



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL CASE NO.74 OF 2012**

**ROBERTS INSURANCE BROKERS LIMITED .....PLAINTIFF**

**VERSUS**

**KIPNG'ETICH K. BETT .....1<sup>ST</sup> DEFENDANT**

**MARTIN OWITI (*Sued as joint Receivers/***

***Managers of Muhoroni Sugar Co. Ltd in Receivership*).....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

The plaintiff stated that it was on 6/4/05 appointed as interim administrator and subsequently appointed a liquidator of Muhoroni Sugar Company Limited Staff Retirement Benefits Scheme by the Compliance officer of the Retirement Benefits Authority under the provisions of the Retirement Benefits (Minimum Funding Level and Winding up of Schemes) Regulations 2000 and in particular Regulation 7 thereof. The defendants were the joint receivers and managers of Muhoroni Sugar Company Limited (In Receivership). The employer and member contributions receivable were Kshs.18,115,250/= and excess of accrued liabilities over scheme assets was Kshs.3,003,413/= which brought the total to Kshs.21,118,663/=. The plaintiff made a demand for the amount which the defendants did not dispute but asked for time to organise payment. They did not pay. On 23/4/12 the plaintiff filed this suit seeking the amount plus interest on the two figures at 50% from 30/4/05 to the date of the suit. The interest was Kshs.8,597,416/63 which brought the total to Kshs.29,716,079/63 which was demanded plus interest at 5% per annum until payment in full. Also demanded were general damages for breach of trust and breach of mutual contractual duty of good faith together with interest. Finally, costs and interest. The suit was filed through EVANS THIGA GATURU Advocate.

On 29/5/12 the plaintiff requested for judgment under Order 10 rule 4 of the Civil Procedure Rules on the basis that the defendants had been served but had failed to enter appearance and/or file defence within the stipulated time. On the same date the deputy registrar entered interlocutory judgment pending formal proof. It is this interlocutory judgment that the defendants are seeking by their motion filed on 14/8/12 to have set aside unconditionally to allow for the hearing of the suit interpartes. One of the reasons for the application was that the 1st defendant had not been personally served with summons to enter appearance, a copy of the plaint and verifying affidavit.

This point of service on the 1st defendant can be dealt with easily. According to the affidavit of service sworn by the advocate of the defendant, on 8/5/12 at about 2.30 p.m. he personally served the documents on the 2nd defendant who signed for them. He then asked the 2nd defendant if he would agree to accept service for the 1st defendant who was a joint receiver. The 2nd defendant answered in the affirmative and was left with the documents. Indeed there is an endorsement by the 2nd defendant that he

was receiving the documents on behalf of the 1st defendant. It is clear that the 1st defendant was not personally served. Under Order 5 rule 7 service was supposed to be effected on each defendant. Under rules 8 (1) service was to be effected on each defendant personally or on his agent. Rule 12 allowed service on the agent where a reasonable number of attempts had been made to serve the defendant. Even then, there has to be evidence that the agent of the defendant was empowered to accept service. In this case the advocate did not seek to know where the 1st defendant was. He did not make another attempt to get him. There is no evidence of him making “a reasonable number of attempts to serve” the 1st defendant. There is no evidence that the 2nd defendant had been empowered by the 1st defendant to accept service on his behalf. In short, the purported service was not recognized by law. The subsequent interlocutory judgment was irregularly entered against the 1st defendant and is hereby set aside *ex debito justitiae* (MWALIA .V. KENYA BUREAU OF STANDARD [2001] 1 EA 151).

The 2nd defendant was served on 8/5/12. He entered appearance on 30/5/12 and filed a defence on 29/6/12. It is acknowledged that both the entry of appearance and the filing of defence were done out of time. Appearance was supposed to be entered within 15 days and defence filed within 14 days of the entry of appearance. The appearance was entered about 7 days late and the defence filed about 23 days late. I have noted in the foregoing that interlocutory judgment was entered on 29/5/12 on the basis that no appearance had been entered or defence filed.

The 2nd defendant's contention is that the interlocutory judgment was irregular because the plaintiff's claim was not a liquidated one. The plaintiff's case is that this was a liquidated claim in respect of which he was entitled to the entry of the judgment. The second issue raised by the 2nd defendant in his motion was that he has a formidable defence that raises issues of law and fact. He seeks to be heard on the same.

It is notable that in the defence on record the defendants admitted that claim for employer and member contributions was made but they deny that they were personally liable to pay in their capacity as receiver managers of the company under receivership as they were mere agents of the company under receivership without any personal interest in the affairs of such company. They deny that the amount payable was the amount claimed in paragraph 3 of the plaint. They also denied that the plaintiff had right to claim interest thereon at 5% as sought. It was pleaded that there is petition number 25 of 2012 at the High Court at Kisumu between individual employees and Muhoroni Sugar Company Limited (Under Receivership) in which the employees seek their benefits and the suit is pending determination.

It was the 2nd defendant's case that the pending suit and the instant suit are suits between the same parties over the same subject matter and cannot both be heard at the same time. It was pleaded that the plaintiff had no capacity to sue in its disclosed capacity as the liquidator of Muhoroni Sugar Company Limited Staff Retirement Benefits Scheme without leave of the court, and that no such leave has been sought or obtained. Lastly, it was pleaded that the claim sought to be enforced arose as a debt prior to the appointment of defendants as receiver managers and the crystallization of the floating charge created by the existing debentures registered in favour of Kenya Sugar Board, the succession in title to Kenya Sugar Authority, over all the existing assets of the company and whose secured debt stands in priority against all other unsecured debts, which include the claim by the plaintiff.

There cannot be any dispute that the defence raises various serious issues which should go to trial. I have considered that the application to set aside was defended by grounds of objection and that, so far, no reply to the defence has been filed.

It is now settled that when the interlocutory judgment set to be set aside was irregular in nature (now that the 2nd defendant contends that this was not a liquidated claim), the court has no discretion in the matter as the judgment should be set aside *ex debito justitiae* (MWALIA .V. KENYA BUREAU OF STANDARDS (above)). Where the judgment sought to be set aside was regularly obtained, the court has unfettered discretion to set it aside. The only fetter to the discretion is that justice should be done to the parties. The factors to be considered in the exercise of that discretion include the nature of the action; the reasons why the defendant did not act on time; whether he has a reasonable defence to the claim; whether the plaintiff can reasonably be compensated by costs for any delay or inconvenience (PATEL .V. E.A.

CARGO HANDLING SERVICES [1974] EA 75); and, lastly the consideration that justice is better served when a suit is heard and determined on merits (SEBEI .V. GASYALI [1968 E.A.300]).

Was the interlocutory judgment entered against the 2nd defendant on 29/5/12 regular. MR. GATURA for the plaintiff and MR. RAGOT for the defendants submitted at length on this point.

Under Order 10 rule 4(1):

“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 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.”

The Supreme Court Practice, Volume 1m 1985 at page 33 a liquidated demand is defined as follows:

“A liquidated demand is in the nature of a debt that is a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure requires investigation beyond mere calculation, then the sum is not a 'debt or liquidated demand', but constitutes 'damages'...the words 'debt or liquidated demand' do not extend to liquidated damages, whether in tort or contract, even though the amount of such damages be named a definite figure”.

On 27/6/12 the plaintiff filed a notice of withdrawal of prayer (b) in the plaint. The prayer sought

“b) General Damages for Breach of Trust and Breach of the Mutual Contractual Duty of Good Faith together with Interest as Court Rates.”

That was certainly an unliquidated demand. It was part of the plaint. An interlocutory judgment could not be based on it. The claim required formal proof under Order 10 rule 9.

It is notable that the Deputy Registrar entered judgment on the plaint

“for Kshs.29,716,079/63 together with interest at 5% p.a. together with interest at court rates and interlocutory judgment pending formal proof.”

Clearly, the Deputy Registrar was saying that the judgment he had entered was going to be subject of formal proof. He did not say that he was entering interlocutory judgment on prayer (a) and that prayer (b) was going to be subjected to formal proof. Mr. Gaturu submitted that that was what the deputy Registrar meant, but that is not clear from the entered judgment.

Be it as it may, was the claim in prayer (a) a liquidated claim? The amount claimed in prayer (a) was as claimed in paragraph 5 of the plaint which state as follows:

“5. By reason of the said Failure by Muhoroni Sugar Company Limited (In Receivership) to pay the said Employer and Membership Contributions Receivable and Excess of Accrued Liabilities over Scheme Assets for Several Years the Company was in arrears of such Remittances to the tune of Kshs.29,716,079/63 including interest at 5% p.a. from 30/4/05 to date made up as follows:

1. Employer and Members Contributions Receivable.....18,115,250/=
2. Add Accrued Liabilities over Scheme Assets

.....3,003,413/=

3. Add Interest on 1) and 2) above @ 5% from

30/4/05 to date.....8,597,416/63

4. Grand Total.....29,716,079/63.”

There is no dispute that a specified sum was claimed in prayer (a), but it is not clear when the amount became due, over which employees, what the monthly or annual contributions were, how they were calculated, on what basis an excess of accrued liabilities over scheme assets was calculated, and what was the basis of the interest at 5% and why it was payable from 30/4/05. It is my considered view that this was not a liquidated demand. The claim required formal proof.

In the case of MBUNI DRYCLEANER LIMITED .V. MARGARET CHELANGAT AND OTHERS [2005] eKLR the defendants counter-claimed Kshs.5,642,581/= being service dues, three months salary in lieu of notice and allowances. They obtained an *ex parte* judgment in default of filing defence by the plaintiff. The court held that the claim as pleaded in the counter-claim was not a liquidated demand; that formal proof was required to establish it.

It follows that the default judgment entered against the 2nd defendant on 29/5/12 was irregular as evidence needed to be called during hearing to prove each of prayers (a) and (b) of the plaint. As a matter of course, the judgment is hereby set aside. The defendants shall be paid costs of the application. The memo of appearance and defence shall be deemed to be properly on record. The plaintiff shall file a reply to the defence in 7 days and thereafter the parties can proceed under Order 11 of the Civil Procedure Rules.

**Dated, signed and delivered this 8th day of July, 2013.**

**A. O. MUCHELULE**

**J U D G E**