

REPUBLIC OF KENYA

High Court at Bungoma

Civil Suit 7 of 2012

NEW NYANZA WHOLESALERS LTD.....PLAINTIFF

~VERSUS~

MUHAMMED RISAKA UNAL HAJI.....DEFENDANT

RULING

On 31/1/2012 the Plaintiff filed this suit against the Defendant claiming Ksh.8,226,662/51 together with costs and interest. On 12/4/2012 an *ex-parte* judgment as entered against the Defendant on the basis that he was served with summons but did not enter appearance, and neither did he file a defence. When the process of execution begun the Defendant brought the present application seeking stay and the setting aside of the *ex-parte* judgment and all consequential orders. His case was that he had not been served with summons. He stated that he had only learnt of he suit through a friend. He promised to put the process server to strict proof at the hearing of the application. When the application came for hearing, however, there was no indication that he wanted the process server produced for cross-examination on the allegation that summons had been served. The Plaintiff's replying affidavit indicated that the Defendant had been duly served with process.

I have looked at the affidavit of service sworn by process server Everlyne Achieng Achieng that shows that on 31/1/2012 she found the Defendant in the Plaintiff's shop where he had come to buy goods. The Plaintiff's Director Sarah Hersi Moghe pointed out the Defendant to her. She introduced herself and served him with summons to enter appearance, plaint, verifying affidavit and statements and lists of exhibits which he received and signed for. The acknowledgment was filed. Sarah Hersi Moghe's replying affidavit states that the Defendant had actually come to negotiate with her on how to pay the debt when he was served. She saw him sign at the back of the summons to enter appearance as acknowledgment of receipt of service. On the face, I find that the Defendant was properly served with summons and therefore the default judgment was regularly entered against him.

Despite the fact that there was a regular judgment this court has a wide and unlimited jurisdiction to do justice between the parties (**Patel V. EA Cargo Handling Services Ltd [1975] EA 75**). The court has to look at the nature of the action, the nature of the defence that has been proposed, the question as to whether the Plaintiff can be reasonably compensated by costs for any delay occasioned, the issue whether the application has been brought to delay or defeat justice, and, finally, it should be borne in mind that justice is usually better served when the parties are ultimately heard and their case determined on merits (**Sebei District Administration v. Gasyali [1968] EA 300**).

There is no dispute that the Defendant purchased a lorry registration number KBE 883 V make Iveco using a loan of Ksh.7,848,000/= advanced by Gulf African Bank and which the Plaintiff guaranteed. Also advanced was a loan of Ksh.2,000,000/= which was used to buy a 3 axles semi-trailer. The loan was to be repaid by monthly installments. The Defendant hired out the lorry to the Plaintiff for transport business and a running account was opened. It was agreed that the installments and operating costs would be debited to the account. The Plaintiff states that as at 20/1/2012 the running account showed Ksh.8,226,662/51 in debt, hence the suit. To the replying affidavit she annexed the account details to show the debt.

The Defendant's case is that he contracted his brother Haji Abdul Aziz Omar to operate the lorry under the supervision of the Plaintiff. The lorry was carrying sugar from Mumias Sugar Company. In November 2009 the vehicle was involved in an accident. The Plaintiff agreed to repair it and debit the

account. In January 2012 he went to the bank and paid Ksh.400,000/= which was the amount outstanding to clear the loan. He denied that he owed the claimed amount, or any amount. Prior to the accident, he said, he was paying for the lorry directly to the bank. He stated that the Plaintiff made over Ksh.20 million from using the lorry and cannot be heard to be saying that any amount was owed to it. The Plaintiff admits that there was a time the lorry had an accident. It spent Ksh.434,844/87= to repair it. It was further deponed that when the lorry was operating they paid maintenance costs. They paid for fuel and other petroleum costs and were paying salaries. All these are shown in the statement of account. Other than the alleged payment of Ksh.400,000/=, the Defendant did not say how much he paid to the bank before or after the vehicle's accident.

On 10/4/2012 an agreement was signed between the Plaintiff and one Eli Ahmed Omar in which the latter acknowledged that the Defendant owed the Plaintiff Ksh.8,226,662/51 as at 20/1/2012 which had led to the suit. Omar agreed to pay a total of Ksh.11,000,000/= to the Plaintiff by monthly installments of Ksh.200,000/=. The Plaintiff swore that Omar had been sent by the Defendant to enter into the agreement. The Defendant disputes that he sent Omar to the Plaintiff. It is, however, notable that this agreement (marked LEN 9) was produced by the Defendant in the affidavit he swore to support the application. Where did he get it from, if he did not send the said Omar? The Plaintiff stated that it was on the basis of the agreement that Omar released the lorry's original logbook to them. The Defendant swore a further affidavit to say that this Omar was his brother, and the same person who was served with summons to enter appearance. He states that he did not authorize his brother to either receive summons to enter the agreement; that he was himself at the time outside the jurisdiction of the court. It is material that neither Omar nor Haji Abdul Aziz Omar who was entrusted with operating the lorry has sworn any affidavit. They are both the brothers of the Defendant. The Defendant does not dispute that he has since handed over the original log book to the Plaintiff. This was done through Omar.

I have anxiously considered all the material placed on record by the parties. It is quite clear to me that the Defendant owes the Plaintiff the amount in question and that no useful purpose will be served by re-opening the matter. The Defendant has no defence that should go to hearing. The consequence is that I dismiss the application with costs.

Dated, signed and delivered at Bungoma this 3rd day of October, 2012

A. O. MUCHELULE
JUDGE