



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

Civil Case 69 of 2004

**WALLY TRADING COMPANY LIMITED
PLAINTIFF**

VERSUS

**ISIOLO COUNTY COUNCIL
DEFENDANT**

RULING

1. The Application dated 31.10.2005 seeks orders as follows:-

i)

ii) That the Honourable Court be pleased to set aside the interlocutory judgment entered herein on 21st September 2004 together with all other consequential orders.

iii) That there be a stay of execution of the decree pending hearing and determination of this application.

iv) That the Defendant/Applicant be granted leave to file defence out of time.

v) That the costs of this application be provided for in any event.

2. The grounds in support of the Application are that:

(a) The suit herein was filed on 18th August 2004.

(b) The summons to enter appearance seem to have been served upon one Rehema.

(c) The Summons were never served upon the clerk to Isiolo County Council, the Defendant herein.

(d) The Defendant came officially to be aware of this suit on 25th October 2005 when the Clerk was served with a ten (10) days' Notice of Intention to execute.

(e) The Defendant has a good defence which raises triable issue and ought to be allowed to file its defence out of time.

(f) The Plaintiff has already obtained the decree and has given notice of his intention to proceed with execution.

(g) The Defendant shall suffer irreparably if condemned unheard and shall lose huge sums of money for a claim which it has a good defence against.

(h) The Plaintiff shall not suffer any prejudice if this application is allowed.

(i) This Application has been brought without undue delay and has been brought in good faith.

3. From the Supporting Affidavits of Ali Apidi sworn on 31.10.2005 and that of Rehema Ali sworn on 31.10.2005 it is clear that the only substantive issue for determination at this stage is whether the service of Summons to Enter Appearance was proper and whether the intended Defence raises triable issues. I have also read the Replying Affidavits of Zadrack Achoki Advocate and Hussein Shariff Ali, Managing Director of the Plaintiff company in response to the Application and I may advert to them in due course.

4. On the question of service of Summons to Enter Appearance, I note that the Defendant does not deny that such summons were actually issued and served on 18.8.2004 at 3.40 p.m. I have seen the Affidavit of service sworn on 14.9.2004 by Stephen Mwema Kyongo, process server. He depones that he served the summons upon one Rehema, Secretary to the Clerk, Isiolo County Council who proceeded to affix the stamp of the Clerk, Isiolo County Council upon the duplicate copy of the summons. I have perused the record and I confirm that the process server has deponed to matters that I have now verified. Rehema Ali aforesaid also confirms these facts in her Affidavit in support of the Application.

5. In his Affidavit in support, Ali Apidi, the current Clerk to Council depones that he only came to know of the suit on 25.10.2005 when he was served with a Notice of Intention to execute the decree and when he **“made inquiries of the suit as it involved large amounts of money..... nobody seemed to know about the case.”** This statement seemed baffling to me because on 27.10.2004, Stephen Mwema Kyongo served Rehema Ali with notice of hearing for the formal proof of the suit. She signed at the back of that notice. On 24.1.2005 another such notice was served on the Clerk to Council who signed at the back of the notice in acknowledgment and confirmed that he was aware of the case. Another notice was served on 29.4.2005 and although the process server depones that he served the Clerk to Council the stamp in acknowledgement is that of the Council Registry. That notwithstanding, surely somebody, Rehema Ali included, was aware of the suit prior to service of execution proceedings.

6. The question however that confronts this court is this; was service of the original Summons to Enter Appearance, on Rehema Ali, Secretary to the Clerk to council such service as can be called proper within the meaning of Order V of the Civil Procedure Rules.

7. Before I delve into the matter, I should note that Onyancha J. who heard this case, in his judgment delivered on 15.9.2005 said this;

“The Defendant was properly served with summons to enter appearance, probably because it recognized the existence of the contract.”

8. Earlier in the same Judgment, the learned Judge had noted thus;

“The defendant was served with the summons to enter appearance on 18.8.2004 and there is an affidavit of service to that effect, but it neither entered appearance nor defence.”

9. To my mind it is not open to me at this stage to re-open that matter as the judge conclusively determined the question of service before proceeding to hear the suit ex-parte. Assuming that I was entitled to do so, and I doubt that I am, I have set out above the circumstances under which service was effected. It is admitted that service was in fact made and that Rehema Ali is by her own admission the person who ignored the same and failed to bring it to the notice of the Clerk to Council. I have however said that service of other process was effected before hearing of the suit and the council did nothing about the pending suit. The mistake of Rehema Ali may be excusable at the first instance but when repeated by herself and other members of the Council then court sees not inadvertence but a desire to obstruct and delay the course of justice (see Patel vs. E.A. Cargo Handling Ltd. [1975] E.A. 75).

10. In the circumstances and for the above two reasons I am not prepared to find that service of summons was not effected on the Council as stated by the Applicant.

11. On the second point, it is argued on behalf of the Applicant that the draft Defence raises triable and weighty issues and the Defendant ought to be allowed an opportunity to put forth its case. The case for the Council is that the Plaintiff is in breach of contract and an order for specific performance and general damages for breach of contract is sought. At paragraphs 3,4,5 and 6 the Council denies any contract with the Plaintiff or that it made any payments to it totaling to Ksh.350,000/=. I have seen the Judgment of Onyancha J. and he finds contrary to the averments in those paragraphs as documentary evidence was laid before him to show that the contract was awarded to the Plaintiff and the Council indeed made a down payment Ksh.350,000/= contrary to the assertions by the council.

12. It is trite law that no damages for breach of contract can be awarded and in dismissing the Plaintiff's claim in that regard, Onyancha J. said, "Mere breach of contract in my understanding do not result (*sic*) into an award of general damages." I agree and the Defendant equally has no defence in that regard.

13. The only and probable defence left for the Defence is the prayer for specific performance of the contract. On this point P.Exh.2 is a letter dated 19.2.2003 on the council's letter-heads where the senior warden in-charge of Shaba Reserve, Abdi Boru confirmed that "Wally Trading Company Ltd, contracted to haul and dump murram, has done so in accordance with the specifications contained in the contract." This letter has not been disowned by the Defendant and this is what led Onyancha J. to conclude that the Plaintiff's evidence in that regard is unchallenged. I am of the same mind. There cannot be a credible defence on this point when the Council has already approved the works as completed.

14. I should only say this last point; if Isiolo County Council is so disorganized in its operations so that one officer does one thing and another comes to deny it, then such acts should not be visited on third parties who deal with it as an entity. When Rehema Ali receives summons; the clerk to council receives hearing notices and both ignore them and then blame Rehema, what can a court otherwise think? When Abdi Boru, Senior Warden approves the work of the Plaintiff and Ali Apidi the Clerk to Council disowns the same, how can discretion surely favour such a party?

15. In a nutshell, I see no triable issues raised in the draft defence and as was said in Python Waweru Maina vs Thuku Mugiria [1982 – 1988] 1 KAR 171 in exercising discretion to set aside interlocutory judgment, the court ought to consider the facts and circumstances both prior to and subsequent to that judgment and also the respective merits of the cases put forth by the rival parties. I have attempted to do so and I have found for the Plaintiff on all fronts.

16. I must come to the end and before doing so I should thank both Mr. Ombachi advocate and Miss Bii Advocate for the authorities supplied to court and for their incisive submissions.

17. As for the Application dated 31.10.2005, I do not see merit in it and the same is hereby dismissed with costs to the Plaintiff/Respondent.

18. Orders according.

Dated, signed and delivered at Meru this 11th Day of July 2006

ISAAC LENAOLA

JUDGE

In the Presence of:

Mr. Ombachi (absent) Advocate for the Applicant Miss Bii Advocate for the Respondent

ISAAC LENAOLA

JUDGE