REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO.5 OF 2002

TRANSPARES (KENYA) LIMITED …… PLAINTIFF

VERSUS

SOYONIN FARM LIMITED ……. DEFENDANT

R U L I N G

Plaint dated 2nd January 2002 and filed into the court on 9th January 2002 prayed for judgment against the Defendant as follows:

(a) KSh.1,357,600 being special damages.

(b) KSh.79,370.60 being the value of goods lost while being transported in motor vehicle registration Number KUR 068/ZB 8679. This was crude oil which w as allegedly spilt because of the accident.

(c) Special damages for loss of use and/or net profits amounting to KSh.384,600. This was, according to paragraph 9 of the Plaint claimed as reasonable loss of use and/or net profits for a period of one month durin g which the Plaintiffs trailer was undergoing repairs.

(d) Interest on (a) (b) and (c) above at court rates from the date of filing the suit until payment in full.

(e) Costs of and incidental to this suit.

(f) Any other or further relief the court may deem fit to g rant.

There is Affidavit of Service sworn by Samson Okongo, the learned Counsel for the Plaintiff showing that the summons to enter appearance together with a copy of plaint were served by registered post upon the Defendant. Upon that the Plaintiff requested for Judgment for the sum of KSh.1,821,570/60.However that request was rightly not acceded to as there was no leave to serve by registered post given to the Plaintiff. What is important however is that at the time the Plaintiff made the request for judgment, it did pay for that and a receipt No. L 838623 dated 7th March 2002 was issued to the Plaintiff. The Plaintiff then purported to have served summons to enter appearance and copy of plaint upon the Defendant through a process server George Rumba Mgalla on 28th day of March 2002 and Mr. Mgalla did swear Affidavit of service to that effect. Another Request for Judgment was made dated 9th May 2002 and filed on 13th May 2002, but on that day only 75/- was paid for the same request and not the full fee. Interlocutory Judgment minuted on 15.3.2002 was then signed on 6.6.2002. Notice of Judgment dated 1st

July 2002 was then filed on 2nd July 2002, but I do not see any evidence that it was served except annextures to that effect in the Applicant's Affidavit.

On 8th August 2002, this application was filed. It is seeking that default judgment entered on 6.6.2002 and all consequential orders be set aside and the Defendant/Applicant be granted unconditional leave to file defence. It is also seeking costs of this application to be provided for. The main grounds for the same application are that the Defendant was not served with the summons to enter appearance; that the default judgment has been wrongly entered as the filing fee of KSh.1,075/- was not paid; that the default judgment is based on a valuation of a vehicle other than the vehicle which was involved in the accident; that the Defendant has a reasonable defence and that the defendant will be prejudiced and will suffer substantial loss. The application is supported by an affidavit and annextures to the same Affidavit which includes a draft proposed defence.

The Respondent opposed the application and filed a lengthy Replying Affidavit in which the Respondent's claims officer states what I may in brief summarise that filing fee for Request for Judgment was paid on the two occasions the request was made, that the Applicant has no defence as its driver had been charged, and convicted of careless driving; that service of the summons to enter appearance was done by post and through the Process Server George Mgala and that the General Manager was served; that Notice of Judgment was served on 1.8.2002 but the General Manager served declined to accept service and that the default judgment was not based on the valuation of a wrong vehicle. I have anxiously considered this application. I have perused all the pleadings, the affidavits, the annextures and I have considered the able submissions by the learned counsels. In my humble opinion this application must succeed.

First Judgment was entered for the entire amount that was prayed for in the plaint. The request for judgment was made under Order 9A rule 3 which allowed only judgment to be entered where the plaint makes a liquidated demand only and the Defendant fails to appear. In my mind, the prayers in the plaint for judgment were for special damages, value of goods lost as a result of the accident and special damages for loss of use and or net profits. Although the Plaintiff did quantify these loses, nonetheless they remain special and general damages and could not be said to be liquidated demand simply because they were quantified. Even if no defence was filed in respect of the same there would have been need to subject these claims to formal proof so that the court would assess the same and either agree with the plaintiff or reduce them or reject them or any of them as per proof set forth. In my feeling liquidated demand is different from quantified damages.As an example, a demand for agreed price of goods sold and delivered or a demand for payment in respect of work done at an agreed price is different from a demand for loss of profit so that while in the former two instances, the amount was agreed upon between the parties so that if the Defendant does not file defence it goes without saying that he is still bound by that same amount and interlocutory judgment can be given under Order 9A Rule 3, in the later case the amount quantified and claimed is as per assessment by the Plaintiff and is not bound to be the correct amount hence the need to have it subjected to assessment. I think in this case interlocutory judgment should have been entered under Order 9A Rule 5 and not under Order 9A Rule 3.Put another way this matter should have been set down for formal proof or assessment of damages after entering interlocutory judgment under Order 9A Rule 5. To that extent, I do find that the interlocutory judgment entered was not regular.

Secondly, the summons to enter appearance were served upon one called Chemasi. The Applicant states that it does not have any person called Chemasi in their staff list. The Respondent says that Chemasi is one and the same person as the General Manager who the Applicant says is called Joseph B. Tuitoek. The same Chemasi was pointed out by the Gate Keeper of the Applicant company and the claims officer states that he had seen the same General Manager earlier on at the scene of the accident and he knew him to be the same person the Gate Keeper had told them to wait for when they went to serve summons to enter appearance and plaint and upon whom the same were served.The question that lingers in ones mind through all these is where did the name Chemasi come from? The Gate Keeper is the crucial witness as far as this question is concerned. He has not sworn an affidavit to state what happened in his presence and where he got this name from. Whether it was a genuine name or a nick name. Either way there is a doubt as to who was actually served with summons to enter appearance and in a case of this magnitude, I do not think it is fair to take a risk.

Lastly, and in any event, even if the interlocutory judgment was regular, I have perused the draft statement of Defence annexed to the application.I do agree with Mr. Okongo, that the conviction of the Defendant's driver on a charge of careless driving will to a large extent militate against the Defendant on liability and the claims in Draft Defence that the Plaintiff's driver was the one negligent may be difficult to prove in the face of that conviction. However that conviction may only affect liability and not quantum of damages. In a running down case like the one before me, there are two aspects that the court needs to be satisfied upon before finalising the case. These are liability and quantum of damages. The fact that a Defendant is liable for the accident does not mean that he has to pay anything the Plaintiff demands. His defence on quantum will still need to be properly investigated as against the claim by the Plaintiff. I have seen paragraphs 7, 8, 9 and 10 of the draft statement of defence as I am bound to look at it, and I am satisfied that those parts of the Defence raise triable issues and hence the statement of defence raises reasonable defence to the claim.

The sum total of all the above is that this application is allowed. Interlocutory judgment entered on 6th June 2002 is hereby set aside. Let the Defendant/Applicant file its statement of defence within ten (10) days of the date hereof. Costs to the Applicant/Defendant.

Dated and delivered this 28th day of November 2002.

J.W. ONYANGO OTIENO

JUDGE