REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION – MILIMANI

CIVIL SUIT NO. 424 OF 2010

FRIGOKEN LIMITED……..…….PLAINTIFF

VERSUS

VALUE PAK FOOD LIMITED.....DEFENDANT

RULING

By this application, the defendant moves the court to order that the *ex parte* judgment entered in this matter on 18th November, 2011, be set aside. It also applies for an order that there be a stay of execution of the decree till final determination of this application and the auctioneers be restrained from attaching the goods and property of the defendant. The application also seeks any other or further relief that this court deems fit to grant.

The application is brought by a chamber summons dated 24th January, 2011 and taken out under Section 3A, of the Civil Procedure Act; and Order IXA Rules 10 and 11, and Order XXI Rule 22 (1), (2), (3) and (10) of the Civil Procedure Rules. It is supported by the annexed affidavit sworn by Raymond Mathews, a Director of the Defendant, on 24th January, 2011, and is premised on the grounds that –

(1) The summons to enter appearance has not been served on the defendant to enable it file defence and appearance.
(2) Mr Ahmed Shah who is allegedly served on 10th September 2010 has never been in employment of the defendant.
(3) The security officer Mr Jacob Okwemba who allegedly pointed out the said Mr Ahmed Shah on 10th September, 2010 has never been in employment of the defendant.
(4) The defendant being a Corporation, the summons has not been served in accordance with Order V Rule (2) (a).
(5) The Defendant has good and sustainable defence to the claim of the plaintiff

In opposition to the application, the plaintiffs/respondents filed a replying affidavit sworn by their General Manager, one Karim Dostmohamed, on 8th February, 2011. In this affidavit, the deponent avers that the applicant was indeed served with summons to enter appearance through Mr Ahmed Shah, the applicants Assistant Human Resources Manager, who accepted service and duly signed the reverse of the summons. He further deposed that the process servers sent to serve court summons on behalf of the plaintiff are ready and willing to verify the service should they be required for cross examination in court.

With leave of the court, the respective parties filed written submissions. After considering the pleadings and submissions of the respective parties, I note that the principles governing the setting aside of *ex parte* judgments are fairly clear. In the first instance, if there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular one which the court must set aside *ex debito justitiae* on the application by the defendants. Such judgment is not set aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process. However, if the default judgment is a regular one, the court still retains an unfettered discretion to set it aside and any consequential decree or orders upon such terms as are just as ordained in Order IXA Rule 10 of the Civil Procedure Rules. These principles were embraced in, among others, **PATEL** v **E A CARGO HANDLING SERVICES LTD**, [1975] EA 75; SHAH v **MBOGO** [1967] EA 75 and also in **PHILIP V CHEMWOLO & ANOR**. v **AUGUSTINE KUBENDE** (1982 – 88) 1 KAR 1036. In sum, the court has unlimited jurisdiction to set aside or vary judgment entered in default of appearance but, as is usual with all discretionary power, that discretion must be exercised judiciously and upon reason. Where the judgment is regular, the court will not usually set it aside unless it is satisfied that there is a defence on the merits. In this context, a defence on merits does not mean a defence which must succeed, but one which discloses *bona fida* triable issues for adjudication at the trial.

Applying these principles to the facts of this case, the issues for determination are whether the judgment was regular; and if so, whether the applicant has demonstrated any defence to the action. Whether a judgment was regular or not depends on whether the applicant was served with summons to enter appearance.

According to the record, this suit was filed on 17th June, 2010. An affidavit of service sworn by Vihaki Armstone, a licensed court process server, on 21st July, 2010, shows that the applicants were served on 28th June, 2010. In his affidavit of service, he avers that he went to the defendant's premises where he found a security officer who disclosed his name as Mr Jacob Okwemba. The latter directed the process server to the office of a Ms Charlotte Jonnes who informed the process server that she was an officer duly authorized to receive court process. However, she indicated that in this case, she was not aware of the issues in question and would therefore retain a copy of the summons and the plaint to forward the same to their lawyers for legal advice and further action. In his wisdom, however the Deputy Registrar declined to enter judgment on the basis of this affidavit of service as it did not disclose the capacity of the officer served in the defendant company. This prompted the respondent to serve the applicants a second time.

This time round, the second service was effect by one Wycliffe A. Ihonga, another licensed court process server. In his affidavit of service, he deposes that he went to the applicant's premises along North Airport Road on 10th September, 2010 where he found a security officer on guard who disclosed his name as Mr Jacob Okwemba. The latter directed the process server to the office of one Ahmed Shah, the Assistant Human Resource Manager, who confirmed that he was authorized by the defendant Directors to receive court process. The process server accordingly served that officer with summons to enter appearance, a plaint and a verifying affidavit, and he proceeded to sign on the reverse side of the principal summons to enter appearance.

In his supplementary affidavit, Raymond Mathews denies that the applicant company had ever employed a lady by the name of Charlotte Jones or Jacob Okwemba or even Ahmed Shah. He produced a copy of what he called a Muster Roll maintained by the applicant to show that the names of those three were not on the list of the defendant company.

In my considered opinion, that Muster Roll is not reliable. In the first instance, some three numbers are conspicuously missing from that list. These are numbers 22, 41, and 43 and no explanation has been offered as to whose numbers they were. In the absence of a grand conspiracy between the two process servers, and no evidence of any such conspiracy has been adduced, the two process servers could not have coined up the same name for Jacob Okwemba for the applicant's security officer. I believe that there must have been a security officer by that name as appears in the separate affidavits of the two process servers. Similarly, and contrary to Raymond Mathew's denial, I also believe that they have an employee by the name of Ahmed Shah, who is the Assistant Human Resources Manager, and who accepted the summons to enter appearance and signed the acceptance at the back thereof. My beliefs are founded one

the affidavits sworn and filed separately by the two process servers. Otherwise, what would be the probative value of affidavits by process servers?

It is not lost on this court that both process servers clearly state that each of them, separately, went to serve court summons upon the defendants whose premises are situated along North Airport Road, opposite Transami Ltd, and next to Volvo Auto Spares. Each of them states that he found a security officer on guard and he disclosed his name as Jacob Okwemba. One wonders whether the court process servers were lying on oath to the extent of coming up with a common name for the security guard. I also find it equally puzzling that the process servers came up with specific names of the defendant's officers whom they served, and yet the Company insists that they don't have any officer by any of the three different names. In the case of **BAIYWO** v **BACH** [1986-1989] EA 27, the Court of Appeal held that there is a qualified presumption in favour of the process server recognized in **MB AUTOMOBILE** v **KAMPALLA BUS SERVICE** [1966] EA 480 at page 484, as having been the view taken by the Indian Courts in construing similar legislations to ours. On Chitaley and Annaji Rao *the Court of Civil Procedure* Vol. 11 at 1670, the learned commentators are quoted as saying –

"3. Presumption as to service – There is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service."

In his replying affidavit, Karim Dostmohamed swore that the process servers were ready and willing to verify the validity of the service should they be required for cross examination in court. The applicants did not take up the challenge and this renders the affidavits of service valid since the defendants have failed to prove that the affidavit of service were improper. Consequently, I find that there was proper service of the summons to enter appearance, and this renders the judgment on record regular. The only process by which such a judgment can be set aside would be for the applicant to attach a draft defence which discloses some *bona fida* triable issues for adjudication at the trial. However, the applicants have not attached any such draft defence. The defendant has failed to discharge the burden of showing that the judgment entered should be set aside and therefore the same remains.

For the above reasons, I find that the application for setting aside the judgment entered herein is not merited and it is accordingly dismissed with costs to the respondent.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 22nd day of September, 2011.

L NJAGI
JUDGE