REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 851 OF 2010

TNT EXPRESS WORLDWIDE (K) LIMITED.....PLAINTIFF

VS

ELSEK & ELSEK (K) LIMITED.....DEFENDANT

RULING

1. By a Notice of Motion application dated 4th June 2012, the Defendant/Applicant has applied to this court for orders for the setting aside of the *ex parte* judgment entered in this matter on 14th October 2011 and all consequential orders issued therein. The Defendant further seeks leave to file its defence and counterclaim out of time.

2. The application is based on grounds set out on the face of application and is further supported by the affidavit of Osman Erdinc Elsek, the Managing Director of the Defendant sworn on 4th June 2012.

3. The Defendant's contention is that the judgment entered in default of defence should be set aside as no Summons to Enter Appearance was served upon the Defendant on 14th July 2011 or on any other date or at all. It further contends that the person allegedly served with the Summons was not an authorized officer of the company. In the event, the Defendant only became aware of the existence of the case only on 17th November 2011 when it was alerted by a company known as Elsek & Elsek Construction Company Limited that the Plaintiff had moved to attach its goods. The Defendant contends that it has a defence that raises triable issues that can only be canvassed during a full hearing. It further claims that the delay in bringing the present application was due to delay in retrieval of some supporting documents from Turkey.

4. In response to the application, there is a replying affidavit sworn on 21st June 2012 by Ephraim Otieno the Credit Controller of the Plaintiff. Through the affidavit, the Plaintiff avers that the application is belated; summons to enter appearance were duly served upon the Defendant; and that the application is brought with *malafides* and ulterior purposes. The Plaintiff further contends that the Defendant's proposed defence and counterclaim raises no triable issues as would justify grant of leave to file defence out of time as the Defendant has already admitted the Plaintiff's claim. It therefore contends that no proper case has been made by the Applicant meriting the exercise of the court's discretion as prayed.

5. At the oral hearing of the application, the Defendant/Applicant was represented by Mr. Waiyaki while the Plaintiff/Respondent retained Mr. Wandabwa.

6. In his submissions, Mr. Waiyaki reiterated the grounds that no proper service of summons to enter appearance was made as service was effected late, and that the same did not conform to the procedure of service of summons upon a company as provided for in Order 5 Rule 3 of the Civil Procedure Rules. He urged the court to set aside the *ex parte* judgment *ex debito justaciae* for want of proper service upon the company.

7. On his part, Mr. Wandabwa submitted that service of summons was proper as the representative of the company upon which service was effected held out has having authority to represent the company. In any event, Mr. Wandabwa argued that Order 5 of the Civil Procedure Rules allows service to be effected upon a company by leaving them at the registered office of the company. That service was effected had also not been disputed by the person upon which service was effected. On the contention that service of summons had been served late, Mr. Wandabwa submitted that no evidence had been placed before the court to show when summons had been collected from the court. Mr. Wandabwa submitted further that despite the Applicant having acknowledged being aware of the suit way back in October 2011, the Applicant had taken no steps to contest service of summons and had therefore acquiesced to any perceived irregularities with regard to service. The Applicant had further not demonstrated that it had an arguable defence as no material had been placed before the court to show that it had a reasonable defence. The proposed defence had indeed made an admission that a sum of Kshs. 4 Million was owed to the Plaintiff. In addition, he submitted that the application had brought in bad faith as the Defendant shared directorship with Elsek & Elsek Construction Company Limited which had objected to attachment of assets in execution of the ex parte judgment and for that reason should not be permitted to hoodwink the court that it was not aware of the judgment.

8. I have carefully evaluated the application on the basis of the affidavit evidence tendered and the rival submissions made by counsel for the parties.

9. The issue I am required to determine is essentially whether the application by the Defendant meets the established legal criteria for setting aside interlocutory judgment.

10. This court has discretion to set aside default judgment under Order 10 Rule 11 of the Civil Procedure Rules and to vary or set aside any consequential decree or order upon such terms as are just.

11. The principles that the court should apply in exercising its discretion to set aside the default judgment are fairly well-settled. In **Shah Vs. Mbogo (1967) E.A 116** the court laid the following criteria:

"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".

12. The above position was expounded further in the case of ***Morris & Company Limited vs. Victoria Minerals & Chemicals Limited & Another (2007) eKLR*** where **Justice H.P.G. Waweru** held as follows:

"The main concern of the court is to do justice to the parties before it. Its discretion will be exercised in order to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error…… Each case will depend on its own facts and circumstances. The court will look at the nature of the case, the conduct of the parties prior to, during and after judgment sought to be set aside. It will also consider if the Defendant has an arguable defence to the claim."

13. The application by the Defendant to set aside the *ex parte* judgment entered in this matter is entirely reliant of the contention that summons to enter appearance were not properly served upon the company and that they were, in any event served belatedly. The Defendant also claims to have a good defence and counterclaim that should be admitted for filing out of time.

14. With regard to the contention that service was not properly effected upon the company, my take is

that Order 5 Rule 3 of the Civil Procedure Rules does not make it mandatory that service of summons must be effected upon the secretary or other principal officer of the corporation. The wording of the provision is that summons "may be served…" In addition, Sub-paragraph (b) (i) thereof provides that summons may be served by leaving it at the registered office of the corporation. In the present matter, it is admitted by the Applicant that summons was received at the registered offices of the Defendant by a lady known as Karen who it is accepted was an administrative assistance of the company. While this lady may not have been the corporation secretary, director of a principal officer of the company, it is at the very least admitted that the summons was left at the offices of the company. In that regard, I would hold that service upon the company was proper under Order 5 Rule 3(b)(i) of the Civil Procedure Rules.

15. With regard to the contention that Summons to Enter Appearance was served belatedly, Order 5 Rule 6 of the Civil Procedure Rules provides that every summons must be collected for service within 30 days of issue or notification, whichever is later, failing which the suit abates. In the present matter, while summons were issued on 14th December 2010, the court record is silent on whether or not any notification was issued for the collection of the summons and on when the summons was indeed collected. Neither has the Applicant placed material before the demonstrating whether such notification was issued and when, if at all, so as to enable the court compute time for purposes of assessing whether or not service was effected on time. In the absence of such evidence, I am unable to make a finding in favour of the Applicant based on this provision. In any event, it has been contended by the Respondent that the Applicant having become aware of the suit in October 2011 ought to have taken expedited steps to contest the alleged irregularity in respect of service of summons. To do so almost a year later has to be seen in the context of an attempt to delay or frustrate execution of the decree in this matter which a court of equity would not countenance.

16. With regard to the test of whether or not the Applicant has an arguable defence, in the context of the present application, I am only required to establish that the proposed defence *ex facie* raises reasonable points of defence to the claim. This approach was laid down in the case of **Tree Shade Motors limited v. D.T. Dobie & Another [1995-1998] EA317 (CAK)** where the Court of Appeal held as follows:

"Where a draft defence was tendered together with an application to set aside a default judgment, 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 judgment aside".

17. In that regard, I have perused the proposed defence annexed to the supporting affidavit of Erdinc Elsek and established that paragraphs 9 and 10 thereof explicitly state that the Defendant not only admits being indebted to the Plaintiff in the sum of Kshs. 4,790,380.61 but indeed had proposed to settle the debt in installment cheques of Kshs. 958,076.00 until the debt was fully settled. In my view, this admission obviates any reasonable probability that the Defendant would have any defence against the Plaintiff's claim as the amount admitted is more or less the sum claimed in the Plaint filed on 9th December 2010. In the same premises, I am persuaded that the proposed counterclaim is indeed an afterthought as the admission that the freight charges were due and payable well before the suit was filed strongly indicates that the Plaintiff had performed its part of the contract.

18. For the above reasons, I find the Defendant/Applicant's application dated 4th June 2012 lacking in merit and is hereby inclined to dismiss the application with costs to the Plaintiff.

IT IS SO ORDERED.

DATED, SIGNED and DELIVERED in Nairobi this 20th September 2012.

J. M. MUTAVA
JUDGE