



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CAUSE NO. 128 OF 2018

KITAMAIYU LIMITED.....PLAINTIFF/RESPONDENT

-VERSUS-

CHINA GANSU INTERNATIONAL CORPORATION FOR ECONOMIC

TECHINICAL CORPORATION COMPANY LIMITED.....DEFENDANT/APPLICANT

RULING

The matter for determination is the Notice of Motion Application dated 22nd April 2020, by the Defendant/ Applicant seeking for orders that;

- 1. THAT the Decree/Judgement entered against the Defendant and all consequential orders be set aside.***
- 2. THAT the Defendant be granted leave to file defence out of time and/or the defence on record deemed duly filed and served.***

The Application is premised on the grounds that; the Defendant/ Applicant has learnt through the media that there is Judgement entered against it for **Kshs.550,042,000/=** whilst it had not been served with summons to enter appearance or any Notice of filing of this matter. That the Defendant is apprehensive that the plaintiff shall proceed with execution of the said money decree against it to the defendant's infinite prejudice and loss without being accorded a fair hearing. Further that the execution shall cause tremendous loss to the Defendant and disruption of its business being construction works in various parts of the country should its plant, machinery and equipment be attached in the process during this critical time of **Covid-19 pandemic**. It was contended that the Defendant/ Applicant has a good defence with triable issues as can be gleaned from the draft defence and that the application has been brought without delay and the Plaintiff/ Respondent suffers no prejudice that cannot be compensated by way of costs and it is therefore in the interest of justice, fairness and the overriding objective of the court to grant the application.

In his supporting Affidavit **Zou Qili**, the General Manager of the Defendant/ Applicant company averred that the Defendant/ Applicant was not aware of the case until **17th April 2020**, when the same was brought to his attention that the issue had been featured in the local dailies. It was his contention that the said news had been reported when he and his colleagues were on self-quarantine imposed by the Government of Kenya upon their return from **China** and therefore he could not have read the same earlier.

He averred that he had learnt that there is a **Judgement and Decree** against the defendant company of **Kshs. 55,042,000/=** entered on **8th April 2020**. That however the Defendant/ Applicant had not been served with the Summons in this case or any court document whatsoever including the hearing notices and therefore was not aware of the suit.

He averred that he is advised by his advocates, whose advice he believes to be true that the Plaintiff/Applicant is now at liberty to execute the money decree herein and thereby likely to disrupt their business.

He averred that he is aware that sometime in 2018, while undertaking the project awarded by the **Kenya National Highway Authority (KENHA)** to construct for the said work, the Defendant entered into various contracts for the supply of the murrum and gravel. That one of their suppliers was a company known as **Scaffolding International Limited**, which agreed to supply them with the materials.

That upon the agreement with the said **Scaffolding International Limited**, the latter's Director **James Kuria** together with the Kiambu County Government Officials in Ruiru who issued necessary licences, showed them the site for excavation of murrum and it was expressly represented to them as invitees to the site that **Scaffolding International Limited** had proprietary right to the site. That they embarked on where they would collect soil murrum from various site including the said Scaffolding International Limited. On or about **April 2018**, barely

two days on the site the Plaintiff/ Respondent invaded the site and disrupted their business. That upon inquiry, the Plaintiff indicated that the property belonged to them and ordered their staff and equipment to be removed from the site. He averred that they then demobilised and left the site.

He denied trespassing into the Plaintiff's property and caused loss and damages as represented by the Plaintiff. He averred that the defendant has a good defence and given an opportunity to be heard, the defendant shall prove its case including seeking to issue a third party proceedings against the said **Scaffolding International Limited** for indemnity and/or contribution. He further averred that the decretal sum against the Defendant/Applicant is exorbitantly high and will occasion injustice to the Defendant/Applicant. That should execution proceed without the Defendant/Applicant accorded a chance to challenge the same, the plaintiff will get away with unjustly enriching itself through ex parte court process without disclosing material facts.

The Application is opposed and **Maina Wanjigi**, a Director of the Plaintiff/Respondent swore a Replying Affidavit on **4th May 2020**, and averred that on **14th April 2018**, the Defendant/Applicant illegally trespassed onto the Plaintiffs/Respondent's property i.e. suit property and illegally carted away murrum from **Kitamaiyu Estate** causing extensive damages and destruction thereat. That on **16th April 2018**, they instructed their advocates on record to issue a cease and desist demand letter to the applicant's Githunguri Kiambu project office as the trespass was still ongoing and the Respondent was suffering loss and damages.

It was his contention that the Respondent's Advocate duly served the cease and desist demand letter which was received by the Applicant's officers and the Defendant/Applicant contemptuously ignored their demand letter and continued its illegal quarrying at Kitamaiyu estate.

He further averred that they then filed the instant suit together with an Application for temporary Injunction and that he is informed by his Advocates that the Court ordered that the application be served upon the applicant for *inter-parties* hearing on **15th May 2018**, and that the Application was duly served upon the Defendant's/Applicant's project manager on **23rd April 2018** and he accepted service but he declined to acknowledge receipt. He further averred that their process server further recorded the service of the Plaintiff and the Notice of Motion Application to the Defendant/Applicant by way of photographs to prove service. He alleged that despite service, the Defendant/Applicant did not file a response to application. That when the Notice of Motion Application came up for *inter-parties* hearing on **15th May 2018**, the Court noted that despite service the application was not opposed and therefore granted a temporary injunction against the applicant.

He further averred that on **21st May 2018**, the Respondent served the Defendant's/Applicant's project manager with a copy of the order issued on **17th May 2018**, Summons to Enter Appearance issued on **24th April 2018**, and the Plaintiff dated **18th April 2018**. That the project manager accepted service but declined to acknowledge receipt. It was his contention that the Defendant/Applicant ignored and failed to **enter appearance** within the stipulated time and the matter proceeded for pre-trial directions on **30th January 2019**, when the matter was certified ready for hearing and it was fixed for hearing on **19th June 2019**.

That the matter then proceeded for hearing **19th June 2019**, where the Plaintiff/Respondent called three witnesses and closed its case. Thereafter judgement was entered and delivered in favour of the Plaintiff/ Respondent on **8th April 2020**.

It was his contention that the Defendant's/Applicant's advocates are not being candid with the Honourable court as the Defendant/Applicant ignored and failed to enter appearance and/or defend the instant case and only woke up days after the Judgement was delivered. He further averred that from the supporting affidavit of **Mr. Zou Qili**, as well as para. 6 and 10 of the draft defence, the applicant has expressly admitted the trespass on the Respondent's suit premises. He averred that he has been advised by his advocates on record which advice he believed to be true that the admission by the Applicant means that there is no triable issue before the court that raises a defence by the applicant to warrant the court to set aside the judgement made by it.

The Defendant/ Applicant filed a further affidavit sworn on **15th May 2020** by **Zou Qili**. He averred that the Defendant/ Applicant maintains a site office in Ruiru for purpose of its projects as required under construction law. It was his contention that the said office is for their technical operational staff for the specific project and not their registered administrative offices and that the said technical officers are not authorized to receive service on behalf of the Company since most of them could not understand the local language and therefore the documents if served upon them, could not have been received. He alleged that upon inquiry from the Defendant's/ Applicant's site officers, none of the staff could recall such service and since some of the staff have left the company, and the country, they could not be traced. He averred that the Defendant/Applicant did not make any efforts to locate their registered offices for the purpose of effecting service on the Directors, Secretary, or authorized Principal Officers of the Defendant Company. He alleged that curiously the Plaintiff/ Respondent found the Defendant' / Applicant's registered offices for the purpose of effecting service of the outcome of the suit. He averred that he has been advised by his Advocates, advice which he believes to be sound that the Plaintiff/ Respondent did not effect service upon the Defendant/ Applicant lawfully and therefore Judgment ought to be set aside.

The Application was canvassed by way of written submissions which the Court has now carefully read and considered together with the affidavits and the annexures thereto. The Court finds that the issues for determination are;

- 1. Whether there was valid service of summons to enter appearance**
- 2. Whether the defence raises triable issues to warrant grant of leave to defend.**

1. Whether there was valid service of summons to enter appearance

The instant Application which seeks to set aside the Ex parte Judgment delivered on **8th April 2020**, is premised on the contention by the Defendant/ Applicant that it was never served with the **Summons to Enter Appearance**. While the Defendant/ Applicant alleges that it

was never served with the suit papers, it is the Plaintiff's/ Respondent's contention that the Defendant/ Applicant was duly served as the process server served its project manager. The process server averred that he visited the Defendant's/ Applicant's Ruiru office where he met a lady who introduced herself as the secretary to the Project Manager but declined to disclose her name. He further averred that a Chinese man introduced himself as the Project Manager of the Defendant/Applicant and confirmed to him, (the process server) that he was aware of the suit property and that had authority to receive documents.

It is therefore not in doubt that as per the Process Server, the suit papers were served upon a Project Manager, who indicated that he had authority to receive the said suit papers. The guiding provisions with regards to service on Corporations is **Order 5 Rule 3** of the Civil Procedure Rules which provides that;

“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.

It is not in doubt that the Defendant have their **site offices** in **Ruiru** which is also their registered offices, although not their Headquarters but non the less it is their office. The Court having perused the Affidavit of Service notes that the Process Server has elaborated how he was able to identify the Defendant's Ruiru office. Further the process server, has indicated that he introduced himself and informed the secretary the purpose of his visit and how he was able to identify the Project Manager of the Defendant / Applicant.

While the Defendant/ Applicant has denied that there was ever, service upon it, it has not produced before this Court any evidence by the said Project Manager denying service of the suit papers. Further the Defendant/ Applicant has not in any way denied that the Project Manager is a Principal officer in the Company, the process server having been informed by the said Project Manager that he had authority to receive the documents. It is the Court's considered view that the burden then rested with the Defendant / Applicant to first at the very least prove that their Project Manager was never served with the Summons to Enter Appearance and secondly that the said Project Manager did not have authority to receive the said summons and or was not a principal officer in the said Company. The Court acknowledges that the Defendant/ Applicant indicated that some of their employees have left the Company and the Country. However, there is no mention of the said Project Manager on whether he was one of the employees or not.

Having failed to prove the same, it is the Court's considered view that the Affidavit of Service dated **14th May 2018**, and **24th May 2018** sworn by **Morris Imbwaga** have satisfactorily detailed the process of service of the Defendant/ Applicant and the same having been served on a Principal Officer of the Company, then service was validly infected. See the case of **Multiscope Consulting Engineers ...Vs... University of Nairobi & another [2014] eKLR** where the Court held that;

“Under Rule (3) (a) where the suit is against a corporation, the summons may be served on the secretary, director or other principal officer of the corporation.”

The Court therefore finds and holds that the service of Summons to the Defendant/ Applicant was valid.

2. Whether the defence raises triable issues to warrant grant of leave to defend.

The Defendant/ Applicant has sought to have the **Ex parte Judgment** entered on **8th April 2020**, set aside. As already held above, the Court has already found that summons to enter appearance were properly served upon the Defendant.

Order 12 Rule 7 of the Civil Procedure Rules provides:-

"Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."

Further the provision is buttressed by **Order 51 Rule 15 of the Civil Procedure Rules** which provides:-

"The court may set aside an order made ex parte"

From the above provisions of law, it is very clear that the court has discretion to set aside or not to set aside an **ex parte judgment**. Such discretion must be exercised judiciously. In deciding the same the Court is guided by the decision of the

Court of Appeal in the case of James Kanyiita Nderitu & Another [2016] eKLR, where the court of Appeal stated thus:

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgement and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside default judgment, and will take into account such factors as the reason for failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default judgment, among others. See Mbogo & Another –vs- Shah (1968) EA 98, Patel –vs- E.A. Cargo Handling services Ltd (1975) E.A. 75, Chemwolo & Another –vs- Kubende (1986) KLR 492 and CMC Holdings –vs- Nzioka [2004] I KLR 173.

In an irregular default judgment, on the other hand; judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.”

The Court having already found and held that service of summons were properly served on the Defendant/ Applicant and that the Judgment was regular, then Court must then determine whether or not the draft Defence raises any triable issue. Order 12 Rule 7 of the Civil Procedure Rules provides that where under this order judgment has been entered or the suit has been dismissed, the Court on application may set aside or vary the Judgment. The power to set aside ex parte orders are discretionary and the Court must use its discretion to come to a conclusion while also ensuring that Justice has been done. The Court in Patel...Vs....E.A Cargo Handling Services Ltd (1974) EA 75, held that:-

“There are no limits or restrictions on the Judge’s discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on such terms as may be just . The main concern of the Court is to do Justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the Rules.”

In its Defence, the Defendant/ Applicant has acknowledged that indeed they entered onto the Plaintiff’s/ Respondent’s property and did the excavation works. However this blame has been put at the door step of a third party. It is not in doubt that the Plaintiff/ Respondent was not a party to the alleged agreement between the Defendant/ Applicant and a third party. Further the Plaintiff/ Respondent’s suit is premised on the fact that the Defendant/ Applicant entered onto its suit property and caused damages. The Defendant/ Applicant having acknowledged that it entered onto the Plaintiff/ Respondent’s property, then this Court is of the considered view that there remains no issue in dispute and therefore no triable issue. Consequently, the court finds and holds that the Defence raises no triable issue. This is so as the Defendant can be able to seek for reimbursement or breach of Contract from the said third parties who may have misled it and therefore will suffer no injustice. However, it will not be in the interest of Justice for this Court to set aside a regular judgment and ventilate on the issues between the Defendant / Applicant and a third party over an agreement wherein the Plaintiff was not a party to.

The Upshot of the foregoing is that the Defendant/ Applicant has not met the threshold to warrant the Court to exercise its discretion in its favour and consequently the applicant is not entitled to the setting aside of the Ex parte Judgment.

Having now carefully read and considered the Application, the affidavits and annexures thereto together with the written submissions, the Court finds that the Notice of Motion Application dated 22nd April 2020, is not merited and the same is dismissed entirely with costs.

It is so ordered.

Dated, signed and Delivered at Thika this 2nd day of July 2020

L. GACHERU

JUDGE

2/7/2020

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020, this Ruling has been delivered to the parties online with their consents. They have

waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With consent and virtual appearance of:

M/s Njoki Gachuhi for the Plaintiff/Respondent

Mr. Chelagafor the Defendant/Applicant

L. GACHERU

JUDGE

2/7/2020