

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 728 of 2000

ELECTRONIWATTS LIMITED..... PLAINTIFF

VERSUS

COUNTRYSIDE SUPPLIES LIMITED..... 1ST DEFENDANT

JOHN M. N. MUTUTHO2ND DEFENDANT

R U L I N G

This is an application (by Chamber Summons dated 26.7.2006) by the defendants seeking primarily that the judgment/decree dated 10.4.2006 be reviewed and/or set aside. The application is expressed to be brought under the provisions of Order XLIV Rules 1, 2 and 3, Order XX1 Rule 22 and Order 1XB Rule 8 of the Civil Procedure Rules Section 3A of the Civil Procedure Act and all enabling provisions of the Law. The reasons for the application are as follows:-

- 1) That the firm of Momanyi & Associates Advocates who were purportedly served with a Hearing Notice dated 14.11.2005 did not have instructions to act for the applicants.**
- 2) That it is on that basis that this matter proceeded ex-parte and judgment was given in favour of the respondent.**
- 3) That the secretary of the said Law firm erroneously received the said Hearing Notice.**
- 4) That the applicants herein have filed a defence, which defence raises triable issues.**

The application is supported by an affidavit sworn by John Mututho the 2nd defendant/applicant. The application is opposed and there is a replying affidavit sworn by Biwott Joseph Korir the plaintiff's advocate.

The application was canvassed before me on 27.9.2006 by Mr. Orange Learned counsel for the defendants and Mr. Korir Learned counsel for the plaintiff. The gist of the defendants' application is that M/s Momanyi and Associates Advocates were not their advocates and service of the Hearing Notice upon them was not service upon their recognized agents and therefore the ex-parte hearing that took place on 9.2.2006 and the judgment that was given was on the erroneous basis that proper service had been affected. The defendants accordingly contend that they were not given a fair opportunity to be heard and this application should be allowed to enable the court give the applicant's a fair hearing.

The plaintiff's position is that the application is without merit and is an abuse of the process of the court. With respect to the service of the Hearing Notice challenged by the defendants the plaintiff contends that the process server sufficiently explained the circumstances under which M/s Momanyi and Associates Advocates were served. According to the plaintiff service of the said Hearing Notice was accepted by the court and the judgment given is regular and should not be disturbed. With respect to the existence of bona fide triable issues in the defence the plaintiff contends that there are none as no evidence was led to controvert the plaintiff's testimony.

I have considered the application together with the affidavits both in support and in opposition to the application. I have also given due consideration to the submissions of the Learned counsel's appearing. Having done so, I take the following view of the matter. Order 1XB Rule 8 of the Civil Procedure Rules,

which in my view is the principal jurisdiction that has been invoked, gives the court an unfettered discretion to make an order as sought upon such terms as are just. In exercise of that discretion the main concern of the court is to do justice to the parties (see **Pithon W. Maina – vs Mugira: [1982-88] KAR**). The discretion of the court although unfettered should be exercised judiciously.

In this case, Ms Momanyi and Associates Advocates have never been on record for the defendants. The process server who served the Hearing Notice deponed that he was informed by a secretary of M/s E. K. Mutua & Company Advocates that the firm of M/s Momanyi and Associates Advocates had taken over the matter from M/s E. K. Mutua and Company Advocates. That advice may indeed have been given but the fact remains that M/S Momanyi and Associates Advocates were not and have not been on record for the defendants. In any event the process server does not in the affidavit of service exhibited by the plaintiff as “**JKB 1(a)**” depose that he indeed served a Hearing Notice upon the said firm. In the premises it cannot be said that the defendants have deliberately sought to obstruct or delay the course of justice. Indeed in my view as the defendants or their recognized agents were not served with a Hearing Notice, the judgment obtained on 9.2.2006 was irregular and should be set aside **ex debito justitiae**.

I will in the circumstances allow the application in terms of prayer 2 thereof with costs to the applicants. Order accordingly.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF OCTOBER, 2006.

F. AZANGALALA

JUDGE

23.10.2006

Read in the presence of:-