



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. E321 OF 2019

SEO AND SONS LIMITED.....PLAINTIFF/RESPONDENT

-VERSUS-

KENYA AIRPORTS AUTHORITY.....DEFENDANT/APPLICANT

RULING

1. This ruling is in respect to the application dated 9th January 2020. In the said application the defendant/applicant seeks orders to set aside the ex-parte judgment entered against it on 6th December 2019 together with all the consequential orders. The application is supported by the affidavit of the defendant's Corporation Secretary and is premised on the grounds that: -

a) That defendant/applicant's failure to file a defence to the plaintiff/respondent's claim was purely inadvertent and occasioned by factors beyond he defendant/applicant's control.

b) That defendant/applicant has a good defence to the plaintiff's claim and ought to be given a chance to ventilate its defence as opposed to being locked out of the seat of justice via a judgment entered on a default technicality.

c) The dictates of justice require determination of legal disputes based on substantive justice as opposed to procedural/technicality justice.

d) Guided by the affidavit of service on record, the defendant/respondent's judgment was irregularly entered as the service fell short of the nature of service that should be effected on a corporation as provided for under the Provisions of Order 5 Rule 3 of the Cap 21.

e) The amount in issue is colossal Kshs 7,690,000/- and the defendant/applicant stands to suffer irreparably notwithstanding the fact that if the amount claimed goes unchallenged, that will be an unjustifiable loss of tax payers' money as the amount claimed is baseless and/or exorbitant.

2. The plaintiff/respondent opposed the application through the replying affidavit of its Director **Samow Edin Osman** who explains the genesis of the plaintiff's dispute with the defendant and states that the defendant was duly served with the Summons to Enter Appearance but that it did not act on them within the stipulated period thus leaving the plaintiff with no option but to apply for interlocutory judgment.

3. It is the plaintiff's case that the defendant is truly indebted to it having benefitted from the project that it undertook at the request of defendant. The plaintiff adds that the defendant's defence raises no triable issues.

4. Parties canvassed the application by way of written submissions which I have carefully considered. The main issue for determination is whether the defendant has made out a case for setting aside the interlocutory judgment.

5. The defendant's case was that the interlocutory judgment is flawed as service was not effected in accordance with the parameters set out under Order 5 Rule 3 of the Civil Procedure Rules which stipulates as follows: -

“3. Subject to any other written law, where the suit is against a corporation the summons may be served —

(a) on the secretary, director or other principal officer of the corporation; or

(b) if the process server is unable to find any of the officers of the corporation mentioned in rule 3 (a) —

(i) by leaving it at the registered office of the corporation;

(ii) by sending it by prepaid registered post or by a licensed courier service provider approved by the court to the registered postal address of the corporation; or

(iii) if there is no registered office and no registered postal address of the corporation, by leaving it at the place where the corporation carries on business; or

(iv) by sending it by registered post to the last known postal address of the corporation.”

6. In the present case, have perused the Affidavit of Service sworn by one **Eric O. Osingo** on 3rd December 2019 and I note that he avers as follows at paragraphs 2, 3 and 4 thereof.

1. That on 11th November, 2019 I received Summons to Enter Appearance dated 27th September, 2019 together with copies of plaint, Verifying Affidavit, List of Witnesses, Witness Statement and List of Documents all dated 26th September, 2019 from Wandabwa Advocates with instructions to effect service upon the defendants herein, Kenya Airports Authority.

2. That on the same day at around 11.00am. I proceeded to the Head Office of Kenya Airports Authority located within Jomo Kenyatta International Airport(JKIA) Off Airport North Road.

3. That I was directed to the Legal Department of the Authority where my service was acknowledged by the Legal Officer who stamped and signed on my copies, which I attach herewith duly served.

7. I have also perused the service copy of the plaint and I note that it has the defendant receiving stamp even though the identity of the officer receiving the summons is not disclosed.

8. My finding is that there was a lapse, on the part of the process server, in failing to disclose the identity of the defendant's officer who received the summons. It is worthy to note that summons that are not received by the proper designated officer of the defendant, which this court notes is a sizeable government body, could have landed in the wrong hands thus not given the prompt, proper attention that is required in such time bound processes.

9. I also note that there was no delay, on the part of the defendant in filing the instant application which was filed 9th January 2020 a period of slightly over one month after the impugned judgment was entered against the defendant.

10. For the above reasons I am persuaded that the justice of this case will require that the defendant be granted an opportunity to defend the case as the annexed draft defence raises pertinent issues over alleged fraudulent documents and the valuation of the work carried out by the plaintiff that may need to be ventilated at the trial.

11. Consequently, I allow the application dated 9th January 2020 and direct the defendant to file and serve its defence within 14 days from the dated of this ruling.

12. The costs of the application shall abide the outcome of the main case.

Dated, signed and delivered via Microsoft Teams at Nairobi this 14th day of October 2020 in view of the declaration of measures restricting court operations due to Coved -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Okeyo for defendant/applicant.

Miss Odemu for Miss Kamau for plaintiff.

Court Assistant: Silvia