



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 557 OF 1998

RAMJI RATINA & COMPANY LTD. PLAINTIFF

VERSUS

THE HON. ATTORNEY GENERAL DEFENDANT

RULING

This application has been brought under O. IXA Rule 10 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for the following orders:-

- “1. That there be a stay of execution of the Decree issued on 1 st February,1999 in this suit;***
- 2. That the judgment entered on 21 st January, 1999 be set-aside along with all consequential orders thereto;***
- 3. That the annexed Defence be deemed to be properly filed;***
- 4. That the costs of the Application to be provided for.”***

The grounds upon which the application is based are that the judgment is irregular and given those circumstances the defendant/applicant is entitled to have it set aside ex debito justitiae as there was an appearance filed before the judgment was entered; that the suit was time barred and the court lacked jurisdiction to entertain the suit; that the defendant has a good defence and the suit ought to be heard on merit.

In the affidavit in support of the application Mrs. Madahana who represents the defendant in this matter, states that a memorandum of appearance was filed on 8.1.1999 before the application for leave to enter judgment in default of appearance was granted. She also depones that the sum being claimed was not in accordance with the contract sum agreed by the parties. She also alleges that the rates of interest applied by the plaintiff in computing the sum due to it was not part of the contract. Consequently she contends that the amount claimed by the plaintiff is not a liquidated sum and would require assessment by way of formal proof before judgment can be entered.

Mrs. Madahana also deponed that the plaintiff has never served upon the defendant the requisite Statutory Notice under Section 13A of the Government Proceedings Act and accordingly the proceedings are void ab initio. In a notice and grounds of opposition filed in court on 17.3.2000, the plaintiff states that as at the time judgment was entered, i.e. on 21.1.1999, there was no appearance filed by the defendant as the Memorandum of Appearance annexed to the affidavit of Mrs. Judy Madahana was clearly never filed at the High Court, Milimani. It is further claimed that no memorandum of appearance has ever been served upon the plaintiff. The plaintiff also claims that it has a good judgment procedurally

obtained as provided in the law, its claim being for a liquidated sum, which meant that there was nothing to establish by way of formal proof. Further the plaintiff claims that there is no variance in the rate of interest between the judgment and the certificate of order against the Government issued by the court. The plaintiff finally contends that if there was any error in the interest applied, the same is an error apparent upon the record, which can be corrected with no prejudice to either of the parties.

In order to determine whether or not the judgment should be set aside, I think we should start by first examining whether there was any basis for entering the judgment in the first place. All that hinges on the further question whether or not an appearance had been made by the time judgment was entered on 21.1.1999. I say so because the only reason for the application for leave to enter the judgment against the Government pursuant to which judgment was subsequently entered was the defendant's alleged failure to enter an appearance. In that regard, it is to be observed that no appearance had been made by that time while the defendant claims that appearance was entered on 8.1.1999, some 11 days before the judgment was entered.

In support of the defendant's contention, Mrs. Madahana has annexed to her affidavit, a photocopy of a stamped Memorandum of Appearance which shows that appearance was made at the High Court Central Registry on 8.1.1999. Given the fact that the suit had been filed at Milimani Commercial Court, the plaintiff contends that the appearance at the High Court Central Registry was defective. Mrs. Madahana however maintains that the appearance at the Central Registry was in accordance with the law in that Section 14(1) of the Government Proceedings Act permits appearance to be made at the Central Registry in cases in which civil proceedings against the Government in the High Court have been instituted by the issue of a plaint out of a District Registry.

However, that submission is based on the premises that Milimani Commercial Courts is a District Registry, which assumption is clearly wrong. District Registries in this country are set out in the Schedule to Order XLVI Rule 2 (I) of the Civil Procedure Rules. Any court which is not included in that schedule is not a District Registry within the meaning of the Rules and cannot therefore be considered to be such for the purposes of Section 14(1) of the Government Proceedings Act. Since Milimani Law Courts is not listed in sub-rule (I), it follows that Section 14(1) of the Government Proceedings Act does not apply and consequently the appearance made at the Central Registry was not a valid appearance. If I may speculate a little, what appears to have happened in this matter is that the defendant made a simple inadvertent mistake. Instead of filing the Memorandum of Appearance at Milimani Commercial Courts where the suit had been filed, the defendant filed it at the Central Registry and instead of admitting the error, the defendant has sought to justify it. What is to be done in the circumstances?

Bearing in mind the fact that the mistakes of counsel should not be visited upon their clients, I am of the opinion that the error committed by the Attorney-General in filing the Memorandum of Appearance at the Central Registry instead of the Registry at Milimani Commercial Courts should not be considered as sufficient ground for denying the defendant the right to have the judgment set aside.

Regarding the issue whether or not the defendant has a good defence to the claim, Mrs. Madahani made several submissions. One of those was that the suit was bad in law in that the plaintiff had contravened Section 13(a) of the Government Proceedings Act as to giving of a notice. The section requires a party who intends to institute proceedings against the Government to give a thirty days notice in writing in relation to those proceedings. It enacts:-

“13A.(1) No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the Government in relation to those proceedings.”

It is the defendant's contention that such notice was not given. The plaintiff's rejoinder to that contention was that the requisite notice was duly given and consequently the ground lacks substance. To support that assertion, the plaintiff's advocate swore an affidavit annexed to which is a copy of a notice to the Attorney-General dated 3.9.1997 which in my view satisfies the requirements of Section 13(a) of the Government Proceedings Act. The notice identifies the Ministry that engaged the plaintiff as a contractor

as Public Works but goes on to specify that the project was for the Department of Defence. Given those circumstances, there was no doubt as to which Department of the government was responsible for the claim and consequently I do not accept as genuine or founded the complaint that the Attorney-General was misled regarding where to seek for instructions in connection with the claim.

The other issue that Mrs. Madalana raised for the purpose of showing that the proposed defence was good was that the suit by the plaintiff was time barred. In her affidavit she depones that on the face of it, the suit is statute barred having been instituted one year after the cause of action arose. This is a substantial ground which, in my view, can only be established by oral evidence at a trial. But having regard to the view I take of this application, I do not consider it necessary to delve more into the matter. In his response, Mr. Kembi for the plaintiff took the court through the steps he had taken from the date of filing the suit up to the time judgment was entered. He complained that even if the Memorandum of Appearance had been filed, albeit at the wrong Registry, the plaintiff had not been served. In that event he submitted, the plaintiff was entitled to apply for leave to enter judgment against the Government.

There is no doubt in my mind that most of the complaints that Mr. Kembi has voiced are justified and that the office of the Attorney-General has exhibited a complete lack of professionalism in its conduct of this matter. In the first place, it filed a Memorandum of Appearance in the wrong court and failed to serve it on the plaintiff; and when an application for leave to enter judgment against the Government was served, no one turned up in court on behalf of the Attorney-General when the application came up for hearing on 18.1.1998 and the matter proceeded ex-parte. Despite all that, I do not consider that there is any justification for shutting out the Government just because someone failed to do what was required of him. In arriving at that conclusion, I have as mentioned above taken into account the assertion that the Government may have a good defence to the suit. In those circumstances it would be unjust and unfair to permit the judgment entered herein in default of appearance to stand.

Accordingly in exercise of the wide discretion conferred upon this court by O. IXA Rule 10 of the Civil Procedure Rules, I allow the application and set aside the judgment entered in this matter on 21.1.1999. The draft defence annexed to the application is deemed to have been duly filed. The defendant will however bear the plaintiff's thrown away costs, such costs to be taxed if not agreed and to be paid within the next 60 days of the date hereof.

Dated at Nairobi this 23rd day of February, 2001.

T. MBALUTO

JUDGE