CRRC Qiqihar Rolling Stock Co.Ltd v Rift Valley Railways(Uganda) Ltd & 2 others (Civil Case 414 of 2018) [2022] KEHC 306 (KLR) (Commercial and Tax) (28 April 2022) (Ruling)

Neutral citation: [2022] KEHC 306 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE 414 OF 2018

WA OKWANY, J

APRIL 28, 2022

BETWEEN

CRRC QIQIHAR ROLLING STOCK CO.LTD ..... PLAINTIFF

AND

RIFT VALLEY RAILWAYS(UGANDA) LTD ..... 1ST DEFENDANT

UGANDA RAILWAYS CORPORATION ..... 2ND DEFENDANT

KENYA RAILWAYS CORPORATION ..... 3RD DEFENDANT

RULING

1. This ruling settles two applications. The first application is dated 31st July 2019 seeking orders to strike out the plaint and dismiss the Plaintiffs suit against the 3rd defendant or an alternative order that the plaintiff deposits security for costs in the sum of 20 million in favour of the 3rd failure of which the suit against the 3rd defendant be dismissed.
2. The application is based on the following grounds: -
    1. The plaint raises no reasonable cause of action against the 3rd defendant/applicant.
    2. There is no privity of contract between the 3rd defendant and the plaintiff.
    3. The suit is not compliant with the mandatory provisions of section 87 of the *Kenya Railways Corporation Act* Chapter 387.
    4. The Honourable court has no jurisdiction to take cognizance and determine the suit.
    5. Kenya is not a convenient forum for trying the suit herein.

6. The plaintiff is a foreign entity with no known presence or assets within the jurisdiction of the honourable court.

3. The plaintiff opposed the application by grounds of opposition dated 12th November 2019 stating that: -

    1. The application is incompetent and fatally defective as the 3rd defendant has not sworn an affidavit in support of the prayers and the grounds in the application.

    2. The cause of action against the 2nd and 3rd defendants as pleaded in paragraph 19 of the Amended plaint dated 11/4/2019 is trespass to goods in that the 2nd and 3rd defendants purported to take possessions to take possession of the plaintiffs/applicants wagons and has been using them to transport goods in Uganda and Kenya.

    3. Under Order 26 rule 3 of the *Civil Procedure Rules* an order for security for costs cannot be made where it appears to the court that the substantial issue is which of two or more defendants is liable or what portion of liability two or more defendants should bear.

    4. Section 87 of *Kenya Railways Corporation Act* unconstitutional as it violates Article 48 of the *Constitution* which provides for the right of access to justice.

4. The 3rd defendant submitted that the plaintiffs claim for the alleged unpaid contractual balance does not affect it as it involved dealings between the plaintiff and the 1st defendant.

5. In a rejoinder, the plaintiff submitted that the its case against the 3rd defendant is for trespass to goods as the 3rd defendant purported to take possession of the plaintiff's wagons and had been using them to transport goods in Uganda and Kenya.

6. Order 2 Rule 15 deals with striking out of pleadings and provides as follows;

> " 15.
>
> (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
>
> (a) it discloses no reasonable cause of action or defence in law; or
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> (b) it is scandalous, frivolous or vexatious; or
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> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

7. In *Blue Shield Insurance Company Ltd vs. Joseph Mboya Oguttu* [2009] eKLR the Court of Appeal held: -

> " The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of *D.T. Dobie and Company (Kenya) Ltd vs Muchina* [1982] KLR 1 discussed the issue at

length and although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-

"The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case."

We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of *Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others* (No.3) (1970) ChpD 506, where the Lord Justice said:-

"The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading."

We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable. "

8. Similarly, in *Crescent Construction Co Ltd vs Delphis Bank Limited*, [2007] eKLR, the Court of Appeal emphasized the need for a court to exercise its discretion with utmost care when faced with an application for striking out a suit. The Court observed that striking out of a suit is a draconian action that may have the consequences of slamming the door of justice on the face of one party without according it an opportunity to be heard.

9. I have perused the amended plaint dated 11th April 2019 and I note that the plaintiffs claim that the 2nd and 3rd defendants took possession of its wagons without its consent. I find that plaint raises a reasonable cause of action against the defendant the details of which can only be unpacked during the trial. I also find that the issue of compliance of Section 87 of the *Kenya railways Corporation Act* and its constitutionality should be addressed during the hearing as it would require the interpretation and analysis of the facts that will presented to the court.

10. The power to strike out the suit is a drastic step that should be used sparingly (See *Kenya Commercial Bank vs Suntra Investment Bank Ltd* [2015] eKLR). In the premises I find that the plaintiff should be given a chance to ventilate its case on merit.

11. Turning to the alternative prayer for security of costs, the 3rd defendant submitted that it would not be able to recover the costs from the plaintiff in the event it succeeds in its defence as the 3rd defendant is a foreign entity with no known assets or office within the Court's jurisdiction. The plaintiff, on the other hand, submitted that no orders for security of costs may be made where there are two defendants.

12. The law governing security of costs is set out under Order 26 of the Civil Procedure Rules which provides as follows: -

" 1. In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party.

2. If an application for security for costs is made before a defence is filed, there shall be filed with the application an affidavit setting out defence the grounds

of the defence together with a statement of the deponent's belief in the truth of the facts alleged.

3. Where it appears to the court that the substantial issue is which of two or more defendants is liable or what proportion of liability two or more defendants should bear no order for security for costs may be made.

4. In any suit brought by a person not residing in Kenya, if the claim is founded on a bill of exchange or other negotiable instrument or on a judgment or order of a foreign court, any order for security for costs shall be in the discretion of the court.

5.

(1) If security for costs is not given within the time ordered and if the plaintiff is not permitted to withdraw the suit, the court shall, upon application, dismiss the suit.

(2) If a suit is dismissed under subrule (1) and the plaintiff proves that he was prevented by sufficient cause from giving the required security for costs the court may set aside the order dismissing the suit and extend the time for giving the required security.

6.

(1) Where security by payment has been ordered, the party ordered to pay may make payment to a bank or a reputable financial institution in the joint names of himself and the defendant or in the names of their respective advocates when advocates are acting.

13. In *Patrick Ngetakimanzi vs Marcus Mutuamuluvi & 2 others*- High Court Election Petition No. 8 of 2013 it was held that: -

> "Security of costs ensures that the respondent is not left without recompense for any costs or charges payable to him. The duty of the court is therefore to create a level ground for all the parties involved, in this case, the proportionality of the right of the petitioner to access to justice vis-a-vis the respondent's right to have security for any costs that may be owed to him and not to have vexatious proceedings brought against him."

14. Further in *Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 Others*, CA No. 38 of 2013 [2014] eKLR, the Supreme Court emphasized that: -

> "In an application for further security for costs, the Applicant ought to establish that the Respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. It is not enough to allege that a Respondent will be unable to pay costs in the event that he is unsuccessful. And the onus is on the Applicant to prove such inability or lack of good faith that would make an order for security reasonable."

15. In *Shah vs Shah* [1982] KLR 95 that; -

> " The general rule is that security is normally required from Plaintiff's resident outside the jurisdiction, but as was agreed in the court below, a court has discretion, to be exercised reasonably and judicially, to refuse to order that security be given".

16. From the above-cited cases, it is clear that the power to order for security of costs is discretionary and ought to be exercised reasonably and judicially. The court has to consider the place of residence of the plaintiff, the conduct of the parties and the inability of the plaintiff to pay the costs. This court has to satisfy itself that it will be just to make an order of costs in the circumstances of each case.

17. It was not disputed that the plaintiff has no known assets within Kenya. The plaintiff's stature as an international company resident outside the country is not disputed either. The applicant has however not demonstrated that the plaintiff will not be able to satisfy an order of costs. In *Europa Holdings Limited vs Circle Industries* (UK) BCLC 320 CA, it was held that it must be proved that the Plaintiff would not be able to pay the costs at the end of the case. Balancing the interests of the parties herein, I find that no material has been placed before this court to show that Plaintiff will be unable to meet its obligations for costs should it lose the suit

18. In the upshot, the application dated 31st July 2019 lacks merit and I therefore dismissed it with costs.

19. Through the Second application dated 5th March 2021, the applicant/2nd defendant seeks the following orders: -

    a. This honourable court be pleased to discharge and set aside the interlocutory judgment entered herein in default of appearance and all consequential decree orders and processes attendant thereto

    b. This honourable court be pleased to grant the 2nd defendant/applicant an opportunity to be heard on the plaintiff's claims herein and deem the defendant's statement of defence attached herein to be properly filed upon payment of the requisite fees.

    c. The honourable court be pleased to grant any further orders as it may deem appropriate in the circumstances of this case

    d. The costs and incidentals of this application be provided for.

20. The application is supported by the affidavit of Nambasa Sarah Kasembe and is based on the following grounds: -

    1. The Plaintiff/Respondent ingeniously filed this case on 14th December 2018 seeking special damages and compensation arising from a contract negotiated, executed and performed in the Republic of Uganda between the Plaintiff and the1st Defendant.

    2. In the suit as filed before the Court, the Plaintiff failed to mention that the 2nd Defendant was neither a party to the subject agreement nor a participant in the subject contract.

    3. Upon filing the subject suit, the Plaintiff failed to properly serve the 2nd Defendant with Summons to enter appearance and the other statutory documents with the result that the Defendant did not enter appearance as required by the law.

    4. On 17th October 2019, the Plaintiff obtained judgment in default of appearance against the 2nd Defendant/Applicant for a colossal sum of USD 11,078,928.00 which is the equivalent of

Kshs 1.2 Billion allegedly comprising of special damages arising from the 1st Defendants breach of contract together with interests.

5. The exparte judgment in default appearance, obtained by the plaintiff herein is irregular and unlawful and he same has been procured against an innocent party who is neither privy to the contract the subject of the alleged breach nor a participant to the matters alleged to compromise the breach.

6. The plaintiff/respondent failed to properly serve the 2nd defendant, which is a foreign entity ordinarily domiciled out of the court's jurisdiction with the summons to enter appearance and suit papers herein including the plaint as required in law

7. The 2nd defendant has a good defence to the plaintiff's suit herein and wishes to be heard on the same. This honourable court will do substantive justice to the parties herein by setting aside the exparte interlocutory judgment and allowing the matter to be heard and determine on merit

8. The subject ex- parte judgment is in the face of it irregular and unlawful for inter alia awarding a colossal prayer for special damages against the 2nd defendant who is not privy to the disputed contract.

9. The plaintiff/respondent is likely to start the process of executing the unlawful exparte colossal judgment, which it is equally applying to harass the 2nd defendant and threaten it with possible bankruptcy proceedings

10. The principles for setting aside interlocutory judgments are now settled and set out in the celebrate case of *Patel vs East Africa Cargo Handling services Ltd* [1974] EA 75 which principles are as follows

> " There are no limits or restrictions on the judge's discretion 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 condition on itself or fetter wide discretion given to it by the rules"

That where there is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect, defence on the merit does not mean a defence that must succeed. It means a Triable issue" that is on issue it raises a prima facie defence which should go to trial for adjudication

11. The 2nd defendant has a right both under the *Constitution* of Kenya 2010 and the *Civil Procedure Act* to defend itself against the plaintiffs unmeritorious claims herein, which rights should be protected by this honourable court by granting it an opportunity to be heard

12. This application has been filed in good faith and without any delay and with the singular purpose of allowing this matter to proceed for trial on merit where both parties will give their evidence and allow the court to determine the matter

13. The 2nd defendant/applicant will suffer great prejudice due to the colossal amounts herein and the nature of the matters in issue unless this Honourable Court intervenes and sets aside the interlocutory judgment herein

14. The defendant has a good defence to the suit herein as demonstrated in the draft defence attached to this application.

15. It is only fair, just and in the greater interest of justice that the judgment entered herein in default of appearance be set aside and the defense attached hereto be deemed to be properly on record upon payment of requisite fees.

21. The plaintiff opposed the application through the replying affidavit of its Senior Manager Mr. ALdarf Liu who states that it sought and obtained leave to serve the 1st and 2nd defendants by way of substituted service after which the defendants were served through DHL courier services. He faults the defendants for the inordinate and states that they are undeserving of the orders sought.

22. Order 10 Rule 4 (1) and (2) of the Civil Procedure Rules, 2010 provides as follows: -

> " 4(1) Where the plaint 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 so 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 plaint 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.

23. A perusal of the plaintiff's documents reveals that they served the 2nd defendant through DHL courier services in line with the provisions of Order 5 Rule 3 of the Civil Procedure Rules which provides as follows;

> " 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;
>
> (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 licenced courier service provider approved by the court to the registered 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 address of the corporation."

24. I find that service herein to the 2nd defendant was regular. The issue for determination whether the court can exercise its discretion to set aside the interlocutory judgment.

25. Order 10, rule 11 of the Civil Procedure Rules, it reads as follows: -

> " Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

26. In the case of, *Patel vs EA Cargo Handling Services Ltd* (1974) EA 75, the Court held that: -

> " There are no limits or restrictions on the judge's discretion 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 condition on itself or fetter wide discretion given to it by the rules, the principle obviously is that unless and until the count has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure."

27. *James Kanyiita Nderitu & Another vs Marios Philotas Ghikas & Another*, Civil Appeal No. 6 of 2015 eKLR (Msa), the learned Judges of Appeal had this to say; -

> " We shall first address the ground of appeal that faults the learned judge for setting aside the default judgment and consequential orders in the circumstances of the case. From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed 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 judgment 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 the default judgment, and will take into account such factors as the reason for the 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; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & Another v. Shah (supra)* , *Patel v. EA. Cargo Handling Services Ltd* (1975) EA 75, *Chemwolo & Another v. Kubende* [1986/ KLR 492 and *CMC Holdings v. Nzioki* [2004/ 1 KLR 173).

28. The principle that emerges from the above-cited cases is that the court's discretion to set aside the interlocutory judgment is aimed at avoiding injustice to parties by giving them a chance to present their defence. I have perused the pleadings and I note that the amount involved is quite substantial and I am of the view that it will serve the ends of justice to allow the 2nd defendant to defend the case. I am also alive of the fact that there could have been challenges in effecting service of pleadings abroad. I have also had the benefit of reading through the draft defence, and I am of the view that it raises triable issues.

29. In the upshot, I exercise my discretion and set aside the interlocutory judgment entered on 17th October 2019 on the following terms: -

    i. The 2nd Defendants statement of defence shall be deemed to be properly filed and served upon payment of the prerequisite Court filing fees;

ii. The Applicant shall serve the said statement of defence and counter claim within 14 days of this order

iii. In default of compliance with order given in (i) and (ii) then the order vacating the interlocutory judgment shall automatically lapse without further reference to the Court.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF APRIL 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Mr. Agwara for 2nd and 3rd defendant

Mr. Ondego for Plaintiff.

Court Assistant- Sylvia