REPUBLIC OF KENYA

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

Civil Case 643 of 2004 & 652 of 2004 (Consolidated)

STOCKMAN ROZEN (K) LIMITED……..…… PLAINTIFF

VERSUS

ALORA FLOWERS LIMITED....……1ST DEFENDANT

CHARITY M. KETTER…….....……...……2ND DEFENDANT

CONSOLIDATED WITH

CIVIL CASE NO. 652 OF 2004

DE RUITERS ROSES EAST AFRICA LIMITED……..…… PLAINTIFF

VERSUS

ALORA FLOWERS LIMITED……. DEFENDANT

R U L I N G

The parties consolidated the applications dated 14th April 2008 in the instant suit and in HCCC No. 652/04, for purposes of hearing and disposal. The lead file is 643 of 2004. The applications are similar, are filed by the Defendant in each suit and are based on same grounds and seeking similar prayers.

The Defendants application is expressed to be brought under Order XXI rule 18 and 22, Order XI rule 1 and 2 and Order IXA rule 10 and 11 of Civil Procedure Rules and Section 3A of Civil Procedure Act. It seeks the following orders.

3. THAT the Warrants of attachment and sale issued herein to M/s Igare Auctioneers be re-called and cancelled for having been issued and/or obtained irregularly and in contravention of the Rules of Civil Procedure and the execution process be nullified.

4. THAT the ex-parte Judgment and Decree herein given on 13/06/05 be set aside together with all consequential Orders.

5. THAT this suit be consolidated with HCCC 652 of 2004 for hearing and determination together.

6. THAT the Defendants be granted unconditional leave to file a Defence in the Consolidated Suit.

7. THAT the Court do grant such further or other Orders as it deems just and expedient to grant in the unique circumstances of this Case.

The grounds cited on the faces of the applications as the basis upon which the applications are made is a mixture of grounds and statements of fact. I have taken them into consideration.

The application is supported by the affidavit of TONY KETER, a Director of the 1st Defendant Company. It is deponed that the affidavit is also authorized by the 2nd Defendant, whom the deponent claims is his wife. I have considered the contents of the affidavit and the annextures thereto. The application is also supported by the further affidavit of TONY JOHN KIPLIMO KETTER dated 26th May, 2008.

The deponent avers that the names TONY KETTER and or JOHN KIPLIMO and TONY JOHN KIPLIMO KETTER all refer to him. I have considered the contents of the affidavit.

The application has been opposed. The Plaintiffs accountant, one PATRICK CHEBOS has sworn a replying affidavit to the application dated 13th May, 2008. The Respondent relied upon the affidavit of service in which the process server deposed that he served the 2nd Defendant in April 2005. The Respondent's contention is that the 2nd Defendant was duly served with the summons to enter appearance and the plaint on 16th April, 2005. I have considered the contents of the affidavit.

Turning back to the application, the director of the 1st Defendant as stated swore the supporting affidavit. In it he denies service of the summons upon the 2nd Defendant claiming that he and the 2nd Defendant separated in 2004, when a receiving order was issued against his estate. He deposes that the 2nd Defendant left Kenya for her original home in Kampala – Uganda and that she has never been back to date.

In paragraph 1 of the supporting affidavit, Tony Keter avers that he was authorized to swear the affidavit by the Defendant company and the 2nd Defendant. At the same time he avers that he 2nd Defendant disagreed and separated with him in 2004 and she has never been back. The deponent cannot have been telling the truth when he said that he had the authority of the 2nd Defendant to swear the affidavit. Whatever the deponent alleged in that affidavit regarding the service of the summons contravenes Order XVIII rule 16 of the Civil Procedure Rules as he had no personal knowledge of the facts at the time of the alleged service. Paragraph 14 of the supporting affidavit and paragraph 7 of the further affidavit should for that reason be struck out for being in contravention of the said order.

The affidavit of service stands unchallenged and uncontroverted. The process server stated on oath that he served the 2nd Defendant in person, having been identified to him by a disclosed person. The fact that the Applicant has not exercised its right to have the process server summoned for examination as to service is an indication that the Applicant knew such examination would have been adverse to him.

I find that from the evidence before me, the 2nd Defendant was duly served with summons and the plaint on the 16th April, 2005. The service upon her was both on her personal capacity as 2nd Defendant and as a co-director of the 1st Defendant. I find that the service was proper. In the circumstances the judgment entered on both suits against both defendants on 13th June, 2006 in default of defence and memorandum of appearance was regular.

The application has been filed in April 2008, two years after judgment was entered against the Defendants. Tony Keter has attributed the delay in filing the application to the fact that he was unable to make any steps in the cases due to the receiving order issued against him in **BC No. 143 of 2003**.

Mrs. Gathara for the Respondent submitted that annexures to the affidavits of Tony Keter clearly show that the said Keter continued doing business despite the receiving order. That the receiving order was

only being invoked where it was convenient to the Defendant. Mr. Kopere for the Defendant urged the court to find that the receiving order was not the same as being adjudged bankrupt. I agree with Mr. Kopore that the two orders have quite different legal effect. I will accept the Defendants explanation for the delay in bringing this application.

The next point to make is that a court in exercise of its unfettered discretion may give a Defendant conditional leave to defence the suit even where the exparte judgment was regular, if it is satisfied there are triable issues raised in the defence.

There is a defence annexed at pages 38 and 39 of the supporting affidavit dated 14th April, 2008. No reference is however made of it in the supporting affidavit. In paragraph 4 of the defence, the Defendants aver that there was no written agreement between the Plaintiff and the Defendants. In Paragraph 5 and 6, the Defendants aver that they paid the due fees to the Plaintiff directly from proceeds of the flower farm and they deny owing the sum claimed.

In paragraph 7 of the defence the Defendants aver that they will rely on the agreements and payment advices to prove payments were made to the Plaintiff.

These paragraphs of the defence are in response to the Plaintiff's claim in paragraph 5 and 6 of the plaint. Paragraph 5 of the plaint states that the Defendants neglected and or refused to pay for services and goods when they fell due.

The Defendant has annexed several statements to show payments made by the Defendants directly to the Plaintiffs through the foreign banks. Ketter explains that the payments were made directly at point of sale of the flowers. The statements are at pages 20 to 27 of the supporting affidavit. Page 24 is however not one of the statements.

Taking into account the defence and paragraph 5 of the plaint, a triable issue is disclosed. The defence has demonstrated that some payments were made to the Plaintiffs as late as 2006. The plaint seems to allege that no payments were ever made to the Plaintiff. The trial court has to determine whether any payments were made to the Plaintiff towards reducing the debt and to establish how much of the sum claimed is due to the Plaintiff.

I will give the Defendants a conditional leave to defend the suit as there is a likelihood its defence may as well be a sham. Regarding consolidation of the two suits, Mrs. Gathara for the Respondent did not raise any objection to same. At paragraph 12 of the replying affidavit, PC5 is annexed which is a letter from the Plaintiff in this suit Stockman Rozen (K) Ltd., to the Defendants and copied to the Plaintiff in the other suit HCCC 652 of 2004 (De Ruiters Roses Limited). In that letter, the Plaintiff informs the Defendants that it had assigned collection of sums due to it to De Ruiters. The letter however states that Stockman reserved the right to sue directly to recover the debt due in case of default. Apart from what the Defendant explains in the supporting affidavit and Mr. Kopere in his submissions, there is no relationship between the two Plaintiffs. Each Plaintiff is a different legal entity. The sums claimed by each are different. Each had a separate arrangement and agreement with the Plaintiff and dealt with the Defendants independently of the other. I do not see the justification in consolidating these suits as urged.

Having come to the conclusion I have regarding the application, I rule as follows:

1. The applications dated 14th April, 2008 be and are hereby allowed.

2. The ex-parte judgment and decree entered and issued respectively on 13th June, 2005 be and are hereby set aside together with all consequential orders.

3. The Defendants be and are hereby granted conditional leave to defend the suits.

4. The Defendant to deposit with this court in each of the two suits 50% of the decretal sum as

per the decrees issued by this court on 13th June, 2005 within 30 days from date hereof.

5. The Applicant will pay the costs of the application to the Plaintiff in each suit.

6. Prayer 5 seeking an order consolidating the two suits be and is hereby dismissed.

7. In default of (4) above the exparte judgment and the decree herein will automatically be reinstated and the Plaintiff/Respondent will be at liberty to execute upon application.

Dated at Nairobi this 21st day of November, 2008.

LESIIT, J.

JUDGE

Read and signed in presence of:

Mr. Kopere for Applicant

Mr. Moraa holding brief Ms. Obara for Respondent

LESIIT, J.

JUDGE