

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 1147 of 2002

**LAS EXPRESS CARGO LTD.....PLAINTIFF/
RESPONDENT**

VERSUS

**KENYA PORTS AUTHORITY.....DEFENDANT/
APPLICANT**

R U L I N G

Delay in the preparation and delivery of this ruling has been occasioned by my recent illness, hospitalization and recuperation. The delay is regretted.

This application by chamber summons dated 4th July 2004 is by the Defendant seeking the main orders that the *ex parte* judgement entered against it be set aside, that the court do grant extension or enlargement of time for the Defendant to file its defence properly, or, in the alternative, that the memorandum of appearance dated 4th November 2002 and defence dated 7th November 2002, both of which were filed at the Central Registry of this Court, be deemed to be properly filed. The application is stated to be brought under Order 9A, rules 10 and 11 and also Order 21 rule 22 (1) of the Civil Procedure Rules. Sections 3, 3A and 95 of the Civil Procedure Act and all other enabling provisions of the law are also invoked. The main grounds for the application are that the Defendant was misled by the title of the case appearing in the plaint and summons to enter appearance into filing its memorandum of appearance and defence at the Central Registry of this Court rather than at this division; that at any rate the memorandum of appearance and defence were filed within time; and that it is fair and just that the suit be heard *inter partes* so as to serve the ends of justice. There is an affidavit sworn by the Defendant's advocate, MOHAMMED ALAWI, in support of the application. The Plaintiff has opposed the application as set out in the replying affidavit sworn on 7th July 2005 by one JAMA ALI JAMA, the Managing Director of the Plaintiff, and filed on 12 July 2005.

I have read both the supporting and replying affidavits. I have also given due consideration to the submissions of the learned counsels appearing. The history of this matter was set out in some detail in the final judgement delivered on 20th May 2005. I need not repeat it. The discretion of the court under rule 10 of Order 9A and also under rule 8 of Order 9B is intended to do justice to the parties. In this case it is clear that the Defendant filed its memorandum of appearance and defence within time but at the wrong registry - that is, at the Central Registry instead of the registry of this division. It was an excusable error, in that the Defendant's counsel was misled into believing that the case was at the Central Registry because the plaint and the summons to enter appearance stated merely that the case was at the High Court of Kenya at Nairobi. The Defendant's learned counsel fell into the same error when the suit came up for formal proof on 24th February 2005. In these circumstances it will be in the interests of justice that the interlocutory judgement entered on 30th April 2004 and the final judgement entered on 20th May 2005 be set aside to enable the Defendant to defend the suit. Its defence raises triable issues in addition to the preliminary issues whether or not the Plaintiff has the *locus* to bring the suit and whether or not the suit is statute-barred. The Plaintiff will not suffer any injustice that cannot be made good by an appropriate award of costs.

For the above reasons I will allow the application by chamber summons dated 4th July 2004. The interlocutory judgement entered on 30th April 2004 and the final judgement entered on 20th May 2005 be and are hereby set aside. The Defendant's memorandum of appearance dated 4th November 2002 and

defence dated 7th November 2003 filed at the Central Registry but now in this file be and are hereby deemed to have been duly filed. The Plaintiff shall have all its thrown-away costs which shall include the costs of this application. Such costs may be agreed or taxed, and shall be payable forthwith. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF MARCH, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 10TH DAY OF MARCH, 2006.