REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 2944 OF 1997

KENYA COMMERCIAL BANK LTD. ……
PLAINTIFF

VERSUS

AGRO COMPLEX (K) LTD.

& 2 OTHERS …….....……DEFENDANT

RULING

By its application of the 4/10/2000 the 1st and 2nd Applicants seek to set aside an exparte judgment entered on the 26.2.1998 against them.

The 3rd Defendant filed an application on the 24.9.2000 also to set aside the judgment.

The grounds in respect of both applications are different as the main ground adduced by the 3rd defendant for the setting aside is that he was not served with the summons to appear.

I will deal with each application separately in so far as different issues arise. It is to be noted that both applications are made under certificate of urgency more than 2½ years after judgment was given.

It appears that all the Defendants know of the proceedings filed against them as in July 1998 a firm of advocates Gautama & Kibuchi wrote to the advocates for the Plaintiff on the 15/7/98 asking the Plaintiff to get the auctioneer who had attached the Defendants property to stay their hand to enable the Defendants to give security to the Plaintiff of a property thought to be worth in excess of Kshs.20M. They went on to say their clients were making efforts to sell the property.

The Plaintiff's advocates wrote back on the 24.7.98 asking for a professional undertaking from the Defendants advocates to pay the total amount due. The Defendants advocates wrote back on the 24.7.98 giving an undertaking to pay the entire decretal amount on completion of the sale transaction. On the strength of this undertaking the Plaintiff advocates informed the Defendants advocates that execution of the decree would be suspended for 90 days from the 1st August 1998. Further correspondence ensued and an agreement for sale entered into by the 1st Defendant with one Little Ngister Ltd. for sale of the property in question was sent to the plaintiff advocates. This was all to no avail as no monies were forthcoming. The 1st Defendant in a letter signed by the 2nd and 3rd Defendants dated the 6.11.98 stated that they had accepted a buyer of the property in question for Shs.5 plus existing liabilities of Shs.2m. They asked that the Plaintiff accept 5 million and write off the balance. This proposal was accepted on the strict understanding that the sum of Shs.5 Million would be paid to the Plaintiff advocates immediately after the completion of the sale on the 3/2/1999.

On the 12.5.99 the Plaintiff's advocates wrote to the Defendants advocates noting that they had not been

advised of the progress of the sale and stating that unless a report of tangible progress was received by the 14.1.99 they would proceed further.

All of this is contained in the affidavit in reply sworn by Mr. Ougo on the 24.10.2000.

It appears that the Defendants have come late to this application as execution proceedings are now being pursued.

The 1st and 2nd Defendants have attached a draft Defence to the application. The Defence complains that they have not received a statement of account or that they entered onto a loan agreement. They further allege breaches of Central Bank of Kenya directives and set out particulars thereof. They further allege breaches of the law of Contract Act and the Banking Act. No where however in there an allegation that they did not receive the advance of the sum of **Ksh.9,399,193.10./=** the sum claimed in the plaint.

It is clear however that these defendants accepted liability as appears from the correspondence to which I have referred earlier. There was no reason had they had a good Defence why they should not have made application to set aside the judgment against them over two years ago. The fact that they have not done so indicates that their Defence proposed now lacks complete bona fides.

There is one further matter however relating to the summons served upon them. This point is also taken by the 3rd Defendant. The 3rd Defendant raises another matter namely that he was not served with the proceedings in this matter and was shocked when he was served with a Notice to show cause why execution should not issue against him. He states in his affidavit sworn on the 5.10.2000 that on the 1.7.2000 he traveled to Nairobi and instructed his advocates on record to take the matter up on his behalf. As a result his advocates obtained a copy of the affidavit of Kennedy Njenga. This affidavit depones to the fact in paras. 7 and 8 that on 16.2.98 he served the 3rd Defendant in his house No. 861 Plainsview Estate Nairobi with the summons to appear and that he signed the reverse of the original summons. In his affidavit the 3rd Defendant denies these allegation and states he was living on the 16.2.1998 in Nakuru having left the premises in Nairobi. He also denied that he had a house girl called “Lucy” who the process server had said in para 9 of his affidavit identified the 3rd Defendant to him.

If all of this was true one wonders why the 3rd Defendant was not shocked on 1998 when he instructed together with the 1st and 2nd Defendant. Gautama & Kibuchi to act for them in this matter. Indeed why did the 3rd Defendant not mention in the letter signed by him on the 6.11.98 that he had not received the summons. He does not deny the correspondence between Gautama and Kibuchi and the Plaintiff advocates, which clearly refers to this suit in the letter headings. The only inference to be drawn is that he had received the summons otherwise he would have instructed his advocates Gautama and Kibuchi to raise the question of non service and to set aside the judgment in 1998.

The matter now to be dealt with in the matter raised by Mr. Ritho and relied on by Mr. Kagori is that the summons is invalid.

In support Mr. Ritho relied on the case of Ceneast Airlines Vs Kenya Shell Ltd. CA No. 174 of 1999 where the Learned Court of Appeal in a joint judgment stated

> “A matter which was not argued before us, but which came to our notice after we had on 30th March, 2000, allowed the Appellant’s appeal and made our consequential orders, relates to the validity of the summons to enter appearance which was served on the director of the Appellant. An examination of this summons raises the following important issues as to its validity. Order 4 of this Civil Procedure Rules, having first provided in subrule (1) of the rule 3 that when a suit is filed, a summon will issue to the defendant ordering him to appear within the time specified in the summons than goes on in sub-rule (4) of r.3 to state as follows:
>
> > “The time for appearance shall be fixed with reference to the place of resident of the defendant so as to allow him sufficient time to appear Provided the time for appearance shall not be less than 10 days”

This mandatory provision means that the time for entering appearance cannot be less than 10 days or within 10 days of the service of the summons. It must at least, be on the 10th day of service or any day thereafter, as may be specified in the summons. The summons which was served on the Appellant in its pertinent part is as follows:-

"YOU ARE REQUESTED within 10 days from the date of service hereof to enter appearance in the said suit. Should you fail to enter an appearance within the time mentioned about, the Plaintiff may proceed with the suit and Judgment may be given in your absence"

This is a clear breach of 04 r.3 (4) and makes the summons invalid and of no effect"

The learned Judges of the Court of Appeal had already allowed the appeal against the decision of the Commissioner of Assize in the High Court that leave to defend should have been given. The paragraph I have quoted above as Mr. Ougo submitted was obiter and not the ratio in the case.

The summons in this present suit states inter alia

> **" YOU ARE HEREBY REQUIRED** within 10 days from the date of service hereof to enter an appearance in this suit"

Order 4(a) of the Civil Procedure Rules states that ***"the time for appearance shall not be less than 10 days".***

The learned Judges of the Court of Appeal notes that in the Ceneast Case the time cannot be less than 10 days or within 10 days of the service. The matter was not argued before the Learned Judges and Order 9 Rule 1 was not referred to. This order permits an appearance to be entered up until such a time as there either was interlocutory or final judgment. In either case Judgment could not be granted in less than 10 days and if judgment was so entered it would clearly be invalid.

Although the learned Judges of the Appeal held that the service in this Caneast Case was of no effect it is my view that if no prejudice has been occasioned to the Defendant the summons although expressed in the terms used this case must be allowed to stand.

The summon is not per se invalid it is only that the time stated is expressed with an ambiguity namely are the words "within 10 days" limited or does this give the Defendant 10 days within which to enter an appearance. In practice the Defendant has 10 days from the date of service to enter an appearance.

I would add that in every case that I have dealt with in this court the summons has been expressed in the terms of the summons in this suit, although now advocates are putting 15 days as a general rule in their summones. The result would be that every summons issued since Legal Notice 5/96 when the rule was altered, if defective would be bound to be set aside. This of course the courts can not allow.

In the circumstances I find that the summons in this case is not invalid and I therefore do not allow the application on this point.

In the result I find that the Defendants have not shown that they have a good Defence to this suit. That is so far as the 3rd Defendant is concerned he was served with the proceedings herein and having held as I have that the summons herein is valid I dismiss the application of the 1st and 2nd Defendant and the 3rd Defendant with costs to the Plaintiff.

Dated and delivered at Nairobi this 4th day of October, 2001.

P.J. RANSLEY

COMMISSIONER OF ASSIZE