



**REPUBLIC OF KENYA**

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

**(MILIMANI COMMERCIAL & TAX DIVISION)**

**CIVIL CASE NO.144 OF 2014**

**JAMES WANYOIKE.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**STEKA TRAVELLERS LTD/.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**RISPER MOKEIRA MOKAYA &**

**JOSHUA NYAKUNDI(Administrators of**

**the Estate of**

**Paul Gwaro Nyakundi, deceased).....3<sup>RD</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**CMC MOTORS GROUP LIMITED.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**AL FUTTAIM MOTOR & MACHINERY**

**COMPANY LTD.....2<sup>ND</sup> DEFENDANT**

**EQUITY BANK LIMITED.....3<sup>RD</sup> DEFENDANT**

**CFC STANBIC BANK LIMITED.....4<sup>TH</sup> DEFENDANT**

**NIC BANK LIMITED.....5<sup>TH</sup> DEFENDANT**

**RULING**

1. The 1st defendant in its notice of motion dated 24th November 2014 seeks the following substantive orders:-

1. That the interlocutory judgment entered against the 1st defendant on 19th May 2014 be set aside upon such terms as are just.
2. That the 1st defendant be granted leave to defend this suit.
3. That the 1st defendant's statement of defence filed in court on 11th June 2014 and served upon the plaintiffs', the 3rd, 4th and 5th defendants' Advocates on 12th

**June 2014 be deemed as properly filed and served.**

**4. That the costs of this application be provided for.**

2. The application is based on the grounds set out in the body the motion. The application is supported by two (2) affidavits and the annexures thereto. The first one is the affidavit of Kefa Ombati sworn on 24th November 2014 filed in court on 25th November 2014. The second one is the supplementary affidavit of Kefa Ombati sworn on 19th March 2015 and filed in court on 20th March 2015. Defendants no 2 to 5 never filed any responses to the application nor participate in the canvassing of the same.
3. In reply to the 1st defendant's notice of motion, the plaintiffs have filed grounds of objection dated 20th February 2015 and a replying affidavit sworn by Stephen Kariuki Kanyiri on 20th February 2015, filed in court on 24th February 2015.

**THE FIRST DEFENDANT/APPLICANT CASE**

4. The 1st defendant was served with summons to enter appearance on 17th April 2014. By a letter dated 22nd April 2014, the 1st defendant forwarded the summons to enter appearance to its Advocates with instructions to enter appearance and file a defence on its behalf as soon as possible. on 24th April 2014, the 1st defendant's Advocates promptly prepared a memorandum of appearance and a notice of appointment of Advocates, filed the same in court on 25th April 2014 and served the plaintiffs' Advocates on 28th April 2014.
5. By a letter dated 25th April 2014, the 1st defendant's Advocates forwarded the memorandum of appearance and the notice of appointment of Advocates to the 1st defendant with a request that the 1st defendant furnished the Advocates with copies of all the documents in support of its defence to enable them prepare, file and serve the 1st defendant's statement of defence, list of witnesses, witness statements and list/copies of documents to be relied on during the hearing of the case.
6. By a letter dated 29th April 2014 the 1st defendant forwarded to its Advocates copies of documents in support of its case. That this being a product liability claim based on the allegations that the MAN buses sold by the 1st defendant to the plaintiffs had manufacturers defects to the engine and gearbox and the same were not fit for use as public service vehicles, by a letter dated 2nd May 2014, the 1st defendant's Advocates requested the 1st defendant to give them specific instructions on the plaintiffs' allegations of manufacturers defects and the merchantability of the MAN buses.
7. By a letter dated 7th May 2014, the 1st defendant informed its Advocates that it was engaged in discussions with the manufacturers of the MAN buses, MAN Truck & Bus (S.A.) (Pty) Limited based in South Africa and MAN Truck & Bus AG. based in Germany on the plaintiffs' claim and the defence to the claim and it could revert in due course.
8. On 9th May 2014 the 1st defendant's Advocates informed the 1st defendant that the time for filing its defence was due to lapse on 12th May 2014. Between 9th May 2014 and 9th June 2014, the 1st defendant was engaged in discussions on the plaintiffs' claim with the manufacturers of the MAN buses based in South Africa and Germany respectively.
9. On 9th June 2014, the 1st defendant gave its Advocates instructions on the plaintiffs' claim based on the discussions between the 1st defendant and the manufacturers of the MAN buses. The 1st defendant's Advocates promptly prepared, filed and served the 1st defendant's statement of defence on 11th and 12th June 2014 respectively.
10. The 1st defendant's Advocates served the plaintiffs' Advocates with the 1st defendant's defence, list of witnesses and bundle of documents and a secretary in the plaintiffs' Advocates' firm accepted service by retaining the same but she declined to sign and stamp on the duplicate copies stating that Mr. Harrison Kinyanjui was not in the office and he was the only person who could sign and stamp the documents.
11. During the period between 9th May 2014 and 9th June 2014 the 1st defendant's Advocates verbally informed the plaintiffs' Advocates that the 1st defendant and the manufacturers of the MAN buses were engaged in discussions regarding the plaintiffs' claim and they requested the plaintiffs' Advocates not to request for judgment.
12. Unknown to the 1st defendant's Advocates, the plaintiffs' Advocates requested for interlocutory

- judgment against the 1st and 2nd defendants and the same was entered on 19th May 2014.
13. As at the time of filing and serving the 1st defendant's defence, list of witnesses and bundle of documents, the 1st defendant's Advocates were not aware of the interlocutory judgement against the 1st defendant. The 1st defendant's Advocates knew about the interlocutory judgement against the 1st and 2nd defendants when this case came up for formal proof.
14. The plaintiffs have extracted a final decree issued on 18th August 2014 and instructed Starline Auctioneers by a letter dated 30th January 2015 to apply for warrants of attachment and sale of the 1st defendant's movable assets.

### **APPLICANT SUBMISSIONS**

15. The applicant submits that, order 10 Rule 11 of the Civil Procedure Rules provides that '**where judgement has been entered under this order, the court may set aside or vary such judgement and any consequential decree or order upon such terms as are just.**'

The applicant cites and relies on the cases below which are in line with the cited provisions above.

- **Patel -vs- E.A. Carge Handling Services Ltd [1974] EA75**

- Shah -vs- Mbogo [1967] EA166

- Shabbir Din -vs- Ram ParkashAnand [1955]22 EACA 48

- Mohamed &Anor -vs- Shoka [1990] KLR 463,

- Shanzu Investments Ltd -vs- Commissioner of Lands Civil Appeal No. 100 of 1993

-Tree Shade Motors Ltd -vs- DT Dobie &Anor [1995-1998] 1EA 324

- Sebei District Administration -vs- Gasyali& Others (1968) E.A. 300

16. ***from the above cited cases ,the applicant*** summarise its submissions as follows; that, the principles and tests for setting aside an ex-parte judgement can be summarized as follows:-

1. That the court has unfettered, unlimited and unrestricted jurisdiction to set aside an ex-parte judgement.
2. That the tests for setting aside an ex-parte judgement are:-
  - a) Whether there is a defence on the merits.
  - b) Whether there would be any prejudice to the plaintiff.
  - c) What is the explanation for any delay.

17. It further submits that, plaintiff in their plaint dated 19th April 2014 seek various declaratory orders, injunctive orders, awards of compensation, replacement of the suit motor vehicles with new ones, damages for loss of user, damages for product liability, exemplary damages and costs with interest.

18. The plaintiffs claim is based on the allegations that the MAN buses sold by the 1st defendant to the plaintiffs had manufacturer's defects and their engines were patently defective. The plaintiffs' suit is premised on Article 46 of the Constitution and the Consumer Protection Act 2012.

19. The 1st defendant in its defence pleads and raises the following triable issues:-

a) The 1st defendant denies that the MAN buses sold to the plaintiffs had manufacturers or any defects and that they were inherently defective or that they suffered manufacturing or any defect to the engine or mechanical performance.

b) The 1st defendant states that the MAN buses sold and delivered to the plaintiffs were reasonably fit for purpose.

c) The 1st defendant states that the MAN buses sold to the plaintiffs were subject to the manufacturer's warranty conditions set out in paragraph 17 and 18 of the defence.

d) The 1st defendant avers that upon taking delivery of the MAN buses, each of the plaintiffs separately breached the terms and conditions of the warranty as particularized in paragraph 20(a) to (m) of the defence.

20. There is evidence on record of breach of the warranty terms and conditions on the part of the plaintiffs. (Refer to the 2nd plaintiff's letter dated 24th November 2013(Exhibit No. DW2) and 29th May 2013 (Exhibit No. DW3) annexed to the 1st defendant's affidavit sworn by David Wamathu on 25th July 2014 filed in court on the same day. In the said letters, the 2nd plaintiff informed the 3rd defendant that the causes of the engine failure were as follows;

- "That on the way to Moyale the bus developed an engine problem at Isiolo Town. When the bus reached Marsabit it stopped completely. The driver called a mechanic who checked the bus and said the injector pump and nozzles had been damaged because of the diesel that had been put in the bus. After opening the tank, he found that the diesel was mixed with kerosene and water. We reported the matter at Marsabit Police Station OB number 34/20/2/2013 Marsabit Police Station for them to take action against the petrol station who sold the fuel to us (Albarda Petrol Station Juja Road Nairobi) we had bought 300 litres of diesel"
- "That the driver and conductor employed by the 2nd plaintiff stole some equipment in the bus and after stealing, they escaped to Marsabit where they sold the parts leaving the bus without tyres and rims"
- "That one of the suit motor vehicle registration number KBT 867A developed a mechanical problem when it was heading to Moyale on 4th February 2013 and some parts were stolen. The stolen parts were injector pump, engine fuel pump, propeller rubber, nozzles, oil filter and diesel filter.

21. The other evidence of breach of the warranty terms and conditions on the part of the plaintiff is a report/letter dated 28th March 2014 by Galaxy Auctioneers to the 4th defendant in respect of one of the suit motor vehicles registration number KBT 608Q owned by the 3rd plaintiff. (Refer to Galaxy Auctioneers report dated 28th March 2014 Exhibit No. DW6 annexed to the 1st defendant's replying affidavit sworn by David Wamathu on 24th July 2014 filed in court on the same day.

22. The report/letter states that Galaxy Auctioneers found one of the suit motor vehicles registration number KBT 608Q in an unmarked Jua kali garage and the same was cannibalized without engine and gearbox.

Further evidence of breach of warranty terms and conditions is that the 1st plaintiff's motor vehicle registration number KBS 070W developed engine overheating and stopped along the Nakuru-Nairobi highway. The 1st defendant and MAN South Africa, the motor manufacturer's technical team inspected the motor vehicle and ascertained that the causes of overheating and engine damage was:-

- That the radiator was clogged with dirt.
- That there were no coolant traces meaning that there was no coolant on the motor vehicle.
- That the 1st plaintiff's driver failed to heed, observe and make use of the temperature warning gauges which were in good working condition.

23. The 1st defendant contends that the MAN buses sold and delivered to the plaintiffs developed separate and distinct mechanical problems for different reasons including abusive and careless driving; use of dirty and adulterated fuels; cannibalizing the motor vehicles; causing or permitting the motor vehicles to be repaired, serviced and or maintained by roadside mechanics and unqualified persons; failing to maintain and service the motor vehicles according to the manufacturer's specifications and to use genuine parts in the maintenance and repair of the motor vehicles; failing to heed, observe and make use of the gadgets fitted on the motor vehicles like temperature warning gauges and other warning devices etc etc.

24. The 1st defendant denies that there are any engine or mechanical defects on any of the MAN buses and or patent engine manufacturing defects.

25. The 1st defendant denies that the plaintiffs' consumer rights as enshrined in Article 46 of the Constitution of Kenya 2010 and the product safety requirements as contained in the Consumer Protection Act 2012 have been violated.

26. The 1st defendant denies that the plaintiffs have suffered the alleged loss and damage and that it is liable to the plaintiffs in any manner whatsoever.

27. The 1<sup>st</sup> defendant submits that there is no prima facie evidence by way of an expert report or opinion that the MAN buses sold to the plaintiffs have a manufacturer's defect. The prima facie evidence on record points to the fact that the plaintiff breached the warranty terms and conditions.

It relies on the case of Patel -vs- E.A. Cargo Handling Services Ltd (Supra) and submit that, ***where there is a regular judgement as is the case here, the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits.***

28. The 1<sup>st</sup> Defendant submits that the 1st defendant's defence is a defence on the merits. It raises serious triable issues, which should go to trial for adjudication.

36. The first defendant submits that the setting aside of the interlocutory judgement will not cause any prejudice to the plaintiffs. This case was filed on 15th April 2014. The court record shows that the 1st defendant's Advocates promptly filed and served a memorandum of appearance.

29. The court record also shows that the 1st defendant's Advocates promptly filed the 1st defendant's statement of defence, list of witnesses, witness statement and list/copies of documents as soon as the supporting documents were availed to them.

30. The court record also shows that between 19th May 2014 and 21st October 2014, the parties concentrated their efforts and time in the plaintiffs' application (notice of motion) dated 19th May 2014 which was subsequently withdrawn).

31. In light of the circumstances/facts of this case and the proceedings as above, the plaintiffs shall not suffer any prejudice if the interlocutory judgement is set aside. All the plaintiffs shall suffer is a slight delay in the conclusion of this case. The 1<sup>st</sup> defendant further submits that any prejudice that the plaintiffs may suffer can be compensated by an award of costs.

32. The reasons and explanation for the delay in filing the 1st defendant's defence are contained in the supporting affidavit of Kefa Ombati sworn on 24th November 2014.

33. The 1<sup>st</sup> pray that the exercises its unfettered discretion in favour of the 1st defendant and allow the application dated 24th November 2014 in terms of prayers 2, 3, 4 and 5.

**THE PLAINTIFFS/RESPONDENTS CASE**

The said Plaintiff together with the Summons to enter appearance was served on the 1st Defendant/Applicant on 17th April 2014. The 1st Defendant/Applicant then entered Appearance through the Law Firm of KEFA OMBATI & CO. ADVOCATES via a Memorandum of Appearance filed on 25th April 2014 and served on the Plaintiffs on 28th April 2014.

34. However the said Defendant failed, refused and or ignored to file a Defence and consequently the Plaintiff filed a request for judgment in default of filing a Defence on 13th May, 2014. Judgment in default was then entered on 19th May, 2014.

35. The 1st Defendant/Applicant has averred that it then filed its Defence on 11th June 2014, way past the statutory stipulated time, but which Defence was NOT served on the Plaintiffs. The resultant Decree from the Interlocutory Judgment was extracted on 18th August 2014.

36. The Plaintiffs then commenced the process of execution of the said decree, and in the meanwhile sought for a hearing for Formal Proof as against the 1st Defendant.

37. It is upon the knowledge of the intended execution that the 1st Defendant/Applicant brought the present Notice of Motion dated 24th November 2014.

38. The Plaintiffs contend that there is NO plausible explanation offered by the 1st Defendant to explain this inordinate delay and hence are disentitled to any relief as sought.

39. In assessing whether triable issues have been raised by the 1st Defendant/applicant, it is pertinent to examine the Plaintiffs/Respondents case.

40. They have averred that the 1st Defendant/Applicant represented to the Respondents who had approached the Applicants showroom in Nairobi that they had a far superior brand of buses suited to the purpose for which they were to be used by the Respondents, being the PSV long distance business the Respondents are engaged in. This brand was represented to be the MAN brand, which had hitherto not been on offer for sale in Kenya. This is NOT contended.

41. The Plaintiffs were persuaded by the said representation and with the asset financing offered by the banks (Defendants 3,4, and 5 stated above) offering financing facilities, they bought the MAN buses under specified terms and conditions, including the warranty that the MAN buses sold to the Plaintiffs were fit for the purpose of long distance passenger carriage.

42. It is noteworthy that the Plaintiffs DID NOT alter the MAN buses or chassis at all on the purchases made. The fabrication of the MAN buses was at the hand of the 1st Defendant.

43. The Plaintiffs/Respondents relied on the 1st Defendant's seller's skill and/or judgement, and the 1st Defendant is estopped from denying that the MAN buses it offered for sale for PSV business were of a description which it is in the course of business to supply whether as the manufacturer or not. By reason of this, it is an implied condition that the MAN buses were to be reasonably fit for that fare-paying passenger carriage purpose. This is a factor that will NOT change even if the 1st Defendant stood on the witness dock to offer its evidence. Is there then a triable issue worth going for trial in this instance? No. The Plaintiffs/Respondents thus not only entertained but throughout had a legitimate expectation that such MAN buses would be sold, serviced and operated within a consumer market that is fair, accessible, efficient, sustainable and responsible to their benefit in consideration of the purchase price remitted to the Applicants in respect of the MAN buses without the loss and damage that resulted so soon after the sale of the MAN buses.

44. The MAN buses sold to the Plaintiffs/Respondents by the Applicants had manufacturer's defects & were inherently defective and no physical inspection or examination of the buses would have revealed these inherent defects as the said buses suffered manufacturing defects to the engine and mechanical performance during the subsistence of the warranty period.

45. Not only one bus or two but almost all the buses sold by the 1st Defendant/Applicant suffered more or less similar manufacturing defects that clearly rendered the buses unable to perform as PSV buses by reason of which the said sale was unethical, unreasonable, misleading, unfair and which amounted to an improper trade practice. This is a fact that the 1st Defendant CANNOT overturn even if the suit went to trial and hence no triable issue arises in the 1st Defendant's defence so far as this aspect of the claim is concerned.

46. Despite the numerous repeated garage visits to the 1st defendant's/Applicant's workshop in Kisumu and Nairobi by the Plaintiffs/Respondents' MAN buses during the subsistence of their respective warranties, the engine and mechanical defects of each of the MAN buses could not be removed, providing irrefutable reason to believe that there was a patent engine manufacturing defect not resolved to date.

47. The Applicants failed to warn the Consumer about potential risks posed by the MAN buses with manufacturers' defects; failed to provide information to help the Respondents consumers understand the risks of MAN buses with manufacturers defects; failed to monitor the safety of the MAN buses to detect the real cause of the continued remedial action in time or at all, more particularly as passenger safety problem was established early in regard to the sold MAN buses.

48. It is the Plaintiffs'/Respondents case that the Applicants had knowledge of the engine and mechanical design and manufacturer's defect of the MAN buses cited as soon as the first buses were sold and problems reported but withheld publication of the damning information, either to the Respondents or to the members of the public intent on purchasing MAN buses from the 1st Applicant. Meanwhile, despite the knowledge of that data, the Applicant continued to market and/or sell MAN PSV buses affected with said manufacturer's defects.

#### **PLAINTIFFS RESPONDENTS SUBMISSIONS**

The respondents submit that, the issue in contention is whether the Judgment entered in default of appearance should be set aside.

In setting aside judgment, the court must establish:-

- 1) That there is a reasonable explanation for any delay;
- 2) That there is a Defence on merit;
- 3) That it is just to do so.

49. It is the plaintiffs submission that this Court be guided by the provisions of Order 10 rule 4(2) as it lays down what is required to be done: it states:

***“Where the plaintiff 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.”***

50. To set aside a regular judgment on record based on the Applicant's allegation would be subverting the course of justice. The plaintiffs cite and rely on the case of **Shah v. Mbogo & Anor. (1966) EA 116** (also cited by the Applicants) above. The respondents contend that, the Court's discretion to set aside an ex parte judgment should not be used to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the course of justice which is exactly what the Applicant is trying to do.

51. The Applicant having filed a Memorandum of Appearance was fully aware that the Defence was required thereafter within the stipulated time. Exhibit “KO 8” of the Supporting Affidavit Sworn by

KEFA OMBATI on 24th November 2014 indicates that the Applicant was made aware that the stipulated period was to lapse on 12th May 2014. The Applicant attached no value to this warning and injunction and only responded on 10th June 2014, which is approximately a month later.

52. Plaintiffs submit that this is a court of Equity. As a court guided by the maxims of Equity, this Honourable Court cannot be seen to favor the indolent. Clearly the Applicants were served, knew what was in Equity required of them and sat on it. They should not be rewarded for that.

53. The Applicant has not cared to explain its delay in filing its Defence. No letter was written to the Respondents' advocate to seek amelioration of time or explaining of the delay. I

54. It is surprising that even after the pendency of this suit was placed on the internet and published in the business daily newspaper of Kenya on 16th April 2014, there was no urgency on the part of the Applicant to file their Defence. The plaintiffs submit that the Applicant has not in any manner demonstrated by way of evidence that it was engaged in discussions about the Plaintiffs/Respondents' claim with the Manufacturers of the MAN buses as alleged within the period it should have filed its Defence, neither is it stated what implication these alleged discussions had on the claim or the veracity of the Defence.

55. At any rate, it could and should have filed its Defence on time and only sought out of Court negotiations/settlement on a without prejudice basis, which is NOT proven. Exhibit "KO 9" of the Supporting Affidavit Sworn by KEFA OMBATI on 24th November 2014 indicates that there were emails and correspondence between the Applicants and the Manufacturers of the MAN buses.

56. None of the said emails or correspondence has been adduced. Nothing has been factored in the Annexed Defence that was not within the Applicant's reach and/ or was awaiting the input of the Manufacturers as alleged. This is clearly an attempt to subvert the course of justice, which this Court cannot aid or assist.

57. As deposed to in paragraphs 17-26 of the Replying Affidavit by Stephen Kariuki Kanyiri sworn on 20th February 2015, we submit that the Applicant made this Application in bad faith, the Applicant through their Advocates made vain arrangements to settle the matter, conducting the Respondents Advocates to meet purportedly to settle the suit, a settlement proposal having been forwarded to the said Applicant by the Respondents advocates only to keep the Respondents Advocate at the Intercontinental Hotel waiting to have a meeting the Applicants never really intended to have.

58. The 1st Defendant/Applicant used this as an excuse to buy time; their conduct is also captured in paragraph 15 and 16 of the Supporting Affidavit sworn by KEFA OMBATI on 24th November 2014. They failed to show what purpose was being served by what was clearly an act of buying time without any resolution to the matter. Order 10 rule 11 is to the effect that 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.

59. To set aside the judgment of 19th May 2014 would be unjust to the Respondents. The Respondents MAN buses have ground to a halt. To date the buses continue being held by the Applicants in their garage. The Applicants continue to retain the non-gratuitous benefits conferred upon them by the Respondents. This is inequitable and unjust as it can get. Rule 11 only allows the setting aside of an ex parte judgment on terms which are just. Setting aside this judgment would not be just to the Respondent.

60. On the issue of the Defence filed by the Applicant the plaintiffs submit that the court be guided by the principles as laid down by Ringera J in Trust Bank v. Portway Stores (1993) Ltd & 4 Others and especially principles (iv), (v) and (vi) which are;

(iv) has the applicant a Defence on the merits?

(v) is the applicant going to compensate the respondents for loss of their judgment advantage?

(vi) is it vital, in the circumstances of this case, for the opportunity be created for the applicant to be heard?"

61. The 1st Defendant/Applicant's annexed Defence does not have merit, the Applicant has not provided their list of witnesses, the Applicable Law demands and requires a defendant lists his witnesses and avails all documents necessary for their case to be filed with the Defence. The annexed Defence contains mere and bare denials and should be dismissed at the first instance as it does not raise any triable issues. The Applicant even denies service of a Demand letter, that was served on it on 25th March 2014 and was duly stamped by the said Applicant. Is this not a bare and negative denial of that which is incontestable?

62. The plaintiffs submit that the Applicant did not care that the Plaintiffs/Respondents faced financial guillotines from the Defendant banks out of the product liability that has arisen over the Applicant's MAN buses and hence they have not even undertaken to throw away costs should this Court be inclined to hear this application favorably.

63. Further to that the Applicants ought to have deposited into the Court account the sums being ksh 26 Million that have already been awarded to the Respondents as a pre-condition to the grant of the Application in furtherance of principle (v). It therefore follows that allowing this application would just amount to an abuse of the court process as there already is a regular judgment on record. Relying on the case of **Chemwolo & another - V - Kubende [1986] KLR 492** the plaintiffs submit **that**, the 1st Defendant/Applicant should demonstrate that they have triable issues and that the decretal sum should be deposited in Court.

The 1st Defendant's main course of argument is that its advocates did not file the defence on time although (they argue) they have a good defence. But this is not by itself a good reason to set aside the interlocutory judgement in favor of the Plaintiffs and refer to the case of **Sameer Africa Limited v Aggarwal & Sons Limited [2013] eKLR**

64. Relying in the case of **Shailesh Patel t/a Energy Company of Africa v Kessels Engineering Works Pvt. Limited & 2 others [2014] eKLR**, they urge court though reluctantly, if inclined to allow the application, same be done on set conditions.

65. The 1st Defendant cannot contend that the amount of money involved is a lot. The respondents submit that, Court has on many occasions declined to set aside regularly obtained ex parte judgement even involving a more sensitive subject to Kenyans and relied on the cases of **HELLEN OBURA OLANG v GRACE OKEYO OKEYO & JOSEPH OTIENO ACHIENG [2008] eKLR** and **CFC Stanbic Bank Limited v Aeromarine Freighters & Travel (Nairobi) Limited & 3 others [2014] eKLR**,

66. Based on the foregoing, the Respondents submit that the Notice of Motion Dated 24th November 2014 has no merit prays that the court dismisses the application and uphold the default judgment.

67. After going through the pleadings, affidavits filed and parties submissions, the court finds that the following issues are arising;

a) Whether Keffa Ombati ought to be stopped from representing the 1<sup>st</sup> defendant in the instant matter?

b) Whether the applicant's application meets the threshold for setting aside exparte judgments?

68. On the first issues, the court takes note that the same was only raised after the advocate KEFFA Ombati had submitted. Advocate Betty Rashid who appeared for the plaintiff when the said advocate submitted conceded to canvassing to the application without any objection. It was only when

Advocate Kinyanjui appeared to respondent to the same application that the issue was raised. This makes the court to take same to be an afterthought and not intended to aid the course of justice. The court takes early opportunity to reject same with a rider that the plaintiffs are at liberty to raise same during the hearing if they deem fit.

69. On issue no 2, the court makes the following findings. It is not denied that the 1<sup>st</sup> defendant was served with summons to enter appearance and filed defence after the entry of the interlocutory judgement. The plaintiffs are yet to formal proof their case in terms of the entered interlocutory judgment.

70. The defence on record raises various issues including the alleged breach of warranties, the alleged causes of the defects of the subject motor vehicles being attributed to the plaintiffs mishandling of the same buses, and the alleged negotiations. The 1<sup>st</sup> defendant is willing to give throw away costs as a condition for setting aside the exparte judgment. On the other hand, the plaintiffs are will to concede setting aside the exparte judgment on condition that the disclosed amount in the pleadings is deposited as a security.

71. **Order 10 Rule 11 of the Civil Procedure Rules** provides that ;

**‘where judgement has been entered under this order, the court may set aside or vary such judgement and any consequential decree or order upon such terms as are just.’**

72. In Patel -vs- E.A. Carge Handling Services Ltd [1974] EA75 at page 76 C and E the court held as follows:-

***‘There are no limits or restrictions on the Judge’s discretion to set aside or vary an ex-parte judgement except that if he does vary the judgement, 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 conditions on itself to fetter the wide discretion given it by the rules.’***

The court further held as follows:-

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

73. In Shah -vs- Mbogo [1967] EA166 at page 123B the court stated as follows:-

***‘this discretion to set aside an ex-parte judgement is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.’***

74. In Shabbir Din –vs- Ram Parkash -Anand [1955]22 EACA 48 Briggs JA said at page 51:-

***‘I consider that under Order IX Rule 20 the discretion of the court to set aside an ex-parte judgement is perfectly free and the only question is whether upon the facts of any particular case, it should be exercised. In particular, mistake or misunderstanding of the appellants’ legal advisers, even though negligent may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of that particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised.’***

75. In Mohamed &Anor –vs- Shoka [1990] KLR 463, the Court of Appeal held that:-

***‘The test for the correct approach in an application to set aside a default judgement are; firstly whether there was a defence on merit; secondly whether there would be any prejudice and thirdly what is the explanation for any delay.’***

76. In *Shanzu Investments Ltd -vs- Commissioner of Lands Civil Appeal No. 100 of 1993* the Court of Appeal held as follows:-

a) The court has a wide discretion under Order IXB Rule 10 to set aside judgement and there are no limits and restrictions on the discretion of the Judge except that if the judgement is varied it must be done on terms that are just.

b) Jurisdiction to vary being judicial discretion must be exercised judicially and this depends on the particular case.

c) The tests for setting aside judgements are:-

i) Defence on the merits

ii) Prejudice and

iii) Explanation for the delay.’

77. In *Tree Shade Motors Ltd -vs- DT Dobie & Anor [1995-1998] 1EA 324* it was held that:-

***‘Even if service of summons is valid, the judgement will be set aside if defence raises triable issue. Where a draft defence was tendered together with an application to set aside a default judgement, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff’s claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgement aside.’***

78. In *Sebei District Administration -vs- Gasyali & Others (1968) E.A. 300* the Judge stated as follows:-

***“In my view the court should not solely concentrate on the poverty of the applicant’s excuse for not entering appearance or filing a defence within the prescribed time. The nature of the action should be considered, the defence if one has been brought to the notice of the court however irregularly should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of a court. It is wrong under all circumstances to shut out a defendant from being heard. A defendant should be ordered to pay costs to compensate the plaintiff for any delay occasioned by the setting aside and be permitted to defend.”***

79. From the foregoing, the principles and tests for setting aside an ex-parte judgement can be summarized as follows:-

1. That the court has unfettered, unlimited and unrestricted jurisdiction to set aside an ex-parte judgement.

2. That the tests for setting aside an ex-parte judgement are:-

a) Whether there is a defence on the merits.?

b) Whether there would be any prejudice to the plaintiff.?

c) What is the explanation for any delay?

80. The court has already noted the issues raised in the defence filled and need not say any more. There are very serious issues to be interrogated in terms of the alleged warranties breached and the causes of the mechanical breakdown of the buses.

81. On prejudice, the plaintiffs were yet to formal proof their case and also be heard on the other defendants cases. In any event they can be compensated by the costs.

82. On delay , the same was explained by the 1<sup>st</sup> defendant and the offer of throw away costs should console the plaintiffs as they undertake the trial. The court will therefore allow the application as prayed on the following terms;

1. Application is allowed as prayed in prayers 1 and 2.
2. The 1<sup>st</sup> defendant to pay plaintiffs each Ksh 30,000 within 45 days.
3. The 1<sup>st</sup> defendant to comply with practice direction within 21 days.
4. In default of any of the above (2) and (3) the application to stand dismissed with costs and matter to proceed with the formal proof against 1<sup>st</sup> defendant.

**Dated, signed and delivered in court at Nairobi this 30<sup>th</sup> day of October, 2015.**

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**C.KARIUKI**

**JUDGE**