REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
CIVIL CASE NO. 431 OF 2004

KENYA GRANGE LTD………………………...…………….PLAINTIFF

VERSUS

LINEAR COACH COMPANY LTD………………………DEFENDANT

R U L I N G

The Defendant herein, **LINEAR COACH COMPANY LTD.,** seeks by chamber summons dated 23rd November, 2004 the main order that the *ex parte* judgment entered on 10th September 2004, not on 6th October, 2004 as stated, and all consequential orders be set aside *ex debito justiciae*. The application is brought under Order IXA, Rule 10 of the Civil Procedure Rules (the Rules). That rule gives the court power to set aside an interlocutory judgment entered in default of appearance or defence and any consequential decree or order upon such terms as are just. It is an unfettered discretion that must nonetheless be exercised judicially and upon settled principles. Those principles are that the discretion is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. But it is not designed to assist a litigant who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. In exercising the discretion the court will consider, *inter alia*, all the facts and circumstances of the case, both prior and after entry of the interlocutory judgment including whether the defendant has a plausible defence. Uppermost in the mind of the court will be the question whether the holder of the judgment can be reasonably compensated by costs for any delay that may be occasioned by the order to set aside sought. The main focus of the court will be to do justice to the parties, remembering that to deny a litigant a hearing should be the last inclination.

All the above principles will of course be applicable where the interlocutory judgment has otherwise been properly and regularly entered. On the other hand where the judgment was irregularly entered or was not available under the Rules, the same must be set aside as a matter of course or right.

The present application is brought upon the main ground that the Defendant was never served with summons to enter appearance and copy of the plaint. If this be so, the Defendant will be entitled to the order sought as a matter of right. There is a further ground, that the Defendant has a "cogent" defence to the suit. The supporting affidavit sworn by one **IBRAHIM MANOTI**, the Defendant's general manager, in effect argues these two grounds. A draft defence is annexed thereto. There is a supplementary affidavit filed on 26.1.2005 with leave of the court. It is sworn by one **ALFRED M. O. MICHIRA,** a director of the Defendant . In it he denies that the person named **MR. EMARWANGA (who it is indicated in the affidavit of service accepted service on behalf of the Defendant)** is an employee of the Defendant or further that the rubber stamp whose impression appears on the served summons belongs to the Defendant. He has also set out at length what will be the Defendant's defence if allowed to defend the suit. That defence is that the bulk of the spare parts supplied to the Defendant were infact returned to the Plaintiff as they did not work in the Defendant's buses in which they were fitted, and further that the Defendant's six buses are with the Plaintiff awaiting fitting of correct spares.

I have considered the submissions of the learned counsels appearing. The Defendant is a corporation. Under Rule 2 of Order V of the Rules, where the suit is against a corporation the summons may be served:-

> ***"(a) on the secretary, director or other principal officer of the corporation; or***
>
> ***(b) if the process server is unable to find any of the officers of the corporation mentioned (above), by leaving it at the registered office of the corporation or (by) sending it by prepaid***

registered post to the registered postal address of the corporation, or if there is no registered office and no registered postal address of the corporation by leaving it at the place where the corporation carries on business or by sending it by registered post to the last known postal address of the corporation."

I have looked at the affidavit of service sworn by one **NZUKI MUSYOKI** on 9th September, 2004. In it he says that on 23rd March, 2004 he received the summons to enter appearance and copy of the plaint for service upon the Defendant. It will be noted that suit was filed on 30th July, 2004. It has been argued by learned counsel for the Plaintiff that the date 23rd March, 2004 is an obvious typing error. That may well be so, especially because the date of service appearing on the back of the served summons is 23rd August, 2004.

The process server further states that on the same date (of receipt of the summons and copy of the plaint) he served them upon the Defendant's Manager, "**a Mr. Emarwanga" at the Defendant's office opposite the Jack and Jill Supermarket."** The process server further states that the said manager was not personally known to him but was introduced to him by the cashier at the booking office. The cashier is not named. It is further stated in the affidavit of service that the said Mr. Emarwanga introduced himself as the Nairobi branch manager of the Defendant and accepted service by signing and stamping at the back of the summons.

It has been denied under oath that Mr. Emarwanga is the Defendant's employee. The offices of the Defendant have not been identified in the affidavit of service either by the building in which they are situate or by land reference number or by the street on which they stand. All these shortcomings, argued Mr. Nyakiangana, learned counsel for the Defendant, are pointers that the process server could not have been to the offices of the Defendant which, as deponed, are at land parcel L.R. No. 209/8595, View Park Towers, along Monrovia Street, Nairobi, a fact that has not been challenged. The process server could therefore not have served process as alleged and his affidavit of service must be false.

Mr. Simani, learned counsel for the Plaintiff countered these arguments by observing that there was no application made to cross-examine the process sever, that the particular person who was served with the process was named and he signed and rubber-stamped the process after accepting service upon identifying himself as a manager of the Defendant, that he even gave his national identity card number; and, submitted Mr. Simani, a manager of a corporation is a proper officer of the corporation for purposes of service.

I hold that a process server who serves a corporation at its offices should, as a first step, properly identify those offices by indicating in his affidavit of service the physical address. Without proper identification of the corporation's physical address doubt is created as to whether the process server went to the right offices or served an officer of the corporation. In the present case the process server has not indicated the physical address of the Defendant. He has not indicated the street or the building he went to. It has been denied under oath that the person he says he served is an employee of the Defendant. In these circumstances I am not satisfied that there was proper service of the summons to enter appearance and copy of the plaint upon the Defendant. Without proper service the interlocutory judgment must be set aside as a matter of right.

Even if there had been proper service I would still have been inclined to set aside the judgment in the interests of justice. The draft defence of the Defendant annexed to the supplementary affidavit raises triable issues, not least among them being the issue whether or not the bulk of the goods sold to the Defendant were returned to the Plaintiff for being the wrong parts or for being defective.

I will in the circumstances allow the application by chamber summons dated 23rd November, 2004. The interlocutory judgment entered on 10th September, 2004 and consequential decree and orders are all set aside and the Defendant shall have unconditional leave to defend the suit. The Defendant may enter appearance and file defence within fourteen (14) days of delivery of this ruling. Costs of the application shall be in the cause.

Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF MAY, 2005

H.P.G. WAWERU

JUDGE