



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

Civil Suit 421 of 2005

JUANCO SPS LIMITED.....
.....PLAINTIFF

VERSUS

BARAKA AGROVET LIMITED.....1ST
DEFENDANT

DANSON NJUGUNA.....2ND DEFENDANT

R U L I N G

Both defendants have moved this court with a chamber summons brought under order 9A Rule 10, Order 39 Rule 1 (a) of the Civil Procedure Act.

The defendants seek to set aside the exparte judgement entered on 18th November 2005 entered in default of appearance by both defendants.

The application is anchored on the grounds that; the defendants were not served with summons to enter appearance; that the defendants have a valid defence to the claim which raises triable issues; that the 1st defendant company was placed under receivership where Mr Kieran Day was appointed the receiver manager.

The process server, who allegedly served the summons, Raphael Kilonzi was called to be examined on his affidavit of service.

When examined he stated first: -

“I tried to served her husband Dominic Njuguna. She said she was married to Mr Njuguna. I served process on 22.8.2005. I did not know that Mrs Njuguna was working for prime bank. She introduced herself to me and was pointed out by the gardener.”

On being examined by plaintiff counsel the process server stated: -

“I met the gardener Mr Okello first. He told me Mrs Njuguna was in the house. She did not open the door. I handed the proceedings to her through a window. I had known her before.”

The affidavit of service, of the summons to enter appearance and plaint, filed in court on 11th October, 2005, states that the process server proceeded to the premises of the 1st and 2nd defendant. The 1st

defendant, it ought to be noted, is a Limited Liability Company. The process server proceeded to state that he effected service on Esther Wanjiku Njuguna the wife of Danson Njuguna.

On the basis of that affidavit of service the court entered judgment against the 1st and 2nd defendants.

The finding of the court is that such service, if indeed service was effected was not proper. The process server in oral examination stated that Esther Wanjiku Njuguna introduced herself and was pointed out by the gardener. In the affidavit of service the process server stated that the said Esther Wanjiku Njuguna was known to him before service. In the light of those inconsistencies on service, the court finds that it cannot rely on the affidavit of service as evidence of service as evidence of service having been effected. In any case the said Esther Wanjiku Njuguna was not stated to have been a director of the 1st defendant and it is therefore not clear under what circumstances service on behalf of the 1st defendant was effected.

All in all the court finds that service was not effected and accordingly the ex parte judgement entered herein, ought to be set aside ex debito justitiae.

The court did not have the benefit of hearing the plaintiff's argument because, when the defendant's application came up for further hearing on 5th July 2005, the plaintiff's counsel who was aware of that date failed to attend court.

The court will grant the order sought by the defendants and will grant the defendant time to file their defence.

The orders of the court are: -

- (i) that the exparte judgement entered on 18th November 2005, against both defendants, is hereby set aside;**
- (ii) that the defendants are hereby granted leave to file their defence within 14 days from this date hereof.**
- (iii) The defendants are granted costs of the chamber summons dated 27th January 2006.**

MARY KASANGO

JUDGE

Dated and delivered this 31st July 2006.

MARY KASANGO

JUDGE