

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

HCC NO. 120 OF 2018

KENYA COMMERCIAL BANK LIMITED.....PLAINTIFF

VERSUS

MINOLTA LIMITED.....1ST JUDGMENT DEBTOR /APPLICANT

JOSEPH MICHAEL ADEDE.....2ND JUDGMENT DEBTOR/APPLICANT

CAROLINE MLALE ADEDE.....3RD APPLICANT

RULING

1. The remaining prayers in the Notice of Motion dated 11th February 2019 are for setting aside of the interlocutory Judgment entered herein on 13th August 2018 and for leave of the Defendants to file Defence out of time. The Application is said to be founded on Order 10 Rule 11, Rule 2(a), Order 22 Rule 22 and 25 of the Civil Procedure Rules.

2. There are three (3) Defendants in this suit namely Minolta Ltd, Joseph Michael Adede and Caroline Mlale Adede. They are the 1st, 2nd and 3rd Defendants respectively. From the record it is clear that Judgment was entered against the 1st and 2nd Defendants only. The Plaintiff explains that no summons have been served upon the 3rd Defendant and so she is no obliged to defend this matter. However, it seems curious that the Plaintiff retains her as a Defendant without requiring her to defend the suit. The Court shall at the end of this decision be making an order that the Plaintiff should elect whether or not to retain her as a Defendant.

3. In respect to the other two Defendants, this Court will set aside the Judgment entered against them and grant them leave to defend this suit because of the manner in which the proceedings have unfolded.

4. The Plaint herein was filed alongside an application for injunction on 26th March 2018. Initially, no summons was taken out by the Plaintiff. Perhaps, because of the urgency of the matter and this can be understood. So, on that day only a certificate of urgency application, plaint and verifying affidavit were served upon all Defendants.

5. Reacting to this service, the 1st Defendant appointed M/s KMK Law LLP to act on its behalf through a Notice of Appointment filed on 27th March 2018. Subsequently, on 3rd April 2018, the 1st Defendant filed grounds of opposition to the Plaintiff's Motion.

6. Summons herein were taken out on 4th April 2018 and served on the 1st and 2nd Defendants on 12th April 2018. The summons required the Defendants to enter appearance within 15 days of service. Through a request for judgment dated 8th June 2018 and filed on 12th June 2018, the Plaintiff sought judgment against the 1st and 2nd Defendants in default of appearance and/or Defence.

7. In the meantime, on 10th April 2018, the Plaintiff prosecuted prayer 2 of its Notice of Motion dated 23rd March 2018 and the 1st Defendant responded. Prayer 2 is for the following orders:-

2. The Defendants jointly and severally be ordered to produce at Leakeys Garage Lunga Lunga Road Nairobi and at the disposal of the Court within Seven (7) days the following motor vehicles pending the hearing and determination of the suit herein.

No.	Reg. No.	Make	Body	Chassis Number
1.	KCF 861	Mercedes Benz	Prime Mover	WDB93416120003604
2.	KCF 863	Mercedes Benz	Prime Mover	WDB93416120003606
3.	KCF 864	Mercedes Benz	Prime Mover	WDB93416120004885
4.	KCF 865	Mercedes Benz	Prime Mover	WDB93416120003607

5.	KCF 866	Mercedes Benz	Prime Mover	WDB93416120003610
6.	KCF 867	Mercedes Benz	Prime Mover	WDB93416120003611
7.	KBL 917J	Mercedes Benz	Prime Mover	WDB9440322K907392
8.	KBL 892J	Mercedes Benz	Prime Mover	WDB9440322K907820
9.	KBL 904J	Mercedes Benz	Prime Mover	WDB9440322K921114
10.	ZD 4481	BHACHU	Trailer	BIL20239
11.	ZD 4484	BHACHU	Trailer	BIL20242
12.	ZD 4482	BHACHU	Trailer	BIL20240
13.	ZD 4485	BHACHU	Trailer	BIL20243
14.	ZD 4486	BHACHU	Trailer	BIL20244
15.	ZD 3829	BHACHU	Trailer	BIL15750
16.	ZD 3830	BHACHU	Trailer	BIL15749

8. After hearing counsel for both sides and discussing the matter with them, the Court made the following orders:-

1. The Defendants shall within 14 days thereof produce at Kakeyo Garage Lunga Lunga Road all the trucks set out in prayer (2) of the Notice of Motion dated 23rd March 2018 for purposes of the Plaintiff or its agent filling new Trucking Devices at the Plaintiff's costs.

2. For purposes of clarity Order (1) above is not an order for the Plaintiff to physically repossess the trucks and the trucks shall be released upon the filling of the devices.

3. Mention on 24th April 2018.

9. On 31st May 2018, the Plaintiff complained that the orders had not been complied with, while the 1st Defendant stated that the orders had not been disobeyed and that the Plaintiff was to blame for filing other proceedings in Kisumu. The Court then asked the parties to file whatever application they deemed necessary in respect to compliance or none compliance of the Court order.

10. It turns out that the 1st Defendant had in fact on 29th May 2018 filed a Motion dated 25th May 2018 in which he sought that the Plaintiff and one Tom Ogola be held in contempt of the Court's order of 11th April 2018 and that the two make good the losses allegedly suffered by the 1st Applicant as a result of the alleged contempt. It was alleged by the 1st Defendant that, in disobedience of the Court order, the Plaintiff had repossessed motor vehicles KBL 904J, KBL 917J, KBL 892J and trailers ZD 3830, ZD 4481 and ZD 4484.

11. That application was responded to by Tom Ogola in a replying affidavit sworn on 20th September 2018 and filed on 24th September 2018.

12. It is common ground that the said application for contempt is still pending. The Defendants state that the reason for failing to file Defence on time was because that application was awaiting hearing.

13. To this the Plaintiff responds:-

18. THAT in response to paragraph 17 of the 2nd Judgment Debtors supporting Affidavit, I am advised by our advocates on record which advice I verily believe to be true that the filling of a supposed application for contempt cannot possibly halt proceedings that are before Court of law. That is a decision that can only be made by the Judicial Officer before whom the matter is brought. That decision was never made in this matter.

14. While I accept that this Court did not make any specific order requiring that the contempt application be heard and determined before taking of further proceedings, the general rule is that once an application is made then, save for good reason, the Court will hear and determine it in priority of other proceedings. Ibrahim J (as he then was) explained the logic in **Econet Wireless Kenya Ltd v Minister for**

Information & Communication of Kenya & another [2005]eKLR:-

“Where an application for committal for contempt of court orders are made the court will treat the same with a lot of seriousness and urgency and more often will suspend any other proceedings until the matter is dealt with and if the contempt is proven to punish the contemnor or demand that it is purged or both. For instance, an alleged contemnor will not be allowed to prosecute any application to set aside orders or take any other step until the application for contempt is heard. The reasons for this approach are obvious – a contemnor would have no right of audience in any court of law unless he is punished or he purges the contempt. So, the court is obliged to hear the application for committal first before any other matter. This is a general rule which must be applied strictly”.

15. It is for this reason that the Court excuses the 1st and 2nd Defendants for presuming that their application for contempt would be heard before the Plaintiff would be permitted to take further steps in the matter. In reaching this decision, the Court notes that the 1st Defendant has participated in these proceedings right from the time it was served with the Complaint and Notice of Motion of 26th March 2018 and has shown an eagerness to resist the Plaintiff’s claim. Any default in filing the defence is excused as an oversight on its part.

16. But even then Plaintiff tells me that the proposed defences do not raise any triable issues. For an issue to be triable it need not be one that must succeed. It is enough if it raises a prima facie or bona fide defence. One defence raised is that the Bank has failed to account for the proceeds realized from the sale of some charged property. That defence may at the hearing turn out to be hollow but for now it is one that can pass for trial.

17. The Application of 11th February 2019 is hereby allowed in terms of Prayers 3 and 4. The 1st and 2nd Defendants shall file and serve their statements of Defence within 14 days hereof. As to the 3rd Defendant, the Plaintiff is granted 14 days from today to indicate whether or not it shall be maintaining the suit against her and if so to take out suitable summons to enable her enter appearance and file defence.

18. Costs of the Notice of Motion dated 11th February 2019 shall be in the cause.

Dated, Signed and Delivered in Court at Nairobi this 18th Day of October 2019

F. TUIYOTT

JUDGE

PRESENT:

Oweya holding brief Odhiambo for Plaintiff

No Appearance for Defendants

Court Assistant: Nixon