



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 1 OF 2013

1. DIDOVSKY IGOR
2. ANTOSYEV YURIY
3. MYALO OLEKSANDR
4. DRACHUK YURIY
5. GROMOVENKO STANISLAV
6. MALYOVANY VASYL
7. CHERNOV OLEKSIY
8. SOROCHAN VALERIY
9. ARNAUTOV IVAN
10. GACHOMBA GODFREY WAKARIA
11. MOHAMED RUFAI SALIM
12. MELNIKOV OLEG PLAINTIFFS

V E R S U S

1. INTERNATIONAL BULK CARRIER SPA
2. LEADARROW SA
3. SEKUR HOLDINGS INC. DEFENDANTS

RULING

1. The Plaintiffs pleaded in their plaint that they joined as crew of the Vessel Blida from November 2011. In their plaint they pleaded-

“5. At all material times the 1st Defendant was the owner of the Motor Vessel BLIDA (hereinafter referred to as the Vessel) then chartered to the 2nd Defendant, managed by the 3rd Defendant and registered in Algiers, Algeria.”

2. The Plaintiffs pleaded that the Defendants failed to provide them with humane working conditions. They prayed in their plaint for a declaration that the Defendants exposed them to slave labour and that the Defendants were in breach of the contract of employment.

3. On 18th January 2013 this Court granted the Plaintiffs leave to serve Summons and Plaint on the Defendants by e-mail through the Admiralty Marshall of this Court. The Defendants were ordered to file their appearance within 21 days of being served.

4. No appearance was filed by the Defendants and on 5th March 2013 this Court entered interlocutory judgment in favour of the Plaintiffs in default of appearance.
5. The Court is now faced with a Notice of Motion dated 7th May 2013 filed by the 1st Defendant. By that Motion the 1st Defendant seeks to set aside that ex parte judgment.
6. The 1st Defendant relies on the grounds that service of the Summons and Plaint on itself was improper and inadequate; that it has a meritorious defence to the Plaintiffs claim and that the 1st Defendant should not be condemned unheard.
7. The affidavit in support of the application the 1st Defendant stated that it is a limited liability company registered as such in Algeria and that the failure to file its defence was not deliberate but was occasioned by the improper and inadequate service of Summons and Plaint. It was further deposed that the 1st Defendant has a plausible defence which ought to be accorded a fair chance to be heard. The 1st Defendant in its proposed defence stated that there is no privity of contract between it and the Plaintiffs. That the 1st Defendant had chartered MV Blida to the 2nd Defendant for their own use and therefore had no obligation to supply necessities required by the Plaintiffs as claimed. And accordingly that the Plaintiffs had no cause of action against the 1st Defendant.
8. The Plaintiffs' objection to the application was that the 1st Defendant was served with the Summons and Plaint as ordered by the Court and should have filed an appearance within 21 days. Plaintiffs referred to the Memorandum of Appearance which was dated 1st March 2013 but was stamped by the Court on 11th March 2013. The Plaintiff submitted that there was no explanation why the defence and witness statements were dated two(2) months later.
9. In response to the proposed defence the Plaintiffs deposed that the 2nd and 3rd Defendants abandoned the ship and the Plaintiffs then continued to look after the ship on behalf of the 1st Defendant. Plaintiffs in this regard referred to the 1st Defendant e-mail written by the 1st Defendant's General Manager whereby he sought details of the Plaintiffs' claim which is represented in this suit to enable the 1st Defendant to pay.
10. In the Supplementary Affidavit sworn by the 1st Defendant's learned

Counsel it was denied that the 1st Defendant admitted liability of the Plaintiffs' claim. This was because the communication relied upon by the Plaintiffs was in the year 2012 whilst the Plaintiffs filed their claim in the year 2013. Further that Admiralty Marshall who was served with the Summons was not an agent of the 1st Defendant.

11. The Court has discretion to set aside ex parte judgement. That

discretion is provided under Order 10 Rule 11 of the Civil Procedure Rules 2010. It provides as follows-

“Where judgment has been entered under this order the Court may set aside or vary such judgment and any consequential decree of order upon such terms as are just.”

12. The Court's discretion under that Rule has been considered in several

Court's decision as can be seen in the following cases **PATEL -VS- E.A. CARGO HANDLING SERVICES [1974]EA 75-**

“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.”

SHAH -VS- MBOGO [1967]EA 116-

“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.”

CMC HOLDINGS LTD -VS- NZIOKI (2004)IKLR-

“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.”

13.I have considered the parties affidavit evidence and their written

submissions. I am of the view that the interest of justice require that the exparte judgment entered here against the 1st Defendant be set aside *ex debito justitiae*. I so hold because although the Plaintiffs laboured in their submissions with their argument that the 1st Defendant had simply failed to file its appearance because it did not approve of the mode of service I did not understand the 1st Defendant to so argue rather I understood the 1st Defendant to say that they did not receive the Summons and Plaint that were served through the Admiralty Marshall. Further that service through the e-mail address was not effective because that e-mail address belonged to an officer not authorized by the 1st Defendant to accept service. In total what the 1st Defendant seems to say is that they were not served with Summons and Plaint.

14.The other reason that I find that justice requires the exparte judgment

to be set aside is because I find the 1st Defendant has raised triable issues in their proposed defence. In that regard I am well guided by the Court of Appeal case **BARAKA APPAREL EPZ (K) LTD -VS- ROSE OJWANG T/A FAIDA 2002 CATERER (2007)eKLR** where it stated-

“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.”

15.By their proposed defence the 1st Defendant wish for this Court to

adjudicate on the issues firstly whether there was privity of contract between the Plaintiffs and the 1st Defendant and secondly whether the Plaintiffs were employees of the 2nd and 3rd Defendants.

16.As I have considered this Ruling it has become clear that the dispute

herein is one which relates to employment. It therefore rightly ought to be heard by the Industrial Court.

17.It is because of the above reasons that this Court grants the following

orders-

- a. **The exparte judgment entered against the 1st Defendant on 5th March 2013 is hereby set aside.**
- b. **The 1st Defendant shall file and serve its defence within 14 days from this date hereof.**
- c. **The costs of the Notice of Motion dated 7th May 2013 shall be in the cause.**
- d. **This case is hereby transferred to the Industrial Court sitting in Mombasa.**

Dated and delivered at Mombasa this 31st day of October, 2013.

MARY KASANGO

JUDGE