REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1292 of 2004

GIDEON ASIRIGWA MBAGAYA…….……PLAINTIFF

VERSUS

TEA BOARD MBAGAYA……..DEFENDANT

RULING

The Plaintiff herein has judgment in this matter given out in his favour on 3rd February, 2006 to the total tune of Kshs 1,684,400.00. The defendant has come to this court by way of chamber summons under Order IXA rules 10 and 11, Order 21 rules 22 Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the law seeking an order that this Honourable Court be pleased to set aside the interlocutory judgment entered in favour of the Plaintiff on 31st January, 2005 and the final judgment passed on 3rd February 2006 and any other consequential orders upon such terms as it may deem fit.

(2) That the defendant be given unconditional leave to defend the suit.

(3) That costs be provided for.

The grounds in support are set out in the body of the application supporting affidavit, annextures and oral submissions in Court and the major ones are:-

(1) The Defendant being a Company Services is required to be effected on a Company Executive namely a company Director or the Corporation Secretary. But not a Directors Secretary. Service was effected on a Director's Secretary.

(2) That the amountt awarded is in excess of what the Plaintiff could have lawfully claimed as shown by annexture ANN E. His entitlement was Kshs 941,708.00. There is therefore an excess award of Kshs 742,692.00 which should go to trial.

(3) That the defendant has a valid defence which raises triable issues and he should be heard on the same.

(4) That reopening the matter will assist the plaintiff claim allowances up to the time of degazetment not included in his claim.

(5) That the Plaintiff was entitled or required to present a liquidated claim to court and not one of general damages.

In response Counsel for the Plaintiff/Respondent submitted that they presented a general claim because they had been denied accessibility to documents and that is why they turned to the court for assistance to assist in assessing the claim.

(2) They content service was proper as it was left at the company premises when the process server was denied accessibility to the authorized officers.

(3) That the defence has admitted that the plaintiff is entitled to some payment. This amount can be paid over to the plaintiff and the balance can go trial.

(4) That if the matter is reopened for the defence they will also have an opportunity to amend the plaint and include the claims left out.

In addition to submissions the Court was referred to authorities on the subject. In the case of KINGSWAY TYRES AND AUTOMART LTD VERSUS RAFIKI ENTERPRISES NAIROBI CA.220/1995. At page 5 paragraph 3, the findings is that "*not withstanding the regularity of it, a court may set aside an experte judgment if a defendant shows he has a reasonable defence on merit."* In the case of AMOS JOSIAH MUYUMBU AND ANOTHER VERSUS ELDORET EXPRESS SERVICES LTD NAIROBI HCCC NO.378 OF 2002 at page 3 of the ruling it is stated "*The rules under the Civil Procedure Act requires that service on a Corporate Institution must be upon a Principal Officer of the said company. Failure to find that principal officer, service may be done by registered post to their registered offices"*.

In the case of PATEL VERSUS E.A. CARGO HANDLING SERVICES LTD [1974] E.A.75. At page 76 paragraph E-F SIR WILLIAM DUFFUS president as he then was had this to say "*I also agree with this broad statement of the principles to be followed. The main concern of the court is to do justice to the parties, and the Court will not impose conditions and itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this case a defence on the merits does not mean in my view a defence that must succeed, it means as Sheridan J. put it a on issue which raises a prima facie defence and which should go to trial for adjudication."* It was held that the discretion of the court is not limited.

In the case of KENYA AUTHORITY VERSUS KUSTRON (K) LTD NAIROBI HCA.142 OF 1995 at page 4 paragraph 1 it is stated "*the nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally, I think, it should always be remembered that to deny a subject a hearing should be the last resort of a court"*.

In the case of OUMA VERSUS NAIROBI CITY COUNCIL [1976] KLR 297. At page 304 paragraph G-H it is stated "*Thus for a plaintiff to succeed on a claim for special damages he must plead it with sufficient particularity and must also prove it by evidence"*. It was held in holding 2 that although special damage had been specifically pleaded by listing in the plaint the items alleged to have been stolen or damaged the plaintiff's failure to prove such damage at trial with certainty and particularity precluded the court from making any award of special damages.

Turning to the provisions of the Civil Procedure Rules Order IXA rule 10 states "*where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just"*

Order XXI rule 22 is not applicable here as it deals with stay of a decree by a court to which a decree has been sent for execution by court that has issued it. Herein the decree in issue has not been transferred to this court by another court but was issued by the same court. Where as Section 3A Civil Procedure Act is simply a saving Section bestowing upon this Court inherent powers to do all that is necessary to prevent abuse of the Court process and for ends of justice to be met.

Appling the above principles and provisions of the law to the facts of this case it is clear that jurisdiction exists in favour of this court to set aside or/vary a judgment irregularly entered or regularly entered by this Court. An irregular judgment is required to be set aside as of right. A regular judge is to be set aside where the ingredients for setting aside have been met. Herein the applicant's complaint is that:-

(a) service was improper

(b) They have a defence with triable issues

(c) The amount awarded is in excess of what the Plaintiff should have rightfully claimed.

(d) There is room for the plaintiff to claim more money due to him up to the time of degazettement.

On service order 5 rule 2 is clear. It states "*subject to any other written law where the suit is against a corporation the summons may be served.*

(a) On the Secretary, director or other principal officer of the corporation: or

(b) If the process server is unable to find any of the officers of the corporation mentioned in rule 2 (a), by leaving it at the registered office of the corporation or sending it by prepaid registered post to the registered postal address of the corporation or if there is no registered office and no registered postal address of the corporation by leaving it at the place where the corporation carries on business or by sending it by registered post to the last known postal address of the corporation"

The requirement is that service may be effected on the secretary, director or any other principal officer of the corporation. The defendant denies service. The Return of summons dated 16.12.2004 and filed on 12.1.2005 says that service were left at premises of the corporation. On the facts it is difficult to tell who is telling the truth. In view of the fact that this was a first attempt the court expected the process server to make at least more than one attempt to serve the defendant before leaving the summons at the defendants place of business. Service has therefore been faulted. There is therefore one proved ground for this court to re-open the case for the defence to be heard.

On the defence, this has been annexed as ANN F. The Court has perused the same. It is clear that the Plaintiff had been appointed as a Director though wrongfully as claimed by the defence. He was kept out of the office, he should have been degazetted as recommended to the Minister for Agriculture by the Defendant. However, recommendation was not effected and if the plaintiff missed meetings then he missed 17 meetings. On that basis they denied the plaintiffs claim and put him to strict proof. The supporting affidavit depones to the contrary. Paragraph 8 and 10 of PHRASIA WAMBUI MWANGI depones clearly that the entitlement of the Plaintiff should have been only shs 941,708 and not 1,684,400.090. As submitted by the Plaintiffs Counsel this is an admission which cannot be ignored by the Court leaving an excess of about 742,692.00 which can go for trial. In view of the amount involved it is only proper that the defendant be allowed to be heard on the difference. Another reason for reopening the matter is the revelation that if the plaintiff's claim is sustainable he is entitled to claim his allowances up to the time of degazettement.

Taking all the relevant factors into consideration the Court is satisfied that this is a proper case where ex parte judgment can be set aside on terms.

This Courts judgment of 3.2.2006 be and is hereby set aside on the following terms.

(a) The Plaintiff is allowed to proceed with executor for the admitted sum of Kshs 941,708.00.

(b) The balance of the claim to be reopened for the defence to go for trial.

(c) The defendant given 21 days from the date of the ruling to file and serve a defence.

(d) The Plaintiff Respondent will have costs of the application.

(e) Thereafter parties to proceed according to law.

DATED, READ AND DELIVERED AT NAIROBI THIS 25TH DAY OF MAY 2007.

R. NAMBUYE

JUDGE