



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 43 OF 2013**

**GULAMHUSSEIN FARKRUDIN ..... PLAINTIFF**

**V E R S U S**

**KENYA RAILWAYS CORPORATION .....DEFENDANT**

**RULING**

1. The Notice of Motion dated 25<sup>th</sup> March 2013 is filed by the Defendant. By that application the Defendant seeks to set aside the exparte judgment entered in favour of the Plaintiff.
2. The record of the court file shows that the Plaintiff filed his plaint on 8th February 2012. The Defendant filed a memorandum of appearance on 5<sup>th</sup> March 2012. That memorandum of appearance was served upon the Plaintiff's Counsel on 15<sup>th</sup> March 2012. The Defendant then filed a Defence on 20<sup>th</sup> March 2012. This filing is evidenced by the receipt issued to the Defendant which is receipt No. 4556852. The Plaintiff on 13th June 2012 requested for Judgment to be entered against the Defendant in failing to file a Defence within the prescribed period. The Deputy Registrar of this Court on 13<sup>th</sup> October 2012 entered final judgment for the Plaintiff in default of a Defence. It is that judgment that the Defendant seeks to set aside.
3. The Defendant broadly seeks the court to set aside that judgment in exercise of its discretion and on the ground that the judgment was entered in error and in contravention of the law.
4. The Court's discretion in setting aside exparte judgment such as in this case is wide. Order 10 rule 11 of the Civil Procedure Rules 2010 provides 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.”***

5. That discretion was discussed in the case of **Patel -Vs -EA Cargo Handling Services [1974] EA 75**. The Court stated in that case 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 conditions on itself to fetter the wide discretion given it by the rules.”***

6. The Court's discretion was also considered in the case of **Shah -Vs- Mbogo [1967] EA 116**. In

that case the court had this to say-

***“This discretion is intended so as 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 course of justice.”***

7. Similarly, in the **CMC Holdings Ltd -Vs- Nzioki [2004] I KLR** the Court expressed itself thus-

***“We are fully aware that in an application before a Court to set aside ex parte judgment, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously. On appeal from that decision, the Appellate court would not interfere with the exercise of that discretion unless the exercise of the same discretion was wrong in principle or that the Court did act perversely on the facts. This is trite law and there are many decided cases in support of the proposition.”***

8. On the second ground identified above, the Defendant submitted that it filed its Defence on 20<sup>th</sup> March 2012 and that the Court was in error to have entered judgment in default of defence on 8<sup>th</sup> November 2012. What the Defendant does admit is that it was in error in failing to serve that Defence on the Plaintiff. Order 10 Rule 3 of the Civil Procedure Rules provides that the consequence of failing to serve a Memorandum of Appearance or Defence is that those documents would be liable to being struck out. This is what that rule provides-

***“Where a Defendant fails to serve either the Memorandum of Appearance or Defence within the prescribed time, the Court may on its own motion or on application by the Plaintiff, strike out the Memorandum of Appearance or the Defence as the case may be and make such order as it deems fit in the circumstances.”***

9. The Court which is mentioned in that rule as having jurisdiction to strike out those documents for such default in this case would be the High Court. This we find in Section 2 of the Civil Procedure Act Cap 21. Section 2 defines the Court as-

***“Means the High Court or Subordinate Court, acting in exercise of its Civil jurisdiction.”***

The Court that has jurisdiction in this case is the High Court and it follows only a Judge of the High Court could strike out such documents as per Order 10 Rule 3. Similarly only a Judge could enter judgment under that Rule. This is because this suit was filed in the High Court.

10. The Deputy Registrar of this Court entered exparte judgment in

default of Defence on 8th November 2012. That was at a time when the Defendant had filed a Defence. Judgment could only have been entered for the Plaintiff in default of service of that Defence by a Judge of High Court as defined in Section 2. Even under Order 49 the Deputy Registrar had no jurisdiction to enter judgment in default of service.

11. The Deputy Registrar's jurisdiction to enter judgment in default of

appearance or defence as provided under Order 10 rule 4 is limited to the case where the Plaintiff's claim is liquidated. In this case the Plaintiff's claim was that the Defendant failed to deliver vacant possession of a property in Changamwe which it had leased from the Plaintiff for a period of six years. As a result of that alleged breach the Plaintiff pray in his Plaint for compensation of Kshs. 6.8 million in respect of construction he had undertaken on that property. Further the Defendant prayed for Kshs. 10,000/- per day from 1<sup>st</sup> January 2010 and the costs of the lease at Kshs. 5,000/-. The question is whether the Plaintiff's claim is a liquidated claim to enable the Deputy

Registrar to entertain the application for judgment. Order 10 rule 4 is the rule that provides that the Deputy Registrar can enter judgment in default of an appearance or defence for a liquidated claim. Under that rule, the Deputy Registrar can only enter what is essentially is final judgment and where there is a liquidated demand. What is a liquidated demand? The answer to that question was stated in the case of **Epco Builders Ltd -Vs- Geomaps Africa Ltd [2008]eKLR**. The Court in that case referred to the Supreme Court of Practise Vol. 1 1985 as follows-

***“A liquidated demand is in the nature of a debt i.e a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a ‘debt or liquidated demand’, but constitutes ‘damages’ ... the words ‘debt or liquidated demand’ do not extend to unliquidated damages, in tort or contract, even though the amount of such damages be named at a definite figure.”***

12. In my view the Plaintiff's claim is not a liquidated claim. The

Black's Law Dictionary 8th Edition defines a liquidated claim as-

***“A claim for an amount previously agreed on by the parties or that can precisely be determined by operation of law or by terms of the parties’ agreement.”***

13. As stated before, the Plaintiff's claim was for compensation. Accordingly the Deputy Registrar should only have entered the interlocutory judgment under Order 10 rule 6.

14. On the basis of what is stated above the Plaintiff's application is merited.

15. Additionally, it is merited because the Defendant raised triable

issues in its Defence which issues ought to be considered at a full hearing. The Defendant in its Defence has challenged the jurisdiction of this Court to hear this case and has also pleaded that the Plaintiff's suit is time barred. The Defendant ought to be given an opportunity to ventilate its Defence as was stated in the case **Baraka Apparel Epz (K) Ltd -Vs- Rose Mbula Ojwang T/A Faida 2002 Caterers [2007]eKLR** as follows-

***“It is our humble view that where there is a Defence which raises bona fide triable issues, or even a solitary bonafide issue, the same ought to be allowed to proceed to hearing and final determination on merit.”***

16. This Court will allow the Defendants application to enable the

Defendant to be heard on the issues raised in its Defence.

17. Before completing this Ruling, I need to state that I did not

consider the Plaintiff's written submissions because they were filed out of time and as far as I could tell were not served on the Defendant. To proceed to consider them might therefore be prejudicial to the Defendant.

18. The orders of the Court are as follows-

a. **The exparte judgment entered on 8th November 2012 against the Defendant is hereby set aside. The Defendant is granted leave to defend this suit on condition that the Defendant**

**does serve, if it has not yet done so, its Defence on the Plaintiff within fourteen (14) days from today's date.**

- b. The costs of the Notice of Motion dated 25th March 2013 are awarded to the Defendant in any case.**

**Dated and delivered at Mombasa this 20<sup>th</sup> day of September, 2013.**

**MARY KASANGO**

**JUDGE**