**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 220 OF 2017**

**NAIROBI BOTTLERS LTD.....APPELLANT**

**-V E R S U S –**

**BENJAMIN DEON MUSAU.....RESPONDENT**

***(Being an appeal from the ruling and orders of the Chief Magistrate Court of Kenya at Nairobi delivered by Hon. P. Gesora (Mr) dated 28th April, 2017 in Milimani CMCC No. 5097 of 2016)***

**JUDGEMENT**

1. Benjamin Deon Musau, the respondent herein, filed an action before the Chief Magistrate's Court, Milimani against Nairobi Bottlers Ltd, the appellant herein vide the plaint dated 11th July 2016. In the aforesaid action the respondent sought for *inter alia* to be paid ksh.1,133,719/= in respect of empties and shells delivered and or returned by the respondent to the appellant. In this case the plaint and the summons to enter appearance were served upon the appellant. The appellant entered appearance but failed to file a defence within the stipulated time. The respondent successfully applied for entry of default judgment on 17.10,2016. The appellant filed its defence on 30.11.2016 and upon effecting service, the same was received under protest since judgment in default had been entered and a decree issued. On or around 5th April 2017, the appellant was served with a proclamation notice of attachment of the appellant's movable property from the respondent's auctioneers giving the appellant 7 days to settle the decretal sum of ksh.1,364,893/= failure to which execution would follow. Apparently, the appellant and the respondent were engaged in negotiations to settle the matter out of court. When the negotiations failed to bear fruit the appellant was prompted to file an application dated 12.4.2017 in which it sought for:

***1. Spent***

***2. Spent***

***3. THAT this honourable court be pleased to set aside the judgment and all consequential orders made herein against the defendant/applicant and grant the defendant leave to defend suit.***

***4. THAT the honourable court be pleased to declare that the purported execution against the defendant/applicant by way of attachment or any other mode whatsoever is unlawful, premature, null and void.***

***5. THAT the defence filed by the defendant/applicant filed on 30/11/2016 be admitted as having been duly filed and duly served.***

***6. THAT this court be pleased to make such further orders as are necessary for the ends of justice to be served.***

***7. THAT the costs of the application be provided for.***

2. The aforesaid motion was heard and dismissed by Hon. Gesora, learned Chief Magistrate on 18.4.2017. Being aggrieved by the dismissal order, the appellant preferred this appeal.

3. On appeal, the appellant put forward the following grounds:

***1. THAT the learned trial magistrate erred in fact and in law by failing to take into account considerations that he should have taken into account before dismissing the appellant's application for setting aside the default judgment.***

***2. THAT the learned trial magistrate erred in fact and in law by failing to take into account the fact that the appellant had entered appearance vide a memorandum of appearance filed on 22nd September 2017 and that there was a defence filed on 30th November, 2016 before dismissing the appellant's application to set aside the default judgment.***

***3. THAT the learned trial magistrate erred in law by dismissing the appellant's application yet the appellant's defence raises and discloses a reasonable defence in law which ought to be addressed by the honourable court at full trial.***

***4. THAT the learned trial magistrate erred in fact by failing to consider the fact that the appellant had honoured all its obligations under the distributorship contract between itself and the respondent and that the appellant did not at any one time breach the terms of the said contract.***

***5. THAT the learned trial magistrate erred in law and in fact by deciding that the defence on record contained mere denials and didn't raise a triable issue while it is clear that the defence raises several triable issues inter alia whether or not the appellant owes the respondent the money claimed in the plaint, that ought to be addressed by the honourable court at full trial.***

***6. THAT the learned trial magistrate erred in law and in fact by failing to consider the admission by the respondent and his advocate on record that the respondent did not serve the appellant with a Notice of Entry of judgment.***

***7. THAT the learned trial magistrate erred in law and in fact by deciding that the defence received under protest since judgment had already been entered and decree issued sufficed as Notice of Entry of Judgment before dismissing the appellants application.***

***8. THAT the learned trial magistrate erred in law and in fact by denying the appellant an opportunity to be heard and defend itself from the grave and substantial claim levelled against it yet the appellant had entered appearance and filed a defence and had the appellant been heard and had court considered the evidence and communications between the parties, then the trial magistrate would have appreciated that there was no money owed to the respondent.***

***9. THAT the learned trial magistrate erred in law and in fact by failing to consider that the appellant had served the respondent with a statement of accounts showing that the appellant had refunded kshs.142,961.70 to the respondent upon closure of his account with the appellant which amount was demonstrated to be the final account.***

***10. THAT the learned trial magistrate erred in law and in fact by reaching to the conclusion that the figures set out in the defence were meant to cause confusion despite the fact that those figures demonstrated that the appellant did not owe the respondent any money as alleged in the plaint or at all.***

***11. THAT the learned trial magistrate erred in law and in fact by failing to address himself on the illegality of the purported execution process against the appellant.***

***12. THAT the learned trial magistrate erred in law by dismissing the appellant's application dated 12th April 2017 in its entirety yet the same was meritorious.***

***13. THAT the learned trial magistrate erred in law and in fact by dismissing the appellant's application for setting aside the default judgment yet the execution process was unlawful ab initio.***

4. When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the rival written submissions. In the application seeking to set aside the default judgment before the Chief Magistrate's Court, the appellant put forward two serious grounds in support of the application. First, that the appellant was not properly notified of the entry of judgment. Secondly, that the appellant has a good defence to resist the respondent's claim. The aforesaid issues were argued before the Chief Magistrate's Court. The learned Chief Magistrate came to the conclusion the appellant's advocate was accommodated for a long time by the respondent's advocate but the appellant failed to take the necessary steps to have the default judgment set aside. The learned Chief Magistrate also found that the draft defence filed by the appellant did not contain any triable issues but was full of mere denials.

5. Though the appellant put forward a total of 13 grounds of appeal, two grounds commend themselves for determination.

First, whether or not the appellant's draft defence contained triable issues entitling it a right of hearing.

Secondly, whether or not the failure to serve a notice of entry of judgement is a ground to be considered in setting aside an exparte regular judgement.

6. On the 1st ground, I have already stated that the learned Chief Magistrate was of the view that the appellant's defence was basically a mere denial. It is the appellant's submission that the defence had triable issues which should have allowed to go for trial. According to the respondent, the appellant's defence was a sham and was an assembly of denials meant to confuse the real issues as well as to subvert a regularly obtained judgement. I have considered the rival submissions and I am convinced that the appellant in its defence and relying on the respondent's account statement has stated that the only amount owed to the respondent at the point of closure business was the sum of ksh.142,962/10 which amount was paid thereby leaving no outstanding balance as alleged by the respondent.

7. The appellant further stated that no outstanding balance as alleged and put the respondent to strict proof. It was pointed out that one could not ascertain the sum of kshs.1,133,719. In my humble estimation, I find the appellant's submissions over the above issue to be convincing and traible. I am therefore satisfied that the appellant's defence has triable issues. The question is whether or not a regular exparte judgement should be set aside on that account.

8. In the case of **Patel =vs= East Cargo Handling Services Ltd (1974) E.A 75, Duffus P,** stated *inter alia*

> **"The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it 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."**

9. In the case before this court, I have already stated that the appellant's defence contains serious triable issues. It is therefore clear that where there is a good defence with triable issues a regular judgment may be set aside in broad interest of justice. In so doing, the court has to ensure that the decree holder is not prejudiced. In this case an award of costs shall suffice to address the respondent's prejudice. In this

dispute a careful examination of the correspondences exchanged by the parties will reveal that the default judgement should have been set aside.

10. Annexed to the affidavit of Cyrus Gitau sworn on 12th April 2017 and filed in support of the motion dated 12.4.2017 in the Chief Magistrate's Court is the letter dated 15th December 2016. In the aforesaid letter, the appellant's advocate had sought for the indulgence of the respondent's advocate to allow the appellant's defence deemed as duly filed so that the appellant would have a chance of being heard. In the aforesaid letter, the appellant's advocate explained the cause for the delay to file a defence in time. It is said that the appellant had not received statements of account from the respondent. In response, the respondent's advocate promised to consult his client and revert back to the appellant. The respondent's advocate too promised to keep the matter in abeyance. By the letter dated 19/1/2017, the respondent forwarded to the appellant's advocate statements of accounts. After a critical analysis of the aforesaid correspondences, it appears to me that the learned advocates had attempted to explore an out of court settlement. There was no evidence showing that the appellant intentionally intended to delay in filing its defence. In his ruling, the learned Chief Magistrate concluded that at the time of filing its defence, the appellant should have noted that there was something amiss and should have taken steps to remedy. With respect, I think the learned Chief Magistrate misapprehended the point. Had he taken time to go through the correspondences exchanged between the parties he would have noted that the learned advocates had begun the process of reconciling accounts with the aim of determining the actual outstanding debt. In my view, the appellant's delay to file a defence was well explained to the respondent. There was high expectation that the issue would be resolved amicably without parties resorting to court to set aside the exparte judgement.

11. The second ground of appeal relates to the impact of the failure to give notice if entry of judgement. The law is clear that a party who has obtained judgment must give the other side notice of entry of judgment. The respondent has stated that he notified the appellant but the appellant denies it was given notice. The provisions of Oder 22 rule 6 of the Civil Procedure Rules provides the answer as to what should happen if one does not serve a notice of entry of judgment, that is to say that **no execution for payment nor attachment or eviction shall take place unless notice of 10 days is given.**

12. It is clear to me that the respondent did not issue such as notice hence he failed to comply with the provisions of Order 22 rule 6 if the Civil Procedure Rules. The respondent was not therefore entitled to execute in the first instance.

13. In the end, I find the appellant's appeal to be meritorious. It is allowed.

Consequently the order dismissing the motion dated 12.4.2017 is set aside and is substituted with an order allowing the motion in terms of prayers 3, 4 and 5. In the circumstances of this case I think a fair order on costs of the appeal is to direct that each party bears its own costs. However the costs of the motion dated 12.4.2017 which is before the trial court assessed at 15,000/= is awarded to the respondent(plaintiff). The suit to be fixed for hearing before another magistrate of competent jurisdiction other than Hon. Gesora on priority basis.

Dated, Signed and Delivered in open court this 24th day of November, 2017.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent