



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT KAKAMEGA**

**ELC CASE NO. 299 OF 2015**

**NOAH KAISHA KEDOGO.....PLAINTIFF/RESPONDENT**

**VERSUS**

**CHINA CONSTRUCTION COMPANY LIMITED.....DEFENDANT**

**AND**

**CHINA OVERSEAS ENGINEERING CONSTRUCTION**

**COMPANY LIMITED .....APPLICANT**

**RULING**

This application is dated 28<sup>th</sup> March 2019 and is brought under order 22 rules 6, 22 & order 51 rule 1 of the Civil Procedure Rules and section 1A, 1B, 3A & 34, 63 (e) of the Civil Procedure Act seeking the following orders;

- (i) That this application be certified as urgent and heard ex-parte in the first instance.
- (ii) That pending the hearing and determination of this application inter-parties there be a stay of execution of the judgment entered on 16<sup>th</sup> October, 2018 and its consequential orders.
- (iii) That this honourable court be pleased to set aside the entire execution process of the judgment entered on 16<sup>th</sup> October, 2018 and the consequential orders emanating therefrom as against the applicant herein.
- (iv) That the costs of this application be borne by the plaintiff/respondent.

It is grounded upon the annexed affidavit of Bai Yan Rong and further grounded on the facts that the plaintiff/respondent has commenced execution against the applicant when the judgment was against a different company or party. The applicant will suffer great prejudice and irreparable loss if this application is not granted since its motor vehicles would have been sold when there is no judgment or valid decree against it. This application is brought in utmost good faith. That the execution process is irregular, un-procedural and unlawful as there is no judgment, valid decree or notice of entry of judgment against the applicant as required by the law. That this application has been brought within a reasonable time. That the judgment that was obtained was not against the applicant. That it is in the interest of justice that the application be allowed and the orders be granted.

The respondent submitted that, the application lacks merit as the only prayers being sought by the applicants is for an order setting aside judgment and execution. That the applicant has not denied they are the ones constructing the Kisumu – Kakamega road and are the ones who excavated murram from the plaintiff land without authority. That China Construction Company Limited is the same as China Overseas Engineering Construction Company Limited and who are the sole contractors of Kisumu-Kakamega highway. That the offices are located next to Kisumu International airport where service has always been effected annexed and marked NKK are affidavits of service with the same name as China Overseas Engineering Construction Company Limited. That the insistence by the applicant that they ought to have been served at their headquarter office in Nairobi is a lame duck statement to escape liability. That the applicants were properly served with court papers and have been known never to attend court. That infact attachment of the applicant's property was done at Majengo in Vihiga County where they are in the final stages of completion of work.

This court has considered the application and the submissions therein. In the case of General Motors (EA) Limited v Catherine Mokaya, Lawrence Nyan'gau & Linear Coach Company Ltd [2018] eKLR, the court held that,

*“Service of Summons upon a defendant by a plaintiff is so important that any order issued in favour of the defaulting plaintiff by a*

*court is irregular and must be declared null and void, and any judgment resulting therefrom must also be set aside ex debito justitiae upon the defendant moving the court Under **Order 10 Rule 11 Of The Civil Procedure Rules**. However, the applicant is under an obligation to satisfy the court that indeed no service of summons was effected”.*

In this case the defendant is a limited liability company, service of summons upon it must be in strict compliance with the provisions of Order V Rule 2 which reads thus:-

**“Order V Rule 2. 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 2 (a) , by leaving it at the registered office of the corporation or sending by prepaid registered post to the registered postal address of the corporation, or 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 by sending it by registered post to the last known postal address of the corporation.”**

I have perused the court file and the defendant in this case is China Construction Company Limited. The plaint in court dated 23<sup>rd</sup> November 2015 was never amended. The warrants have now been issued against the applicant who is China Overseas Engineering Construction Company Limited. These appear to be two distinct legal entities. The respondent states that China Construction Company Limited is the same as China Overseas Engineering Construction Company Limited. No evidence has been adduced to establish this. In the absence of such evidence this court cannot allow execution against a third party who was not party to this suit. I find this application has merit and I grant the same as prayed.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 14<sup>TH</sup> DAY OF MAY 2019.**

**N.A. MATHEKA**

**JUDGE**