



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 233 OF 2003

MOHAMED SALEH & CO. LTDPLAINTIFF

V E R S U S

TARGET CARRIERS LTDDEFENDANT

Coram: Before Hon. Justice Mwera

**Mogaka for the plaintiff
Lumwaji for the Defendant
Court clerk – Sango**

RULING

The defendant's application dated 17th March 2004 was brought under Order 9A rr. 10, 11, Order 21 r 22 Civil Procedure Rules and Section 3A Civil Procedure Act. The two main prayers were:-

- (i) that there be a stay of execution of the ex parte judgement entered against the applicant on 18th December 2003 and
- (ii) that that judgement be set aside unconditionally thereby allowing the applicant to file a defence to the suit

Mr. Lumwaji relying on the grounds in the body of the application as well as the affidavit of one Ghafour Haji, one of the defendant's directors, told the court that the deposition by one Samson Heho a process server (see the affidavit of service filed here on 15th December 2003) was false and defective in that the said Heho did not serve on the defendant the summons to enter appearance together with the copy of plaint. That the defendant had a good defence to the claim and that similarly entry of the ex-parte judgment on the defendant was never served. That by granting the sought orders interests of justice should be served.

Samson Heho, the said process server was examined on oath on how he effected service of both processes. That in the initial one (summons to enter appearance), he was accompanied by a Mr. Hussein, a representative of the plaintiff, to an office occupied and used by the defendant company in an office block in a compound behind some buildings off Mombasa Road. That the compound had a sign VOLVO nearby from the main road. That when they entered the defendant's office a secretary by the name Ann Wanjiru showed Heho into the office of Gafur Haji, the Managing Director of the defendant company. That this process server introduced himself as well as his mission. He served Haji with the summons to enter appearance. That Haji accepted the same but did not acknowledge the receipt by signing, choosing to consult their lawyers first.

And that on the second visit to serve notice of entry of the default judgement, again Heho was accompanied by Hussein who was providing transport. That this time Ann Wanjiru was not present in the defendant's office. Again Haji was served with that process. That he declined to acknowledge as he did in the first instance. That Heho then filed due affidavits.

Mr. Lumwaji's relying on the replying affidavit of the said Ghafour Haji denied that his client was ever served. That the said Ann Wanjiru (she did not swear an affidavit to discount Heho's claim) was ready to be examined on oath to deny that Heho visited their defendant's offices. The court was told that Heho did not specifically explain / state the location of the defendant's offices in his affidavit(s) of service and that he did not have to go along with Hussein on the second visit if indeed he had since known the location of the defendant's offices.

Mr. Mogaka saw no substance in what the applicant was putting forward, stating that the affidavits of service were proper and valid. That on oath, Heho was not shaken about how he served the processes and that the defendant actually had no defence to the claim because it had brought in its draft defence the subject motor vehicle's sale agreement of 2nd June 2001 between it (defendant) and Sajun Ltd. That the plaintiff's role and claim was only to deliver the motor vehicle to the defendant and be paid for his services. That the issue of paying customs duties was by agreement between the defendant and Sajun and this it was no issue to controvert the claim. That indeed the defendant had even made part-payment by a cheque dated 30th November 2002 which had been returned unpaid. That the defendant's prayers be thrown out or it deposits the whole claimed money before being allowed to defend this suit.

Having perused the plaint, the draft defence, the affidavits with annexures and having heard the process server (Heho) and the examination and submissions by counsel, this court is not inclined to grant the prayers. This court is satisfied by the affidavits of service (for summons to enter appearance and entry of the ex-parte judgment) that Heho did not falsely swear them or that they were defective. He was guided on both occasions by the plaintiff's employee to the defendants offices where a named secretary ushered him into the office of the (managing) director and he was served. On the next occasion the secretary (Ann Wanjiru) was not in the office but again the (managing) director Haji was properly served. Haji and Wanjiru work for / with the defendant applicant and it is not suggested that Heho "invented" them.

The intended defence even if not due for strict focus now does not seem to answer the claim. The claim is clear and even the defendant began by paying Kshs. 462,500/- by a cheque that bounced. The defendant has not explained why it was "paying" the plaintiff save for this court to conclude that it was in respect of an owing sum. There can be no reasonable defence to that.

In sum both prayers are refused with costs. But if the defendant is firmly minded to have its day in court, it has 45 days to deposit the sum claimed in the lawyers' joint income – earning account and thereafter move to trial.

Orders delivered on 23rd day of September 2004.

J. MWERA

JUDGE