



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

Civil Case 240 of 2008

KINGSWAY TYRES LIMITED.....PLAINTIFF

VERSUS

PAWS AFRICA SAFARIS LIMITED.....DEFENDANT

RULING

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 eminent.
- (d) That the defendant 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.

Mr. Robert Cullens, the Director of the Defendant Company swore an affidavit dated 12th September, 2005 in support of the application. I have considered the contents of this affidavit. In that affidavit it shows that the Defendant became aware of the suit on 5th September, 2008 when the deponent received warrants of attachment and sale from Base Auctioneers.

The Application was served on the Plaintiff. The Plaintiffs have not filed any replying affidavit or papers in reply to the application. The application is therefore unopposed.

Mr. Wangila for the Defendant argued this application on behalf of the Defendant/Applicant. Counsel submitted that there was an ex parte judgment entered against the Defendant in default of appearance and defence. He relied on the supporting affidavit where Mr. Robert Cullens deposed that the Defendant was not served with any summons to enter appearance or plead, that the Defendant was absolutely unaware of this case until warrants of attachment were received by them. Mr. Wangila submitted that the judgment was irregular by virtue of the fact that there was no affidavit of service on record and that there was no basis upon which a judgment in default of the defence could have been entered against the Defendant. I have confirmed on the record that indeed there was no affidavit of service filed. There was therefore no evidence that the plead and the summons to enter appearance had been served upon the Defendant. It is difficult to know on what basis the learned trial magistrate entered the ex parte judgment. The learned Deputy Registrar's action smacks of gross negligence. Entry of ex parte judgment is a judicial duty which should be exercised diligently after careful consideration of the record including all the supporting documents giving rise to the exercise of the judicial power. Where judgment is entered without the most important supporting document, like an affidavit proving service of the summons and the plead upon the Defendant, there is no other interpretation for that but that it was negligence. The right of the Plaintiff to apply for judgment in default of appearance and defence arises only after proof that the plead and summons to enter appearance were served on the Defendant and that the requisite period within which the memorandum of appearance and the defence should be filed have passed. In the instant case, without proof of service of those two documents, entry of an ex parte judgment does not arise. The learned Deputy Registrar therefore did not exercise its discretion judiciously and therefore the ex parte judgment entered in this case was irregular.

I have also noted that the Plaintiff's claim was not liquidated even though there is a specified sum claimed in the plead. The claim arises from the supply of products and certain services. The Plaintiff should have been required to formally prove its case before judgment could be entered in the sum claimed. If the Plaintiff was deserving of a judgment in default of defence, then the only judgment that should have been entered against the Defendant in this case was an interlocutory judgment. The case should then have been set down for formal proof in the normal way.

Having come to the conclusion I have of this matter, I order as follows:

- 1. The Plaintiff's application dated 12th September, 2008 is allowed.**
- 2. The ex parte judgment entered in default of appearance and defence together with all the consequential orders are hereby set aside.**
- 3. The Defendant is granted unconditional leave to defend the suit and is granted 14 days from today within which to file and serve its defence.**
- 4. The Plaintiff will bear the costs of this application.**

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

LESIIT, J.

JUDGE

Read, signed and delivered in presence of:-

Mr. Wangila for the Applicant

Mr. Mbaluka for the Respondent

LESIT, J.

JUDGE