



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

**Civil Suit 291 of 2009**

**INTERFREIGHT EAST AFRICAN LTD.....PLAINTIFF/RESPONDENT**

**VERSUS**

**AFRICAN LINER AGENCIES LTD.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**GLOBAL CONTAINER LINE LTD..... 2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

1. The application before me is a Chamber Summons dated 16<sup>th</sup> September, 2010 filed by the 2<sup>nd</sup> Defendant/Applicant. It was filed under the old Order IXA Rules 10 and 11 and Order XXI Rule 22 of the Civil Procedure Rules and Sections 3A and 63(e) of the Civil Procedure Act. The Applicant seeks the following orders:

***“a) There be a stay of proceedings and or execution pending the hearing and determination of this application.***

***b) This Honourable Court be pleased to set aside the Judgment endorsed herein on the 3<sup>rd</sup> day of February,2010.***

***c) The 2<sup>nd</sup> Defendant/Applicant’s Defence that was already on record be deemed as having been filed and on record within the requisite period.”***

2. The application is supported by the annexed affidavit of Murshid Abdalla Mohamed, 2<sup>nd</sup> Defendant’s counsel, and annexures thereto. The Applicant’s grounds for the application are that:

- The Judgment entered favour of the Plaintiff was entered irregularly and contrary to the provisions of the Civil Procedure Rules.
- The Honourable Court had no jurisdiction to enter Judgment in this instance.
- The second Defendant had already filed its defence prior to endorsement of the said Judgment.
- The second Defendant has a good defence to the claim and in any event the plaint is defective.
- It is proper and in the interest of justice that the Judgment be set aside.

3. A further Affidavit deponed on 8<sup>th</sup> October, 2010 by the 2<sup>nd</sup> Defendant's counsel, he alleges that he had filed a Defence on behalf of the 2<sup>nd</sup> Defendant on 18<sup>th</sup> January, 2010 whilst request for Judgment in default of defence was filed by the Plaintiff on 27<sup>th</sup> January, 2010. However, due to an oversight, the Court filing fees receipt and counterpart of the Defence were retained by the Court registry for filing in the Court file, which was not done.

4. The Applicant/Respondent filed a Replying Affidavit deponed by King'ang'ai James Wachira one of the Plaintiff's counsel on 28<sup>th</sup> September, 2010. Essentially, he deponed that at the time they requested for judgment in default, they had not been served with a Defence by the 2<sup>nd</sup> Defendant, nor was there any Defence filed in the Court file. He further averred that the 2<sup>nd</sup> Defendant had until 17<sup>th</sup> January, 2010 to file a Defence, and the alleged filing of a Defence on 18<sup>th</sup> January, 2010 by the 2<sup>nd</sup> Defendant was done without leave of the Court, and as such, was irregular. Further, that the said Defence was served on the Plaintiff on 22<sup>nd</sup> April, 2010 long after Judgment had been entered.

5. The parties filed written submissions. The 2<sup>nd</sup> Defendant on 20<sup>th</sup> October, 2010 and the Plaintiff on 10<sup>th</sup> March, 2011.

6. In their submissions, the 2<sup>nd</sup> Defendant admits that due to an oversight on the part of their counsel's clerk oversight should not be visited upon the 2<sup>nd</sup> Defendant. As a result of the said oversight, judgment was entered in default against the 2<sup>nd</sup> Defendant.

7. The 2<sup>nd</sup> Defendant, however, points out that their defence was filed on 18<sup>th</sup> January, 2010 as shown by receipt annexed as "MAM2" to their affidavit. They allege the receipt was retained by the Court registry for filing in the Court file, but that it had not been so filed in the court file by the court registry staff by the time the Judgment was endorsed on 3<sup>rd</sup> February, 2010.

Further, the 2<sup>nd</sup> Defendant submits that the Judgment entered in default on 3<sup>rd</sup> February, 2010 is irregular as the Deputy Registrar failed to notice or establish that their Defence was already on record prior to the endorsement of the judgment in default. In addition, they point out that the sum awarded in the Judgment in default and in the Decree is erroneous. By this is meant that the Amended Plaint sought US \$ 41,450.67 whilst the decree shows the figure as US\$ 41,450.00.

8. Finally, the 2<sup>nd</sup> Defendant asserts that their Defence as filed is a good defence to the claim, and should be deemed as duly filed and served. They rely on HCC Number 981 of 2003, Nairobi, **Lalchand Shah And Rambhah Shah vs Kenindia Assurance Comapany Limited**. There, Nyamu, J (as he then was) held that an *ex parte* judgment irregularly obtained ought to be set aside as a matter of right.

9. The Plaintiff's/Respondent's submissions are that the 2<sup>nd</sup> Defendant entered appearance on 17<sup>th</sup> December, 2004 but did not serve them with a defence. Accordingly they filed a request for Judgment, which, was entered on 3<sup>rd</sup> February, 2010. It was after extracting the decree on 1<sup>st</sup> April, 2010, that they notified the 2<sup>nd</sup> Defendant on 8<sup>th</sup> April, 2010 of the existence of the Judgment. On 16<sup>th</sup> April, 2010 the Defendant wrote the Plaintiff/Respondent seeking the setting aside of the judgment by consent, which the Plaintiff rejected on 26<sup>th</sup> April, 2010. Thereafter, the Defendant went quiet until warrants were issued on 11<sup>th</sup> August, 2010.

10. The Plaintiff/Respondent avers that the judgment in default was properly and regularly entered on the following grounds:

- Both the Plaintiff's counsel and the Deputy Registrar were satisfied that there was no defence in the Court file when he endorsed the request for judgment and signed the decree.
- Even if the defence had been filed on 18<sup>th</sup> January, 2010, the same was out of time and, therefore, improperly filed without leave of the court as the time within which to file it expired on 17<sup>th</sup> January, 2010.

- The 2<sup>nd</sup> Defendant failed to comply with Order VIII Rule 2 as it did not serve the Defence within 7 days of filing.
- This application to set aside the default judgment was not brought without unreasonable delay. It was brought after nearly five months, and no explanation has been given for the delay.
- The Defence comprises mere denials and no issue is raised for trial.
- The Defendant has not shown any willingness to comply with any condition the court may impose in setting aside the judgment.
- The Defendant's application is supported by Affidavits that have been improperly sworn and should be expunged as the signature of the deponent is a printed scanned signature indicating that the deponent never swore the Affidavits before a Commissioner for Oaths.

11. I have carefully considered the parties' representations, their affidavits and annexures thereto, and the court record. Order 1XA Rule 10 under the old Civil Procedure Rules, which is invoked for setting aside empowers the court to:

***“set aside or vary such judgment and any consequential decree or upon such terms as are just.”***

And Order XXI Rule 21 invoked for stay of execution gives discretion to the Court:

***“upon sufficient cause being shown, [to] stay the execution of such decree....”***

12. As I understand it, the 2<sup>nd</sup> Defendant was served with an amended defence and summons on 3<sup>rd</sup> December, 2009, and filed appearance on 17<sup>th</sup> December, 2009. It is in dispute whether 1<sup>st</sup> Defendant filed a Defence on 18<sup>th</sup> January, 2010. The 1<sup>st</sup> Defendant has exhibited a Court Receipt dated 18<sup>th</sup> January, 2012 showing that a Defence was filed in this cause, and the 2<sup>nd</sup> Defendant's defence is as exhibited in the affidavit supporting the motion. It bears a stamp of the High Court registry dated 18<sup>th</sup> January, 2010.

The Plaintiff does not dispute the existence of the receipt or allege fraud or impropriety in respect thereof, or as to the stamping of the defence with the High Court stamp. What it contends is that the Defence was not filed or contained in the Court file at the time when the request for Judgment was endorsed, and that, even if filing was done at all, the same was irregular as the time period for filing the Defence expired on 17<sup>th</sup> January, 2010.

13. On the second contention, I take judicial notice that 17<sup>th</sup> January, 2010 was a Sunday. Therefore, under Order XLIX Rule 3, where time expires on a Sunday, time is extended to the next following day when offices are open. Accordingly, such Defence would have been properly filed if so done on 18<sup>th</sup> January, 2010, and I so find.

Whilst the 2<sup>nd</sup> Defendant must be faulted for not serving the Defence, within 7 days, in accordance with the law, the Plaintiff cannot be faulted for the absence of the said Defence from the Court's file as at 18<sup>th</sup> January, 2012 and for the period thereafter up to 3<sup>rd</sup> February, 2010 and when the Plaintiff requested judgment.

14. No reasons have been given to adequately explain what happened to the Defence after it was filed in the registry by the 2<sup>nd</sup> Defendant. The Plaintiff's counsel has deponed that at the time of requesting the judgment in defence they perused the file and ascertained that there was no defence filed by the 2<sup>nd</sup> Defendant. On their part, the 2<sup>nd</sup> Defendant says they left the duplicate copy of the Court filing fees receipt and counterpart of the defence with court registry for filing. Apparently, however, that was not done.

15. Having already found that the 2<sup>nd</sup> Defendant had lodged their defence at the Court registry for filing and paid the requisite fees, I cannot attribute to the 2<sup>nd</sup> Defendant the failure of the defence to appear on

the Court file from 18<sup>th</sup> January, 2010.

Accordingly, I must exonerate the 2<sup>nd</sup> Defendant from that default, and place on the court's registry the responsibility for an explanation in that regard.

16. The upshot of what I have stated above is that the absence of the defence on the file at the time when the request for Judgment was made is attributable to the registry personnel. So that when the Plaintiff requested and the Deputy Registrar endorsed the Judgment in default, there was a registry error extant.

Accordingly, the endorsement of the judgment in default was irregular on the ground that it was obtained when there was a defence duly lodged at the registry and paid for, although it had not then found its way into the court file.

In this regard, I refer to the dictum of Ringera, J in **Mwala vs Kenya Bureau of Standards** EALR [2001] 1 EA 148 (CAT) where he said:

***“Where a Judgment sought to be set aside is a regular one, then all the above consideration as to the exercise of discretion should be borne in mind in deciding the matter. Where on the other hand the Judgment sought to be set aside is an irregular one, for instance one obtained where there is no proper service ...or when there is a Memorandum of appearance or defence on record but the same was inadvertently overlooked the same ought to be set aside not as a matter of discretion, but ex debito justitiae for a court should never countenance an irregular Judgment on its record.”***

17. In terms of Order XXI Rule 22 of the Civil Procedure Rules, I am satisfied that the Defendant has shown “sufficient cause” to ground a prayer for stay of execution, and, equally to found a basis for setting aside under Order IXA Rule 10.

18. I have also carefully perused the 2<sup>nd</sup> Defendant's defence. Whilst it is true that the defence largely contains bare denials, I take specific notice of the following paragraphs:

5. where the Defendant asserts that the cargo subject matter of the dispute was delivered damaged,

6. that, the said goods were received under protest, and

9. that the Defendant is a stranger to the contents of paragraph 9 of the plaint.

All these appear to be to be triable issues, in respect of which it would be unsatisfactory to proceed by way of summary judgment.

19. Accordingly, and for all the above reasons, I hereby make my determination as follows:

1) I set aside the Judgment in terms of prayer (b)

2) I Direct that the 2<sup>nd</sup> Defendant's defence be deemed as filed on production at the registry of the original or duly stamped counterpart copy thereof together with original or duplicate or triplicate of filing receipt within seven(7) days from the date hereof.

3) The Plaintiff is hereby granted leave to file a Reply to Defence, if any.

4) Thereafter, parties shall comply with Order 11 in terms of preparation, filing and service of pre-trial documents, in readiness for taking a hearing date.

5) Cost to be in the cause.

Orders accordingly.

**Dated, signed and delivered this 24<sup>TH</sup> Day of MAY, 2012**

**R.M. MWONGO**

**JUDGE**

**Read in open court**

**Coram:**

1. Judge:                   Hon. R.M. Mwongo

2. Court clerk:           R. Mwadime

**In Presence of Parties/Representative as follows:**

a) .....

b) .....

c) .....

d) .....