



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 774 OF 2001

GITHONGO ELECTRICAL

ENGINEERING LIMITED.....PLAINTIFF

VERSUS -

ERNIE CAMPBELL & CO. LIMITED.....DEFENDANT

RULING NO.2

1. The defendant, **ERNIE CAMPBELL & Co. LTD**, has asked the court to set aside the judgement which was entered against it on 26th January 2016.
2. It is the contention of the defendant that the court erred when it entered judgement. The reason why the defendant says that the court erred is because the defendant had, in its view, already filed a Defence before the judgement was entered allegedly because there was no Defence on record.
3. In answer to the application, the plaintiff said that at the time when the court entered judgement, there was no Defence on record.
4. The defendant also prays that the plaintiff should pay the costs of the Court Broker who had undertaken steps towards the execution of the Decree. The Court Broker had already proclaimed the defendant's goods.
5. The reason why the defendant wants the plaintiff to pay those costs is that the plaintiff failed to give Notice to the defendant, about the fact that the court had entered judgement in default of Defence.
6. The requirement that Notice should be given to a defendant if judgement has been entered in default of Appearance or in default of a Defence, is provided for by Order 22 Rule 6 of the Civil Procedure Rules.
7. The defendant also faulted the plaintiff for failing to send a draft of the Decree to the defendant, for approval.
8. The need for a draft Decree to be sent to the other party or parties, for approval, is provided for by Order 21 Rule 8 of the Civil Procedure Rules.

9. The defendant submitted that the execution of a Decree should not be an ambush, as the rules require service of Notice of Entry of judgement in default of appearance or in default of Defence.
10. It is common ground that on 18th May 2006, the court entered judgement in favour of the plaintiff, after the defendant had failed to file its Defence.
11. However, that judgement was later set aside by the court on 23rd April 2015.
12. When the court was setting aside the judgement dated 18th May 2006, the court ordered the defendant to file its Defence within 10 days.
13. According to the plaintiff, there was no compliance with the order requiring the defendant to file its Defence within 10 days. It is for that reason that the plaintiff sought the entry of judgement.
14. The plaintiff submitted that the failure by the defendant to file a Defence as it had been directed to do, was an indication of the defendant's lack of interest in defending itself.
15. The plaintiff also asked the court not to assist the defendant, as the defendant was only seeking to delay the determination of this old case.
16. This application stands or falls on the basis of the question as to whether or not there was a Defence on record, by the time when the court granted judgement.
17. The plaintiff says that there was no Defence on record, whilst the defendant insists that the Defence was already on record.
18. When I make reference to whether or not there was a Defence on record, I am not simply talking about the presence or absence of a copy of the Defence on the court file.
19. Regrettable though it is, the truth is that there are many times when a pleading has been lodged in court, and been properly paid for, but a copy of the said pleading was missing from the court file.
20. I say that it is regrettable because once a party lodges a pleading in court, the said pleading ought to be found in the court file, but that does not always happen.
21. Therefore, the only sure way of ascertaining if a pleading was already properly filed in court, is through ascertaining the authenticity of the receipt issued by the court, in respect to any such pleadings.
22. Although I have not conducted the process of verification of the authenticity of the court receipt issued to the defendant when it lodged its Defence in court, I am prepared to presume that the said receipt was valid. I make that presumption because the plaintiff, who insinuated that the Defence had not been properly lodged in court, did not adduce any evidence upon which the court could make the finding that the receipt was not legitimate.
23. I also find that the plaintiff failed to comply with the provisions of Order 22 Rule 6 of the Civil Procedure Rules. The said rule stipulates that when judgement is granted in default of appearance or in default of Defence, no execution, by payment, attachment or eviction shall issue unless not less than 10 Days Notice of the entry of judgement is given to the defendant.
24. In order to ensure compliance with that requirement, the rule further stipulates that the Notice of the entry of judgement, which had been served upon the defendant, shall be filed with the first application for execution.
25. As the plaintiff did not file the Notice with its application for execution, I find that the notice was not served upon the defendant.

26. And as the Notice was not served on the defendant, the process of execution of the Decree was irregular. Therefore, the plaintiff, who applied for execution before serving upon the defendant, the notice of entry of judgement, shall be responsible for the execution costs.

27. Meanwhile, as regards the judgement, I find that it was irregular. Therefore, it is also set aside.

28. However, the defendant is ordered to pay to the plaintiff, the costs of the application dated 13th April 2016. I so order because the defendant failed to comply with order 7 Rule 1 of the Civil Procedure Rules. That rule requires a defendant who has filed his Defence to serve the Defence upon the plaintiff, within 14 days from the date of filing.

29. If the defendant had complied with the rule, it is possible that the plaintiff may not have undertaken the process of execution.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 6th day of October 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Macharia for the Plaintiff

Odhiambo for 1st the Defendant

Collins Odhiambo – Court clerk.