



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
Civil Case 276 of 2003

INDUSTRIAL WATER MANAGEMENT LTD.....
.....PLAINTIFF

VERSUS

GE-BETZ C/O GENERAL ELECTRIC COMPANY USA

(formerly HERCULES ITALY S P A

BETZ DEARBORN DIVISION.....1ST DEFENDANT

VIPAN KALIA2ND DEFENDANT

R U L I N G

The plaintiff instituted this suit against the GE-BETZ c/o **GENERAL ELECTRIC COMPANY U.S.A.** formerly **HERCULES ITALY S.P.A.** as the first defendant.

Orders were granted to the plaintiff to serve the 1st defendant with the court processes out of this court's jurisdiction, in the United States of America.

The summons and plaint were served and an affidavit of service in style and manner as drawn in U.S.A. was filed in court on 6th February 2004. That affidavit states: -

“On the 24th day of November, 2003, at 2.15 pm, at the address of EASTON TURNPIKE FAIRFIELD, Fairfield County, CT; this affiant served the above described documents upon GE-BETZE c/o GENERAL ELECTRIC COMPANY USA, by then and there personally delivering 1 true and correct copy (ies) thereof, by then presenting to and leaving the same with KAREN SELAVKA, PARALEGAL; W/F; BR HAIR; 36 – 50’ 5’55” 100 – 130 LBS.”

Judgment was entered against the 1st defendant on 10th February 2004, in default of an appearance.

What was argued before me was the chamber summon dated 28th April 2004 brought under Section 3A of the Civil Procedure Act and Order B Rule 2, 16, 31 and Order I X A Rule 10 of the Civil Procedure Rues. The application seeks the order that default judgment entered herein against the 1st defendant be set aside.

The deponent to the affidavit in support of the application state as follows: - · That he is the vice president and general manager of Water and Processing Technology of General Electric Company, USA.

- That the General Electric Company is not a party in these proceedings. · That there is no legal entity known as GE-BETZ. GE BETZ is a common denominator of a group of legal entities active in the filed of water treatment and incorporated in various countries
- That GE BETZ in those cases is merely part of the name of every such corporate entity whose full name and identity depends on the country of incorporation. For example GE BETZ South Africa Pty. Ltd, incorporated in South Africa; GE BETZ BVBA incorporated in Belgium and GE BETZ S.R.L Incorporated in Italy.
- That by describing GE BETZ c/o ‘**GENERAL ELECTRIC COMPANY USA**’ as 1st defendant makes it impossible to discern against whom the plaintiff’s claim is directed

The defendant annexed an agreement dated 1st January 2001, which was signed between the plaintiff, and a company called Hercules Italy S P A (Betz Dearborn Division). That agreement seems to be the basis of the plaintiffs claim as seen in paragraph 10 of the plaint. The deponent then stated that the plaintiff was not dealing with an entity called GE-BETZ based in USA and that the summons were wrongly served on the wrong entity. That the plaint had wrongly lumped together different entities. That once the summons were served as aforesaid they were circulated to several representatives offices affiliated and trading with GE around the world to ascertain to whom they belonged. In a supplementary affidavit the deponent stated:

“That I confirm that to the best of my knowledge there is no, and there has never been any distributor agreement entered into between the plaintiff and BETZ DEARBORN. Consequently the issue of the alleged company changing its name to GE BETZ does not arise. In addition, the allegation that the operations, assets and liabilities of GE BETZ were taken over the General Electric USA are also untrue.”

“That I am advised by Mr. Vipin Kalia, which I verily believe to be true that the agreement the subject of this suit was entered into between the plaintiff herein and Ms Hercules Italia, SPA subsequently the assets of the BETZ Dearborn division of M/s Hercules Italy, SPA were transformed through a demerger process to a company called GE SPECIALTY MATERIALS SRL a limited liability incorporated in Italy.....”

The said affidavit annexed a copy of the agreement relating to the aforesaid demerger process.

The 1st defendant’s counsel submitted in support of the application, and after repeating the averments in the affidavits as aforesaid stated, that the correct party who ought to have been sued was Hercules SPA Italy. Counsel relied on the case of **FONVILLE – V KELLY III and others [2002] 1 EA 71**; this was a case where lawful service was questioned. Hon Justice Githinji as he then was stated: -

“Notwithstanding the order for leave to serve out of jurisdiction, a foreign defendant who was served has a right to contest the jurisdiction of the court by entering a conditional appearance and thereafter making an application to set aside the order giving leave, or to set aside the service or to strike out the suit for want of jurisdiction.”

Inveiw of the documents placed before the court; the 1st defendant submitted that it was clear, that the plaintiff did not have business relationship with the party served with the summons, and accordingly counsel sought that the irregular judgment entered hereof be set aside ex debito justitiae. 1st defendant’s counsel also relied on the case of: REMCO LTD – MISTRY JADVA PARBAT & co Ltd & OTHERS [2002] EA 233. In an application to set aside default judgment the court held as follows: -

“In exercising the discretion, the court’s concern should be to do justice between the parties, avoid hardship resulting from accident, inadvertence, excusable mistake or error and not to assist a person who has deliberately sought, by evasion or otherwise, to obstruct or delay the course of justice.”

Counsel argued that in this case service on a person who does not exist is irregular and the court should set aside that default judgment.

In opposition a replying affidavit was filed and sworn by a director of the plaintiff. The deponent stated as follows: -

- That the suit is based upon agreements entered into between the defendants and the plaintiff and whose performance was done in Kenya.
- That the defendant was properly served through the diplomatic service but they chose not to enter appearance or file a defence.
- That the defendant had been properly described.

The plaintiff's counsel submitted as follows; that by the arguments of counsel for the 1st defendant that the 1st defendant does not exist, then General Electric Company had no locus to set aside judgment, hereof. He reiterated that GE BETZ does exist and its assets were acquired by General Electric Company USA. He said that the General Electric Company USA was dishonest. Counsel argued that the 1st defendant had failed to annex a draft proposed defence and in view of this failure and because the judgment obtained was regular counsel argued that the default judgment should not be set aside.

I have considered the arguments before me. Essentially the issue is whether there is an entity called "**GE-BEZT c/o GENERAL ELECTRIC COMPANY USA** formerly **HERCULES ITALY SPA.**" The parties that were served as 1st defendants state that there is no such entity. The 1st defendants, quite extensively and with sufficient documents, have shown that such an entity, does not indeed exist. Ordinarily when one alleges something it is their burden to prove the allegation but it is recognized in law that the evidential burden can at times shift to the other party. I believe with the evidence, documentary and affidavit by the party served as 1st defendant it suffices to show that they are not the party described as 1st defendant, the burden to prove that they existed as described in the plaint, shifted to the plaintiff. The evidential burden in regard to the entity named as the 1st defendant and on whether it exist lay on the shoulders of the plaintiff. That burden was not discharged, the plaintiff argued around that issue, but failed to sufficiently explain why it insists that the 1st defendant exists as described. Even looking at the description, thereof, it is plain and obvious that there is no entity that can be names as described, indeed one would ask why have a name then put the word care off. I do find that the 1st defendant has succeeded in proving that indeed there is no existence of such an entity, on prima facie basis. Having then found so I comfortably can say that the default judgment ought, rightly, and in the interest of justice to be set aside.

I do therefore order as follows: -

(1) That the default judgment entered herein on 10th February 2004 and all consequential orders thereof, against the 1st defendant is/are hereby set aside.

(2) The costs of the application dated 28th April 2004 shall be in in the cause.

Dated and delivered this 22nd day of August 2005.

MARY KASANGO

JUDGE