



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CIVIL SUIT NO. 01 OF 2018

ELIZABETH KAVERE1ST PLAINTIFF

TERESA GIMISI.....2ND PLAINTIFF

VERSUS

LILIAN ATHO.....1ST DEFENDANT

REAL TIME COMPANY LTD.....2ND DEFENDANT

RULING

1. This is a ruling on an application for entry of judgment in default of appearance and defence by a Request for Judgment dated 17th September 2018 shown to be brought under Order 10 Rule 4 of the Civil procedure Rules, 2010 and expressed as follows:

“The plaintiffs herein Elizabeth Kavere and Teresa Gimisi request for judgment against the 1st and 2nd defendants herein Lilian Atho and Real Time Company Ltd. respectively who have failed to enter appearance and/or file their statements of defence within the stipulated time after proper service of summons to enter appearance upon them the affidavit of service thereof herewith attached. The request is for judgment as prayed in the Plaint attached herewith.”

Jurisdiction to enter judgment in default of appearance and or defence

2. The cause of action here is for a demand of specific amounts of monies to which the plaintiff claims to be entitled by reason of a breach of contract as follows:

“the Plaintiffs pray for judgment against the Defendants for:-

a. Refund of the Plaintiffs Capital Investment of a sum of Ksh.2,600,000 plus Plaintiffs share of profits of Ksh.22,937,900.

b. Interest on the above at court rates and/or prevailing bank rates, whichever is higher, from the date of investment until the date of full refund.

c. General damages for breach of contract.

d. Costs of the suit plus 16% VAT.

e. Any other relief the court deems just to grant.”

3. The Court is in cases of liquidated demand as here empowered by Order 5 of the Civil Procedure rules to enter judgment in default of appearance and defence as follows:

“[Order 10, rule 4.] Judgment upon a liquidated demand.

4(1) Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.

(2) Where the plaintiff makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, **enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.**

4. As relevant to this suit Order 5 of the Civil Procedure Rules contains provisions for service of summons as follows:

[Order 5 rule 6.] Mode of service.

6. Service of the summons shall be made **by delivering or tendering a duplicate thereof** signed by the judge, or such officer as he appoints in this behalf, and sealed with the seal of the court.

[Order 5, rule 7.] Service on several defendants.

7. Save as otherwise prescribed, **where there are more defendants than one, service of the summons shall be made on each defendant.**

[Order 5, rule 8.] Service to be on defendant in person or on his agent.

8(1) Wherever it is practicable, **service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.**

(2) A summons may be served upon an advocate who has instructions to accept service and to enter an appearance to the summons and judgment in default of appearance may be entered after such service.

5. Clearly, a service upon an advocate who has instructions to accept service and to enter appearance is good for purposes of default judgment under Order 5 Rule 8 (2) of the Civil Procedure Rules.

6. In support a Request for Judgment dated 17th September 2018, the Plaintiff's Process Server, one Patrick Munyi Njue, filed an AFFIDAVIT OF SERVICE dated 3rd August 2018 deponed to his service on the defendants as follows:

2. **"THAT** on 31st day of August, 2018 I obtained from the firm of **H & K Law Advocates** a Plaint dated 23rd April, 2018 and Summons to Enter Appearance dated 23rd July 2018 with clear instructions to serve Lilian Atho and Real Time Company Limited, the 1st and 2nd Defendants herein.

3. **THAT** on the same day, I proceeded to the 1st and 2nd Defendant's place of business at Ground Floor, Kenya Medical Practitioners and Dentist Board Building, Hurlingham. **I however did not find the 1st Defendant or manager(s) of the 2nd Defendant, and upon calling he 1st defendant through her mobile number 0723-152138, she informed me that she had appointed the firm of Otieno Arum & Company Advocates to act for her and the 2nd Defendant in the matter and advised me to deliver summons to the said Firm.**

4. **THAT** I proceeded to the firm of Otieno Arum & Company Advocates located in 2nd Floor, Kenya House Complex, Koinage Street, Nairobi where upon introducing myself and the reason for my visit to the receptionist I was ushered in to see **Mr. Kennedy Arum who confirmed the 1st and 2nd Defendant's instruction to receive summons to enter appearance on their behalf and acknowledge service of the 1st and 2nd Defendants by stamping and signing on the court copies of the said summons to enter appearance.**

5. **THAT** I now return to this Honourable court a copy of the aforesaid Summons duly served upon the 1st and 2nd Defendants herein."

7. While the 1st defendant could without much ado instruct the named firm of company to act for her and accept service on her behalf, she could not do so for the company, which as a different legal entity must act through resolution for that purpose by the company's directors or the General Meeting. No resolution appointing the said firm of advocates as its agent for purposes of accepting service of summons was demonstrated.

8. Accordingly, as held in **BUGERERE COFFEE GROWERS LTD v. SEBADUKA [1970] E.A 147 –**

"When companies authorize the commencement of legal proceedings a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes; no such resolution had been passed authorizing these proceedings."

9. For this reason, the Request for Judgment is only valid against the 1st defendant whose duly appointed advocate was served with Summons on 31/8/2018 requiring her to enter appearance within 15 days from the date of service and was therefore in default of the said summons as at the date of the request for Judgment dated 17th September 2018, and even as at today the 2nd October 2018.

Order

10. For the reasons set out above, in accordance with Order 10 Rule 4 (1) of the Civil Procedure Rules, 2010, Judgment shall be entered in favour of the Plaintiffs as against the 1st defendant only for the liquidated claim of ksh.25,537,900/- together with interest at court rates from the date of the suit and costs of the suit.

Order accordingly.

DATED AND DELIVERED THIS 2ND DAY OF OCTOBER 2018.

EDWARD M. MURIITHI

JUDGE

Appearances: -

M/S H & K Law Advocates for the Plaintiff.

N/A for the Defendants.