**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 57 OF 2009**

**MESHAK GAUKO AMBUTU (AS THE CHAIRMAN OF KENYA RAILWAYS GOLF CLUB)…….....…..1ST APPELLANT**

**SAMUEL MAINA KARANJA AS THE SECTRATRY OF KENYA RAILWAYS GOLF CLUB…….....…2ND APPELLANT**

**DAVID GERISHON MUCHUNGU AS THE TREASURER OF KENYA RAILWAYS GOLF CLUB….....3RD APPELLANT**

**VERSUS**

**JOHN NDUVA MBUGUA T/A JOJEN BUTCHERY…….....RESPONDENT**

(Appeal from the ruling and order in Milimani Commercial Courts Nairobi, CMCC No. 6028 of 2008 delivered on 3rd February, 2009 by Hon. Miss. E. N. Maina [SPM])

**JUDGMENT**

1. The respondent filed Milimani Commercial Court CMCC No. 6028 of 2008 claiming a liquidated sum of KShs. 1,177,845/= for goods supplied at the appellant's request between June, 2005 and June, 2008. Upon the respondent's application, the trial court on 27th October, 2008 entered ex parte judgment against the appellants. The appellant's filed chamber summons dated 17th November, 2008 seeking to set aside the ex parte judgment.

2. Learned Counsel Mr. Osundwa for the appellants submitted that there was no evidence that summons were served upon each of the appellants; that the application for entry of judgment did not comply with Order IX rule 3 of the Civil Procedure Rules since the process server was not appointed by court and there was no affidavit of service; that defence could be served at any time before final judgment; that James Ndungu who was served was not authorised by the appellants to accept service; that entry of appearance does not regularize service; that Kenya Railways Golf Club ('***the club'***) is an unregistered entity and that at the time of filing of the defence the appellants were not aware of the existence of the judgment. The appellants relied in the following cases:

**a) UdaykumarChandulalRajani and 3 others v. Charles Thaithi Nairobi Court of Appeal. No. 85 of 1996**

**b) Trenton (K) Ltd v. Nairobi House Ltd & Another, Nairobi HCCC No. 1184 of 2005**

**c) Sainaghi t/a Enterprise Panel Beaters v. Kasuku Nairobi Court of Appeal No. 88 of 1985**

**d) Masinde & Others v. Kamau & 4 Others [2003] KLR**

**e) Maina v. Mugiri [1983] KLR**

3. Mr. Ndungu, Learned Counsel for the respondent submitted that the appellants did not file the defence within the prescribed time despite receiving summons. He also argued that the fact that they were not personally served was immaterial since they were sued as officials and not in their personal capacity. He contended James Ndungu being the Manager of the club at the time was entitled to receive summons. Counsel relied on the case of:

**a) Kaluworks Ltd v. Pepco Enterprises [1991] KLR 441**

**b) Orion East Africa Ltd v. Komothai Farmers Co-op Society Ltd [2004] eKLR**

**c) CFC Ltd v. Charles Tanui [2008]eKLR**

4. That application was dismissed on the basis that judgment was a regular one having been obtained following the appellant's failure to file a defence within the prescribed period and that the appellant's defence consisted of mere denials and raised no triable issues.

5. The appellants felt aggrieved by the said ruling and filed this appeal on the following grounds:

*i. The learned Magistrate erred in law in holding that the judgment entered against the appellants on 27th October, 2008 was regular and not liable to be set aside ex debito justitiae notwithstanding the fact that the appellants were not served with the summons to enter appearance and plaint.*

*ii. The learned Magistrate erred in law in holding that the appellants were served with the summons to enter appearance notwithstanding the appellants were never served with summons to enter appearance as is required by the provisions of Order V. r. 8 and 9 of the Civil Procedure Rules.*

*iii. The learned Magistrate erred in law in holding that the appellants' defence consists of mere denials notwithstanding the fact that the appellants raised triable issues of fact and law in their defence which ought to be heard and determined at a full trial.*

*iv. The learned Magistrate erred in law in dismissing the appellants' application to set aside the ex-parte judgment obtained against the appellants on 27th October, 2008 and in failing to address the issues of whether the application for the entry of judgment made on 28th October, 2008 complied with Order IXA r. 3 of the Civil Procedure Rules.*

*v. The learned Magistrate disregarded, refused and/or failed to follow the decisions cited before her.*

6. This appeal was canvassed by way of written submissions. It was the appellants' submissions that the request for judgment by the respondent offended the provisions of Order IX A rule 3, now Order 10 rule 4. The appellants' position in that regard was that the judgment as entered was irregular since the request made by the respondent was not for liquidated damages only and the deputy registrar should have complied with the directive in Order IX A rule 3 that the award of costs shall await judgment upon such other claim. On this point the appellants relied on the case of ***Hass Scientific & Medical Supplies Ltd v. Barclays Bank of Kenya [2007] eKLR.***It was further argued that the request was not drawn as required under form 13of Appendix A and considering that the said provision is couched in mandatory terms, the trial court should have declined to enter judgment. The appellants relied in ***Bethany Vineyards Limited & Another v. Equity Bank Limited & 2 Others [2013]eKLR*** where the court set aside judgment for failure to comply with the mandatory provisions of Order 10 rule 4 of the Civil Procedure Rules.

7. It was submitted that the trial magistrate would have come to a different conclusion had she directed

herself to the draft defence. The case of ***Benjamin Deon Musau v. Magdaline Wanjiku Thumbi [2008] e KLR.***was referred to in illustrating that summary judgment is a drastic remedy which may be granted only in clearest of cases. The appellants also relied in ***Industrial and Commercial Development Corporation v. Daber Enterprises Ltd [2000] 1 EA 75(CAK)*** and ***Awuondo v. Surgipharm Limited and Another [2011] 1 EA.***

8. The appellants submitted that the learned magistrate ought to have complied with Order 5 rule 16 considering that they disputed service of summons.

9. The respondenton the other hand held the position that the judgment was a regular one considering that it was entered in default of appearance. It was its position that appearance was entered on 9th October,2008 and filed defence on 4th November,2008 i.e. twenty six (26) days after entering appearance and seven (7) days after judgment in default of appearance had been filed.That despite the irregularity the trial court considered the defence and held that it contained mere denials. Reliance was placed in the case of ***Charles Mwalia v. The Kenya Bureau of Standards Nairobi HCCC No. 1058 of 2000;(2001) 1EA*** where the court was of the opinion that a defence should be considered however irregularly brought to court.

The respondent relied in ***CMC Holdings Limited v. Nzioki Court of Appeal Case No. 329 of 2001*** and ***Mbogo v. Shah (1968) EA 93*** to illustrate that court should not interefere with the trial court's exercise of discretion unless it was wrong in principle.

10. On the issue of service of summons, the respondent referred to ***Pragji Bhagwani& Co. Ltd v. Michael Krags& Others HCCC No. 338 of 1995*** and ***Baiywo v. Bach (1987) EA 27 (CAK).*** In both cases, the court held that service is deemed to have been effected if the party to whom it is intended becomes aware of it. Such a party is thereby expected to respond to the service. The respondent also referred to Order V rule 2 and 9(1) of the Civil Procedure Rules.

11. As to whether or not there was a valid claim, the respondent submitted that the defence contained mere denials. It argued that it was not enough for the appellants to deny that respondent did sell and deliver to them goods amounting to KShs. 117,845/= then later plead that all the goods ordered by and delivered to the club have been fully paid for by the club. Its opinion was that the appellants should have either fully denied all the claims or in admitting sale and delivery, should have demonstrated particulars of the agreement by stating the dates of payments made, specific goods sold and delivered and the amount of money paid. On this point the respondent referred to ***CMC Holdings Limited*** and ***Baiywo*** (supra).

12. This being a first appeal, the primary duty of this court is to re-consider and evaluate the record before the trial court and come to an independent conclusion. (See:***Peter v. Sunday Post (1958) at pg. 429***).

13. I have considered the rival arguments and submissions tendered together with the authorities therein. The issues for determination are:

i. Whether service of summons to enter appearance was a competent one.

ii. Whether the defence could be considered.

iii. Whether the request for judgment was in the prescribed form.

iv. If (iv) above is answered in the negative , whether it could be considered.

14. I draw an inference from my analysis on the appellants' arguments on the issue of service that the appellants actually came to know of the summonses but contend that the service was improper since they were not personally served. This is in consideration to their argument that James Ndungu who was served was not authorised by the appellants to accept service.What therefore entails proper service? To my mind proper service is that which is done in accordance with statutory provisions. Service upon a corporation is derived from Order V rule 2(now rule 3).The said rules stipulate as follows:

Rule 2. (now rule 3) “service on a corporation”.

> ***“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 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 postal 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 postal address of the corporation.***

15. This provision should be considered together with the rationale behind service of summons. On this point I concur with the courts’ findings in the cases of ***Pragji Bhagani & Sons Ltd*** and ***Baiywo*** (supra). The rationale is to ensure that the other party is aware that action has been taken against it and to prepare to defend such action if it so wishes.The club consists of staff members who carry out its day to day business. These include the Chairperson, Secretary, Treasurer and any other employees who carry out other responsible functions such as James Ndungu. Service on a responsible member of a company as those detailed above therefore, is one that effectively ensured that the club and/or the appellants had such notice.Such service is however usually effected at the registered offices or principal place of business. It was undisputed that service was effected upon James Ndungu at the club. I find no merit on the appellants’ argument that there was need to cross-examine the process server considering that the appellants did in fact mention that James Ndungu was served. In the circumstances, I find and hold that there was proper service upon the appellants.

16. It is undisputed that the defence was filed out of time i.e. twenty six (26) days after entry of appearance and without the leave of court. Order 7 Rule 1 provides for filing of defence fourteen (14) days after entry of appearance. The Court of Appeal in ***Philip Kiptoo Chemwolo and Mumias Sugar Co. Ltd v. Augustine Kubende (1982-1988)1KAR 1036***was of the following opinion:

> ***“The discretion is in terms unconditional. The court, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has prima facie defence. <u>It was suggested in argument that there is another rule that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like</u>. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion…the principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure…<u>I think the broad equity approach to this matter is that unless there is fraud or intention to overreach</u>, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline…”***(Emphasis own)

17. In view of the aforegoing and considering my earlier holding on service of summons, I reiterate the pronouncement in ***Shah v. Mbogo & Another (1967) EA 470***wherethe Court of Appeal for Eastern

Africa held as follows:

> ***"IV. Applying the principle that the court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused."***

18. Even if my disposition above would be found to be wrong, could the defence be termed as one raising triable issues? The general rule of pleadings is that matters must be specifically pleaded. Halsbury's Laws of England, Fourth Edition, Vol. 36 par. 48 pg. 38 states:

> ***"The defendant must in his defence plead specifically any matter which he alleges makes the action not maintainable or which, if not specifically pleaded might take, the plaintiff by surprise or which raises issue of fact not arising out of the statement of claim. Examples of such matters are performance, release, any relevant statute of limitation, fraud or any act showing illegality."***

19. Black's Law Dictionary defines triable issues as "***subject or liable to judicial examination and trial***." That is to mean that matters ought to be specifically pleaded for judicial examination.

20. The substantive part of the defence by the appellants is in the following terms:

> *"...3. The contents of paragraph 2 of the plaint are admitted.*
>
> *4. The defendants are strangers to the contents of paragraph 3 and are therefore unable to plead in response thereto.*
>
> *5. the contents of paragraph 4 of the plaint are denied and the plaintiff is put to strict proof thereof.*
>
> *6. in further response to paragraph 4 of the plaint, the defendants aver that all the goods ordered by and delivered to the Kenya Railways Golf Club (hereinafter referred to as "the club" have been paid for by the club.*
>
> *7. the defendants admits receipt of demand and notice of intention to sue but aver that the demand could not be met in view of the matters pleaded hereinabove…"*

21. In Nairobi Flour Mills Limited v. Johnson Kithete t/a Farmers General Stores (2005) eKLR it was stated that:

> ***"on the issue of whether the draft defence raises any triable issues. In paragraph 4 of the draft defence the defendant state:-***
>
> ***"The defendant admits having been supplied with some goods by the plaintiff which he fully paid for but avers that they did not amount KShs. 4,770,255.70".***
>
> ***To reiterate the defendant admits having been supplied by the plaintiff with some goods. The defendant did not give particulars of the said "some goods" and that just exposes the draft defence to be a mere denial…I find and hold that the defendants' defence does not raise triable issues to the plaintiff's claim."***

22. Elsewhere in ***Diamond Trust Bank (K) Ltd v. Martin Ngombo& 8 Others (2005) eKLR*** Ouko J, (as he then was) held which holding I share:

> ***"This summary procedure is intended to give quick remedy to the plaintiff which is being delayed in realizing his claim against the defendant by what is generally described as sham defence…The jurisprudence that passes through the above cases is that a mere denial or general traverse is not sufficient defence and that a defence that has no merit is for striking out."***

23. I am also fortified by the statement of Newbold P in ***Adina Zola and Another, NNO v. Ralli Brothers Limited and Another (1969)EACA 4*** where he stated:

> ***"Order XXXV is intended to enable a plaintiff with a liquidated claim, to which there is clearly no good defence to obtain a quick and summary judgment without being unnecessarily kept from what is due to him by the delaying tactics of the defendant. This is clear from the words of Order XXXV, rule 2, which states:-'the court may thereupon unless the defendant by affidavit, or by his own viva voce evidence or otherwise, shall satisfy that he has a good defence on the merits, or discloses such facts as may be deemed sufficient to entitle him to defend, pronounce judgment accordingly."***

The provision referred to above is equivalent to our Order 36 rule 2 which stipulates that: "***The defendant may show either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit***."

24. In view of the aforegoing deposition, I find that this appeal lacks merit. It is dismissed with costs to the respondent.

Dated, Signed and Delivered in open court this 18th day of December, 2014.

**J. K. SERGON**

**JUDGE**

In the presence of:

……..…..for the Appellants

…….for the Respondent