

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Commercial Civil Suit 131 of 2005

ELLE –TISRI.PLAINTIFF

VERSUS

SAN GIORGIO LTDDEFENDANT

R U L I N G

In a plaint dated 28th June 2005, ELLE TIS.R.I., the plaintiff herein, prayed for judgment in the sum of Kshs.3,946,039.60 from San Giorgio Ltd, the defendant herein. The amount claimed is said to be in respect of shipping services and goods given in the year 2003. The plaint and the summons were served upon the defendant who then engaged the services of Khaminwa & Khaminwa Advocates filed an appearance on 5th September 2005. It would appear no defence was filed until 25th January 2006 when he plaintiff filed a request for judgment in default of defence pursuant to the provisions of Order IXA rules 3, 4, 5 and 6 of the Civil Procedure Rules. The record shows that the plaintiff was given exparte judgment on 26th January 2006 upon that request.

The plaintiff has now taken steps to execute the decree. The defendant to set aside the exparte default judgment by a summons filed pursuant to the provisions of order IXA rule 10, Order VI rule 8(2) of the Civil Procedure Rules.

The summons dated 23.2.06 is the subject matter of this ruling. The summons is supported by the affidavit of Ceccagnoli Italo sworn on the 23rd day of February 2006.

It is the submission of the defendant/Applicant that the plaintiff was served with a request for particulars to enable the defendant prepare and file a defence. It is the view of the applicant that the plaintiff should not have requested for judgment in default of a defence while the questions raised in the request for particulars have not been answered. The plaintiff did not file a response to the summons dated 23.2.2006 despite having been served with the same. Consequently the summons was argued exparte.

I have considered the facts deponed in the affidavit of Cessagnoli Italo. A copy of a request for particulars under order VI rule 8 has been attached to the aforesaid affidavit. It is clear from the court file that no reply to the request was filed by the plaintiff. It is the submission of the defendant that it could not file a defence before getting an answer to the request for particulars. I have examined the provisions of Order VI rule 8 of the Civil Procedure Rules and it is evident that the mere fact that one has requested for particulars did not bar the plaintiff from requesting for judgment in default of defence. Since that is the only main reason advanced in support of the summons then I see no merit in the application. The same is ordered dismissed with no order to costs.

It is obvious that the summons dated 5th July 2006 was filed specifically to seek for orders of stay of execution pending the hearing and determination of the summons dated 23rd February 2006. Since the application dated 23.2.2006 has been dismissed it means that the summons dated 5th July 2006 must go with it. The same is also dismissed with no order to costs

Dated and delivered at Mombasa this 20th day of July 2006.

J.K. SERGON

J U D G E

In the presence of Mr. Wanyonyi for the Respondents and in the presence of Dr. Khaminwa h/b Lijoodi for the applicant.

Dr. Khaminwa

I pray for a stay order to enable me lodge an appeal. The amount involved is substantial.

Court:

The defendant is granted a stay of 7 days to enable it file a substantive application for an order of stay pending appeal.

SERGON, J