

(d) That the defendants was not served with summons to enter appearance and the plaint.

(e) That defendant only became aware of these proceedings when the Base Auctioneers the Plaintiff's Agents came to proclaim the defendants goods.

(f) The defendant has a good defence with high probability of success and should not be condemned unheard.

(g) The defendants/applicant stands to suffer irreparably if the orders sought are not granted.

The application is supported by the affidavit of Robert Cullens. In that affidavit Mr. Cullens who is the 3rd Defendant in the case deposes that the affidavit of service sworn by Julius Mutua Muthoka, claiming that the Defendants were served at their business premises in Lavington on the 10th March, 2007 was untrue. Mr. Cullens has annexed a letter of termination of lease dated 29th January, 2007 showing that the Defendants' lease in the business premises in Lavington was terminated on that date. He has also annexed a tenancy agreement dated 2nd January, 2007 showing that the Defendants had changed the location of their business premises by the time of the alleged service of the process. It is not possible to decipher the new location from the attached tenancy agreement.

I have considered the contents of the supporting affidavit. I have also looked at the affidavit of service sworn by Julius Muthoka. Assuming that there was a proper service, it is clear from the affidavit that only the 3rd and 4th Defendants were served with the plaint and the summons to enter appearance. There was absolutely no service upon the 1st and 2nd Defendants. Despite that clear evidence, the learned Deputy Registrar entered a judgment against all the four defendants. The 1st and 2nd Defendants are limited companies. In the affidavit of service the process server states that he left the plaint and the summons to enter appearance for the 1st and 2nd Defendants with the 3rd and 4th Defendants. The process server does not indicate who the 3rd and the 4th Defendants were in relation to the 1st and 2nd Defendant's companies, whether they were chief officers who could accept service on their behalf as provided under order V rule 2(a) of the Civil Procedure Rules.

I have considered the supporting affidavit sworn by Mr. Cullens who is the 3rd Defendant in the case. He has denied being served with any summons to enter appearance or the plaint by the process server. The 3rd Defendant has annexed 'RC1A' a letter of termination of lease dated 29th January, 2007, and a tenancy agreement dated 2nd January, 2007, to prove that at the time of the alleged service of the summons, (10th March, 2007) the Defendants were no longer operating from the premises at Lavington where the process server alleged to have served them.

No replying affidavit was filed in this matter. There was an attempt to have the matter adjourned on the grounds that the Managing Director of the Plaintiff company was outside the country and therefore could not sign the affidavit. In light of the contents of the supporting affidavit however, the least the Plaintiff could have done was to file a replying affidavit from Julius Mutie Muthoka, the process server who alleged that he served the Defendants with the summons. There is no indication that this person was not available. It is his affidavit of service which has been put to question by the Defendants in the replying affidavit. It was imperative for the process to respond to the allegation made in the affidavit of Mr. Cullens. Having failed to respond to Mr. Cullens allegations that there was no service of the process upon him, it should be presumed, as the law provides, that the process server has conceded to those allegations.

I have also considered the judgment entered by the Learned Deputy Registrar as against the 1st and the 2nd Defendant, the judgment was irregular and should be set aside ex *debito justitiae*. The judgment was itself a final judgment. Looking at the plaint, the Plaintiff's claim is not liquidated, even though there is a sum claimed in monetary terms. The Plaintiff's claim arises out of the supply of goods and services to the Defendant. At an interlocutory stage, the only judgment that could have been entered against the Defendant could only have been an interlocutory judgment in order for the Plaintiff to formally prove its claim against all the Defendant. The learned Deputy Registrar entered a final judgment. That judgment is irregular on that ground alone and should be set aside on that ground alone. Even without looking at the draft defence annexed by the Defendants to the supporting affidavit to this application, the judgment entered against the Defendants was so irregular that it cannot be allowed to stand. The draft defence raises triable issues. In my view, the Defendant should be allowed to defend his suit unconditionally.

Having carefully considered the application, I will allow it in the following terms.

1. That the final judgment entered in default of defence and memorandum of appearance together with all the consequential orders, be and is hereby set aside.

2. The Defendants are granted 14 days to file and serve their statement of defence.

3. The cost of this application will be borne by the Plaintiff/Respondent.

Dated at Nairobi this 9th day of October, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered in presence of:-

N/A for Mr. Miller for the Plaintiff

Mr. Wangila holding brief for Mr. Mogeni for the Defendant/Applicant

LESIIT, J.

JUDGE