



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 1632 OF 2001

CHLORIDE EXIDE KENYA LTD.....PLAINTIFF

VERSUS

MUTARATARA COMPANY LTD.....DEFENDANT

Coram: J. W. Mwera, J

Court Clerk: Ojuki

Macharia for defendant

Njongoro for plaintiff

RULING

On 2nd October, 2002 the defendant filed an application invoking Order 9A rr. 10, 11, Order 22 r 11 Order 49 r5 of Civil Procedure Rules and Section 3A of Civil Procedure Act for orders that this court grants a stay of execution of the decree herein and that the interlocutory judgment be set aside. That in turn the applicant be granted enlarged time to file a defence as per the draft attached to the application.

Mr. Macharia told the court that this application was necessitated by the occurrence wherein the defendant confused the claim herein with a more or less similar one in SRMCC EJ 753/2001 and that its lawyer filed a defence in the latter lower court suit rather than in this. That the defence raised triable issues and millions of shillings are involved. That the plaintiff's position would not suffer loss and if any costs would compensate it.

Mr. Njongoro was unable to discern what good and sufficient reasons the defendant was advancing to warrant the orders sought. That the defendant decided not to comply with the terms of the consent order and thus it cannot pray as it does.

The flow of things here are that on 25th October, 2001 the plaintiff/respondent sued the defendant for Shs.1,377,998/00 on account of goods sold and delivered.

An affidavit of service filed here on 22nd January, 2002 was to the effect that the defendant was served with summons to enter appearance with a copy of the plaint on 6th December, 2001. Apparently there was no appearance entered on time and the plaintiff sought a default judgment which was entered against the defendant on 25th January 2002. On 20th February 2002 costs were certified as Shs.111,900/=.

On the same 20th February, 2002 the defendant sought interim stay orders but the court directed that as *status quo* held, its application dated 19th February 2002 to set aside the interlocutory judgment, had to be served. It was served and on 16th April, 2002 the court recorded consent orders to the effect that the judgment of 25th January 2002 was set aside. That the defendant would file and serve a defence in 15 days from that 16th April, 2002. It was agreed that the plaintiff would get shs.5,000/= thrown away costs in 15 days. It was added that in default of those orders the interlocutory judgment would be reinstated.

The court was told that the costs of Shs.5,000/= were paid in time but the defence was not duly filed. The 15 days did expire on/about 1st May 2002 but the record has it that the plaintiff listed the matter for mention on 24th July, 2002 – some two or so months later, to tell the court in the presence of Mr. Macharia for the defendant, that the defendant had not complied with the consent recorded on 16th April, 2002. That only the costs ordered on that day had been paid. Mr. Njongoro urged the court to activate the other part of the consent orders. Mr. Macharia appeared not to have been aware for what mention was and so that caused the court to allow a further Mention on 29th July, 2002.

On 29th July, 2002 Mr. Macharia explained why the defence was not filed in 15 days as consented to on 16th April 2002 but Mr. Njongoro posited that that failure meant that the default judgment had been reinstated. The court noted all that and ordered as it was agreed by the parties on 16th April 2002. Those orders had to crystallise with the judgment of 25th January 2002 reinstated towards execution.

The defendant again went to rest and brought this application some 2 months later. It sought to ask to set aside the judgment of 25th January 2002 and the orders of 29th July, 2002 putting it in place towards execution.

Mr. Macharia told the court that all along the defendant had wanted to perform its part of the consent orders of 16th April 2002. It had even paid the costs of shs.5,000/= in time. That there was an oversight or inadvertence and the defence was not filed as per those consent orders at all. That the defendant had filed a defence in the lower court case where parties were the same as here and that issues also concerned payment of supplied goods.

Mr. Njongoro who annexed a plaint in RMCC EJ.753/2001 was unable to see what was similar to this suit. That there the defendant was *M/s Motorway Automart Ltd.* being sued on a dishonoured cheque. That this court would not set aside the consent orders of 16th April 2002 in absence of allegations of fraud, mistake misrepresentation etc.

Having heard both sides this court is unable to issue the orders sought. The consent orders of 16th April 2002, set aside the default judgment of 25th January 2002 as per the terms set out in that consent; the defendant had to file and serve a defence in 15 days and also to pay costs of Shs.5,000/=. It was a term that in default the said judgment would be considered reinstated. The costs were paid but the defence was not filed as agreed. Then on 29th July, 2002 the court ordered enforcement of the terms of the consent orders the parties had undertaken. The plaintiff drew up a decree and served it. It is only then that the defendant woke up to bring this application.

This court is not satisfied that the defendant has laid before it sufficient material to set aside the consent orders. They were not tainted with fraud, mistake, ignorance of material facts etc. Confusing two suits one in the lower court and another here, does not fall within the aspects to consider to set aside a consent order. Indeed there was little or nothing in common, on reading the two plaints in those suits, that can warrant to say that the parties or causes, reliefs etc could confuse and did confuse the defendant. It is not a party in the cause in the lower court. Then at every stage the defendant seems not to have acted with diligence at all.

In sum this application is dismissed with costs.

Orders delivered on 17th December, 2002.

J. W. MWERA

JUDGE