



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL CASE NO. 335 OF 1999

KENYA COMMERCIAL BANK LTD.....PLAINTIFF

VERSUS

1. MUMO GENERAL SUPPLIES LTD.....1ST DEFENDANT

2. JOSEPH NGAO KIOKO 2ND DEFENDANT

3. SHADRACK KALATI KAVINYA..... 3RD DEFENDANT

4. FREDRICK KIEMO KIMULI.....4TH DEFENDANT

5. PETER MUOKI MUSYIMI.....5TH DEFENDANT

Coram: J. W. Mwera J.

Miss Mungala Advocate for applicant/defendants 2nd, 3rd and 4th

Sila Advocate for Respondent/Plaintiff

C.C. Muli

RULING

The application for determination now was dated 31.10.2000 and brought under O. 9A rr. 10, 11 Civil Procedure Rules, S. 3A Civil Procedure Act. It sought orders to set aside the default judgement of 22.3.2000 against the 2nd to the 4th defendants and to allow them to defend the suit unconditionally. This was argued by Miss Mungala on the basis that her clients were never served with a summons to enter appearance together with a copy of the plaint and that they had a meritorious defence as on its draft which ought to be heard at the trial. She added that even with the plaint describing the 1st defendant as a limited liability company with the rest of the defendants as its directors, the correct position is that the 1st defendant was a firm in which the other defendants were partners. That particularly the 2nd and 3rd defendants had nothing to do with the suit or the claim. That the respondent bank gave a loan to the 1st defendant which the 4th defendant guaranteed. That it was the 5th defendant, without authority of the 2nd and 3rd defendant who accepted service and that that was invalid.

Mr. Sila was of the contrary view that when the 5th defendant accepted service on behalf of the other defendants, that was valid service, particularly that he, the 5th defendant promised to pass the processes on to the other defendants. Mr. Sila saw no merit in the draft defence even after he conceded that the 1st defendant was a firm. Both sides referred to affidavits and exhibits to illustrate this or that point.

Without going to the other aspects of this suit, this court notes that the plaint while describing the 1st defendant as a limited liability company under the directorships of the other 4 defendants, Mr. Sila

appeared to be of the opinion that the 20 1st defendant was indeed a firm. Said he to a question by the court:

“Court. Was the 1st defendant a firm (partnership) or a limited liability company? Sila. I believe it was a firm.”

Indeed that is on the defence (draft) and if not resolved earlier must be so resolved by evidence at a trial. That resolution will go along way to apportion liability to the plaintiff company because under the two legal entities: a limited liability and a partnership, courses to take on liability are not the same.

Then the issue of service. The process server one Felix Munuve states in an affidavit of service (none was easily traced on the file) at paragraph 6.

“6. That on 23rd day of February 2000 I proceeded to Nairobi South C Estate where I served Peter Muoki Musyimi one of the defendants who accepted service for all the other defendants by way of signing (and) dating at the back side of the original summons.”

Miss Mungala posited and it was not rebutted that Peter Muoki the 5th defendant had no authority from other defendants to accept service of summons to enter appearance plus a copy of the plaint on their behalf. In absence of such authority the service on the 2nd, 3rd and 4th defendants was defective and the default judgement ought not have been entered against them. It is thus set aside. The draft defence to be deemed filed. Subject to paying the requisite fee, it shall be served and the cause moved to trial.

The court observed that if the 1st defendant was surely a limited liability company, save for the guarantor of the loan to it what were the other “directors” sued for? And if the 1st defendant is a partnership was it capable of being served and a default judgement entered against it? Anyway that is by the way only.

In sum the application succeed with costs.

Orders accordingly.

Delivered on 30th May 2001.

J. W. MWERA

JUDGE