



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURT

Civil Case 589 of 2012

POWER SOLUTIONS LIMITED.....PLAINTIFF

- VERSUS -

CMA CGM KENYA LIMITED1ST DEFENDANT

AWANAD ENTERPRISES LIMITED.....2ND DEFENDANT

KENYA PORTS AUTHORITY3RD DEFENDANT

R U L I N G

1. On 7th September, 2012, the Plaintiff filed this suit claiming various orders including a permanent injunction, a declaration as well as general damages. Together with the Plaint, the Plaintiff filed an application under order 40, Sections 1A, 2A, 3A and 63 of the Civil Procedure Act. The application came under vacation rules and Hon. Havelock J admitted the same for hearing during the vacation and directed that the same be served and be heard on 13th September, 2012.

2. On 13th September, 2012 the matter came up before the Hon. Odunga J for inter-partes hearing. Only the Plaintiff and 3rd Defendant were represented. Mr. Ndegwa for the Plaintiff informed the court that the application had been served on all the Defendants. The court looked at the Affidavit of service and was satisfied that there was prima facie evidence that there was proper service and ordered the matter to proceed. Thereupon, the Plaintiff and 3rd Defendant entered into a consent compromising the said application.

3. On 18th September, 2012, the 2nd Defendant took out a motion on notice seeking that the said consent order be set aside and that the Plaintiff’s application dated 7th September, 2012 be heard inter-partes. The grounds upon which the application was grounded were set out on the face of the application. The same was also supported by the Affidavit of Wilfred Oluga sworn on 18th September, 2012.

4. The 2nd Defendant contended that due to the delay of removal of the Plaintiff’s five (5) containers from the custody of the 3rd Plaintiff to the 2nd Defendant’s container freight station, the Plaintiff incurred storage charges payable to the 3rd Plaintiff, that the 3rd Plaintiff therefore debited the 2nd Defendant’s account with itself with storage charges and VAT amounting to Kshs.3,178,771/-, that these monies were recoverable from the Plaintiff before the release of the five (5) containers to the Plaintiff. That the 2nd

Defendant was not represented in court on 13th September, 2012 because it had not been served with the Plaintiff's suit papers, it discovered of the case on receipt of the consent order, that it was not party to the consent order, that the order was given in error as the order only affected the 2nd Defendant and not the Plaintiff and the 3rd Defendant.

5. Mr. Omuga submitted that although the matter was certified urgent on 7/9/12, service was effected in Mombasa on the eve of the return date, that service was effected upon Habo Agencies and not the 2nd Defendant, that the person served was not the 2nd Defendant's legal officer.

6. The Plaintiff opposed the application vide a Replying Affidavit of George Andy Hinga sworn on 21/9/12. The Plaintiff contended that the 2nd Defendant had misled the court that it had not been served, that the process was served upon Habo Agencies who received them on behalf of the 2nd Defendant, that the Plaintiff was intent in stealing a match against the Plaintiff, that the value of the items held by the 2nd Defendant are in excess of Kshs.20 million and a contract of Kshs. 40 million stands to be cancelled because of continued detention of the goods, that the order was akin to a regular judgment.

7. Mr. Ndegwa, learned Counsel for the Plaintiff relied on the Affidavits of Service of Festus Kombe Mwarandu sworn on 12th and 20th September, 2012 respectively as prove of service. That there were no storage charges payable by the Plaintiff to any party, that Habo Agencies and the Plaintiff were one and the same party. Counsel urged that the application be dismissed.

8. Mr. Sangoro, learned Counsel for the 3rd Defendant submitted that the principles applicable in an application for setting aside orders were well known, that where the order is regular it is the court's exercise of discretion that is called upon, that there was no collusion whatsoever between the Plaintiff and the 3rd Defendant, that Counsel was satisfied with the service that is why he entered into the consent, that the court should not accept to be hoodwinked by confusion generated by the employees of the 2nd Defendant, that the 2nd Defendant should have applied to cross-examine the process server and having failed to do so the averments of the process server remain unchallenged. Counsel urged that the application be dismissed.

9. I have considered the Affidavits on record and submissions of counsel. This is an application to vary an injunction made by consent of two parties against two absent parties on 13th September, 2012. The main ground is that there was no service of the suit documents upon the 2nd Defendant. The Plaintiff and the 3rd Defendant on the other hand contend that there was proper service. The Plaintiff relied on two Affidavits of the Process Server known as Festus Kombe Mwarandu filed in court on 13th and 20th September, 2012, respectively.

10. In the Affidavit filed on 13th September, 2012, the process server states:-

“2. That on the 11th September, 2012, I received a Certificate of urgency, Chamber Summons Application with an Affidavit in Support attached with annexures and a Plaint attached with a Verifying Affidavit all dated 7th September, 2012 from Maina & Maina Advocates, Nairobi to serve all the Defendants herein.

3. That on the same day, I proceeded to the 3rd Defendant's offices at Kilindini Port Headquarters on the 6th floor at the legal section where I met the Senior Legal Officer one Stephen Kyandih and upon my introduction and informing him the purposes of my visit, he accepted service of the said documents by stamping and signing on my copy.

4. That on the same day, I also proceeded to the 1st Defendant's offices along Shimanzi road near Missions to seamen at Baywood Building and upon arrival, I met the secretary to whom after introduction, I informed her the purposes of my visit and thereafter served her with a copy of the said

documents which service she acknowledged by stamping at my copy.

5. That on the 12th September, 2012, I then proceeded to the 2nd Defendant's offices at Mikindani and upon arrival, I met one of the Legal officer in the name of Jackline and after introduction and informing her the purposes of my visit, she referred me to their legal team which is situated at Majengo area along the Jomo-Kenyatta Avenue at Habo Plaza 3rd floor and upon my arrival, I met Vivian one of the legal officers, to whom after introduction and informing her the purposes of my visit, I served her with the said papers which service she acknowledged by signing and stamping at the back of my copy."

In the Affidavit filed on 24th September, 2012 the process server swore:-

"2. That on the 15th September, 2012 I received an order issued on 14th September, 2012 from Maina & Maina Advocates with instructions to serve all the Defendants herein at Mombasa.

3. That on the same day at around 10.20 a.m., I proceeded to the 1st Defendant's office at Baywood Building near Missions to seamen along the Shimazi road an upon reaching the said offices, I met the secretary to who after informing her the purposes of my visit, I served her with the said Order which she accepted by stamping at my copy.

4. That thereafter at around 11.30 a.m., I proceeded to 2nd Defendant's office along the Jomo-Kenyatta Avenue at Habo Plaza, 3rd floor, legal Section where upon reaching there I met one, Florence, Legal Officer and after introduction and informing her the purposes of my visit, I served her with the said Order which service she accepted by signing and stamping at the back of my copy.

5. That on 19th September, 2012, at around 11.00 a.m., I proceeded to 3rd Defendant's at Kilindini port headquarters on the 6th floor at the legal section, and upon reaching the said offices, I met one, Dena, one of the Legal Officers to whom after introduction and informing him the purposes of my visit, he accepted service by signing and stamping at the back of my copy."

11. What is clear from the said Affidavits is that on two occasions the process server went to two different places and dealt with three different legal officers, Jackline at Mikindani, Vivian and Florence at Habo-Plaza. It is not clear from the said Affidavits how the process server knew that these three personnel were/are legal officers of the 2nd Defendant. He does not even state that he asked for their identification as well as positions in the 2nd Defendant. He does not say how he knew them or whether he had known them there before. One of those referred to as a legal officer, Vivian Onyango swore an Affidavit on 21st September, 2012 and stated:-

"1. That I am employed by Habo Agencies Ltd as a secretary.

2. That on 12th September, 2012 at about 2.15 p.m. a gentleman I had never met before delivered to me some documents and requested me to receive them on behalf of my employer.

3. That I received the documents believing them to be meant for my employer, Habo Agencies Ltd. In acknowledgement of the documents, I appended the stamp of Habo Agencies Ltd as requested by the person who delivered them and also signed."

12. The contents of this Affidavit were never contested nor challenged in any way whatsoever. I have seen the copy of the hearing notice attached to the Affidavit of Service of 13th September, 2012. It was received with the stamp of Habo Agencies Ltd on 12th September, 2012. Vivian Onyango swore that that stamp was her employer's. That her employer was Habo Agencies Ltd. The question therefore that arise is, between the Affidavit evidence of the process server and Vivian Onyango which one is to be

believed? I am inclined to believe Vivian. This is so because while she swears to matters within her own knowledge, Mr. Mwarandu the process server does not satisfy the requirements of order 5 Rule 15 (1) of the Civil Procedure Rules as to swearing of Affidavits of service. That Rule provides:-

“15 (1) The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No 4 of Appendix A with such variations as circumstances may require.”

13. That order requires identification of the time and manner of service as well as the person (if any) identifying the person served. As I have already stated, Mr. Mwarandu did not say in his Affidavit how he knew the offices of the 2nd Defendant or who directed him there or who informed him that Jackline was a legal officer of the 2nd Defendant. He also did not state whether he confirmed from Vivian whether she was an employee of the 2nd Defendant and if so, how he knew she was a legal officer. It has turned out that she has stated on oath that she is only a secretary of Habo Agencies Ltd.

14. It was suggested from the bar that the 2nd Defendant and Habo Agencies Ltd are one and the same, that the latter is the agent of the former. There was however, no satisfactory evidence to convince the court of that fact. At least a statement on oath would have cleared the air. It may well be that the said companies share offices. However, it is the duty of the serving officer to ensure and clarify that the personnel he is serving belongs to the particular company amongst the two. This he never did and this court cannot speculate.

15. The other issue of concern is the whole process in this matter. It was noted that all the Defendants are situated in Mombasa and the cause of action arose in Mombasa, the matter was certified as urgent on Friday 7/9/12. However, the attempted service upon the 2nd Defendant was on Wednesday 12th September, 2012 at 2.15 p.m. for hearing the following day at Nairobi!

16. As if the same was not enough, the Plaintiff and 3rd Defendant purported to enter into a consent whose effect is to bind 3rd parties. The order made by consent on 13/9/12, affects the 1st and 2nd Defendants only. Why was the 3rd Defendant entering into a consent which did not affect it? Was it not enough if there was proper service for the 3rd Defendant to tell the court that it was not opposed to the application and let the application be argued ex-parte? The 3rd Defendant knowing that the containers were not in its possession should have disclosed that fact to the court and urge the court to issue the order in so far as it was not to affect it. In my view, to proceed and record a consent to the extreme prejudice of other parties was not proper.

17. This court believes that a party can only enter into a consent which can only affect it and not 3rd parties as in this case. The overriding objective of the Civil Procedure Act requires that all parties before court be treated equally and at all times the court try to keep them on equal footing. For the parties in this litigation to be on equal footing, I am satisfied that it is just and fair to set aside the consent order of 13/9/12 and order that the application dated 7/9/12 be heard on merit.

The application dated 18th September, 2012 is therefore allowed with costs.

DATED and DELIVERED at Nairobi this 05th day of October, 2012.

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A. MABEYA

JUDGE