REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL CASE 340 OF 2009

MUSSA EZEKIEL OEBAH ……. PLAINTIFF

VERSUS

JOMO KENYATTA UNIVERSITY OF

AGRICULTURE AND TECHNOLOGY ……. DEFENDANT

RULING

The chamber summons application dated 29th April 2009, seeks inter alia for an order to set aside the default exparte judgment and all consequential orders made on 21st April 2009. The applicant also sought for leave to defend the suit. The application is premised on the grounds stipulated on the body thereto and the facts deposed to in the supporting affidavit by **Prof. Francis Njeru** sworn on 29th April 2009.

Briefly stated, the plaintiff filed this suit against the defendant, summonses to enter appearance were served upon the defendant, due to lack of proper communication between the defendant's registry and the office of the Deputy Vice Administration, instructions were not forwarded in time for the defence to be filed against the plaintiffs' claim. Due to that inadvertence mistake the defence was not filed in time. Secondly, the plaintiff issued a notice of entry of judgment which is irregular because the plaintiff's claim was not liquidated. Since the claim by the plaintiff was not liquidated, it should have proceeded for formal proof under order IX (a) rule 5. Thirdly the defendant contends that they have a valid defence which raises triable issues. This application will also not occasion any prejudice to the plaintiff.

Counsel for the plaintiff cited authorities which emphasized the principles that Courts have unfettered and inherent jurisdiction to set aside exparte judgments as long as the defendant can demonstrate they have a defence which raises triable issues. The overarching consideration for the court is to do justice to the parties and where the court is satisfied that there is a defence on merit, or a defence that raises triable issues, the court should exercise its inherent power to allow that defence proceed for trial.

This application was opposed by the plaintiff, counsel for the defendant relied on the replying affidavit sworn by the plaintiff on 8th May 2009. According to the plaintiff, the application to set aside the judgment is not made in good faith. The defendant is guilty of material non disclosure, especially by failing to disclose the persons in the defendants' registry who were served with the court summons and failed to take action. The applicant is supposed to be as candid as possible, while invoking the court's exercise of its discretionary powers. The defendant has merely sifted blame upon some un named registry

staff without any identification.

The defendant also failed to disclose the facts that the plaintiff's motor vehicle was a commercial commuter service vehicle, plying along Thika Nairobi road, was destroyed by the defendants' student who were rioting on 6th August 2008. Also the defendant did not disclose that the plaintiff held meetings with the Vice Chancellors Prof. Mabel Imbuga and Prof. Francis Njeru where he was asked to produce a valuation report for purposes of compensation for his destroyed motor vehicle. The plaintiff submitted the valuation report on 16th August 2008. However the defendant did not act on the plaintiff's claim and when he started making a follow up, he was referred from one office to another.

Eventually the plaintiff received a letter in which the defendant informed him that they were not in a position to compensate him for the loss he incurred when his motor vehicle was destroyed by the students. This contradicted the position taken by the defendant and was documented in the minutes by the University and also by an advertisement in the press where the students who were sent away for rioting, were surcharged Ksh.3500/- so as to meet the damages caused during the disturbances.

The plaintiff contended that, while he was following the compensation by the defendant, he met several officials who kept on promising to pay him for the loss and that is how he got possession of various minutes and documents where the defendant was considering his claim. In this way the plaintiff came across an affidavit sworn by **Prof. Lomanas Odhiambo** in **Misc. application 671 of 2008 in the Case of Republic vs. Jomo Kenyatta University of Agriculture & Technology (exparte Frank Mutembei Kinyua)** In that case, the defendant produced the documents which showed the plaintiffs motor vehicle was among the properties destroyed by the defendants students among other members of the public.

Moreover, the students were charged in **a Criminal Case No. 3177 of 2008** before the Chief Magistrate Thika, and one of the charges was the destruction of the plaintiff's property. The plaintiff was also supposed to be a witness. The defendant is accused of exhibiting dilatory conduct which disentitles them to the orders sought. The University has a duty to ensure that the students do not break out of the campus and cause destruction and mayhem to the members of the public. The judgment here in was regularly entered, and cannot be set aside.

As regards the notice issued by the plaintiff's advocates about the entry of the judgment nothing turns on it because it was merely meant to notify the defendant. Under Order IX (a) r10 of the Civil procedure Rules it is provided 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."***

In the case of **Ceneast Airlines Ltd v Kenya Shell Ltd East African Law Reporting [2000] 2 EA 362(CAK)** the Court of Appeal cited with approval a passage by Duffus P. in the case of Patel v East Africa Cargo Handling services 1974 EA as follows:-

"***The main concern of the court is to do justice to the parties, and the court will not impose conditions in itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits does not means, in my view, a defence that must succeed, it means as Sheridan J put it 'a triable issue' that is an issue which raises a prima facie defence and which should go to trial for adjudication"***

Having set out albeit briefly the rival arguments, the issues to bring to bear is the defence and whether it rises triable issues and whether the plaintiff can be reasonably be compensated for by costs. It is not in dispute that this was a regular judgment because the defendant was served with summonses to enter appearance. The defendant's explanations why it failed to enter appearance and defence within the stipulated time are not plausible. The plaintiff has nothing to do with the inefficiency and the mistakes committed by the defendant's registry staff. However there is a long line of authorities by the Court of Appeal where it is emphasized that mistakes are excusable if the defence raises triable issues and the

plaintiff can adequately be compensated with costs, but the mistake is not the only problem in this matter.

There is the merit of the defence, and the conduct of the defendant, which must also be taken into consideration. The plaintiff's claim is for compensation for the loss of his motor vehicle which was destroyed by rioting students of the defendants' University. It is alleged that the defendant was negligent and failed to discipline and control their students. The defendant had offered to compensate the plaintiff for the loss of his motor vehicle and the plaintiff was asked to furnish the defendant with a valuation report. The plaintiff also annexed several documents to show that the defendants' students rioted on the material day, they caused destruction of property, and the students were punished and surcharged for damages caused during the riot.

On the part of the defendant, it has annexed a draft defence in which they have denied that the destruction took place, or if it did, it is alleged, it was outside the defendant's premises and therefore they are not liable for criminal activities either by their students or other civilians which happened outside their jurisdiction. This is what is emphasized as a triable issue in this matter.

The Interlocutory Judgment entered on 20th April 2009 provided that the matter will be set down for formal proof. Therefore this was not a final judgment, this was conceded by counsel for the plaintiff, and the notice of entry of judgment sent to the defendant on 24th April 2009 was merely meant to alert the defendant thus nothing turns on it. In that case, the matter will have to go for formal proof to establish the amount due to the plaintiff for damages suffered for the loss of the motor vehicle, the loss of user and the general damages.

Whereas the court has unfettered discretion, as I understand the exercise of discretion it must be exercised judiciously based on evidence, and law. I am not persuaded by the matters pleaded in the defence deserve the exercise of my discretion to set aside a regular judgment. The conduct of the defendant and lack of forthrightness by withholding material information when this application was filled has not helped its case. It is determinable from the material before this court that the defendant is merely acrobating and reprobating. At one time, the defendant intends to compensate the plaintiff; they surcharge the rioting students, and even used the plaintiff as a person whose property was destroyed by the students to defend itself, and at a convenient moment, the defendant deny the plaintiff's claim in total.

I find the exparte judgment was regularly obtained; the issues regarding the assessment of damages can be canvassed during the formal proof. The defendant does not deserve the exercise of my discretion. On the other hand, the defendant who lost his commercial motor vehicle (matatu), cannot reasonably be compensated with costs, he will be prejudiced by being taken backwards by a defendant who did not respect the court summonses in the first place, and did not even care to disclose to this court vital information.

The defendant's application is dismissed with costs to the respondent.

RULING READ AND SIGNED AT NAIROBI THIS 17TH DAY OF JULY 2009.

M.K. KOOME

JUDGE