REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. E002 OF 2021

NAZMUDIN ABDULALI SHARIFF.....1ST PLAINTIFF

ALTAF ABDULALI SHARIFF.....2ND PLAINTIFF

FIROZ ABDULALI SHARIFF.....3RD PLAINTIFF

VERSUS

KENYA RAILWAYS CORPORATION.....DEFENDANT

R U L I N G

NAZMUDIN ABDULALI SHARIFF, **ALTAF ABDULALI SHARIFF** and **FIROZ ABDULALI SHARIFF** (the plaintiffs herein) moved to this Court by their amended plaint dated 25th March 2021 seeking various remedies against the **KENYA RAILWAYS CORPORATION LTD** (the defendant herein) with respect to the land parcel **NO BUNGOMA/MUNICIPALITY/608** (the suit land). Those remedies and the basis upon which they were sought are not relevant for purposes of this ruling.

The plaintiffs also sought and obtained an order restraining the defendant through it's servants, agents or any other persons acting though them from demolishing any building on the suit land or evicting the tenants thereon. This was following their application dated 4th February 2021 which was not opposed and this Court's ruling delivered on 4th March 2021.

On 23rd April 2021, the plaintiffs' Counsel **MR KITUYI** filed a request for Judgment against the defendant for failing to enter appearance or file a defence within the prescribed period. The request was placed before the Deputy Registrar **HON. MWENDA** who in a ruling delivered on 3rd May 2021 entered interlocutory Judgment in favour of the plaintiffs for specified special damages as well as general damages and injunctive reliefs.

The matter then came up before me for formal proof on 29th June 2021 and being satisfied that the defendant had not filed any defence, this Court allowed the plaintiffs' Counsel to prosecute their case. **NAZMUDIN ABDULALI SHARIFF** (the 1st plaintiff herein) proceeded to testify and close the plaintiffs' case whereupon Counsel sought 14 days to file his submissions which he did on 12th July 2021 and the Judgment date was fixed for 28th September 2021.

Meanwhile, by a Notice of Motion filed on 23rd July 2021, the defendant sought the following orders: -

(a) Spent

(b) That pending the hearing and determination of this application inter – parte, this Honourable Court be pleased to stay all proceedings herein and specifically, there be arrest of delivery of Judgment.

(c) That the Honourable Court be pleased to set aside all the ex – parte proceedings together with all consequential orders and to thereafter have the matter heard de – novo.

(d) That this Honourable Court be pleased to grant the defendant leave to defend this suit.

(e) That the annexed defence be deemed properly filed and on record upon payment of the requisite fees.

That Notice of Motion which is the subject of this ruling was predicated upon the provisions of **Order 10 Rule 11** and **51** of the **Civil Procedure Rules**, **Sections 1A**, **1B 3A** and **63(e)** of the **Civil Procedure Act** and **Articles 50** and **59** of the **Constitution**. It was premised on the grounds set out therein and supported by the affidavit of **STANLEY GITARI** the defendant's Senior Legal Officer.

The gravamen of the application is that although this case came up for hearing on 4th march 2021, the defendant had never been served with a notice of mention for directions and only received an email through its advocate on 14th July 2021 that the Judgment would be delivered on 28th September 2021. It was then that the defendant discovered that the hearing had proceeded ex – parte on 29th June 2021. That the defendant has been waiting for directions to be taken in the matter and has a good defence against the plaintiffs' case and it is in the interest of justice that this application be allowed so that it can defend the case. That the application has been filed timely and in good faith and unless it is allowed, the defendant will be condemned un – heard. That the plaintiffs will not be prejudiced if the orders sought are granted. Further, that this Court has the discretion to allow this application.

Annexed to the Notice of Motion are the following documents: -

1. **A copy of this Court's ruling dated 4th March 2021.**

2. **A copy of the notice of Judgment.**

3. **A copy of the defence.**

The application is opposed and **NAZMUDIN ABDULALI SHARIFF** the 1st plaintiff herein swore a replying affidavit dated 17th September 2021 in which he averred, inter – alia, that there is no plausible reason why the defendant failed to file its defence after entering appearance on 19th February 2021 having been served with Summons to enter appearance. That the defendant's Counsel appeared in Court on 22nd February 2021 and was granted time to file his response to the plaintiffs' application for injunction and also file the defence. That this Court delivered it's ruling to the plaintiffs' application for injunction and gave strict timelines which were ignored. That the defendant was again served with the amended plaint but still failed to file a defence and interlocutory Judgment was entered upon request and the case was set for formal proof. The defendant cannot now therefore claim that it only became aware of the case when they were served with a notice for the Judgment. That as was held in **SHAH .V. MBOGO 1967 E.A 116**, a Court has discretion to set aside a Judgment but not to aid a person who has sought whether by evasion or otherwise to obstruct or delay the cause of justice. That the defendant seeks to obstruct the course of justice and also seeks to set aside a final Judgment which has not been delivered and there is no provision for arresting a Judgment.

The 1st plaintiff averred further that the defendant's defence is a sham and does not raise any triable issues and is grounded on un – substantiated allegations and mere general denials. That the plaintiffs' mall is erected outside the Visibility Diamond and the defendant's action in demolishing the plaintiffs' structure and evicting their tenants was illegal and meant to deprive the plaintiffs of their legally acquired land. That no notice was issued to the plaintiffs before their premises were demolished and this application should be dismissed. Annexed to the replying affidavit are the following documents: -

1. **The affidavit of service by one LEONARD M. MATWALI a process server of this Court dated 11th March 2021.**

2. **A Certificate confirming that the said LEONARD M. MATWALI is a licenced Court process server.**

3. **A copy of this Court's order issued on 4th March 2021.**

4. **An affidavit of service sworn by MR ANDREW KITUYI advocate for the plaintiffs.**

5. **Notification of service by email.**

When the application was placed before me on 6th September 2021 I directed that it be canvassed by way of written submissions. The same were subsequently filed both by **MR TOM MUTEI** instructed by the firm of **TOM MUTEI ADVOCATES** for the defendant and by **MR ANDREW KITUYI** instructed by the firm of **A. W. KITUYI & COMPANY ADVOCATES** for the plaintiffs.

I have considered the application, the rival affidavits and annextures thereto as well as the submissions by Counsel.

The defendant seeks the following substantive orders: -

1. **Stay of proceedings and specifically arrest of the intended Judgment.**

2. **Setting aside of the ex – parte proceedings and hearing of the matter de – novo.**

3. **Leave to defend.**

I shall consider (1) and (2) simultaneously.

It is common ground that the defendant was duly served with the plaint and Summons to enter appearance on 9th February 2021 through it's Legal Officer one **CHRISTINE MACHARIA** at their Nairobi Officer. I have not heard **MR STANLEY GITARI** the defendant's Senior Legal Officer deny service. It is also not in dispute that the defendant did not file any defence and upon request, the Deputy Registrar entered Judgment in favour of the plaintiff as agent the defendant. Among the remedies sought by the plaintiffs are special damages as per paragraph **8B** of the amended plaint as follows: -

"The plaintiffs pray jointly for Judgment against the defendant for the loss of income from the premises of Kshs. 2,457,699/=

monthly until determination of the suit from 3rd February 2021 and a further Kshs. 7,519,000/= being costs of repair and expenses to restrict the premises in operational state."

Apart from the above special damages claim that amount to a total of Kshs. 9,976,699/=, the plaintiffs also pleaded for exemplary and aggravated damages for trespass, declaratory reliefs and any order for permanent injunction. Since service upon the defendant is not in dispute, the role of the Court that remained was only to assess the other damages due.

In **FELIX MATHENGE .V. KENYA POWER LIGHTING COMPANY LTD C.A CIVIL APPEAL No 215 of 2002**, the Court held: -

"The role of the Court after entering interlocutory Judgment was only to assess damages since interlocutory Judgment having been regularly obtained there can never be any doubt that Judgment was final with regard to liability and was unassailable. It was only interlocutory with regard to the quantum of damages."

It is now settled that once interlocutory Judgment has been entered, the question of liability becomes a foregone conclusion – **PAUL MUIYORO t/a SPOTTED ZEBRA .V. BULENT GULBAHAR REMAX REALTORS C.A CIVIL APPEAL No 20 of 2014 [2016 eKLR]**.

As the interlocutory Judgment was properly entered, the Court was entitled, as it did to set down the suit for assessment of the other claims. The power to set aside an exparte Judgment, it has been held, is intended to be exercised in order to avoid injustice or hardship resulting from hardship, accident, inadvertence or excusable mistake. It is not intended to assist a person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the cause of justice. The record herein is clear that as far back as 22nd February 2021, the defendant was represented in Court by **MR JUMA** who sought time to file responses in this matter and was allowed 7 days to do so. Nothing was done. On 3rd March 2021 the defendant, now through **MR WAMALWA**, sought another extension of 14 days on the grounds that **MR MUTEI** Counsel for the defendant was indisposed. That further extension of time was disallowed and the Court agreed with **MR KITUYI** that the defendant was not treating this matter seriously. **MR MUTEI** has rightly conceded that the interlocutory Judgment was regular.

Having said so, it is now well settled that the Court has a wide discretion in setting aside any ex parte Judgment or proceedings. In **PATEL .V. E.A CARGO HANDLING SERVICES LTD 1974 E.A 75**, the Court stated as follows: -

"The main concern of the Court is to do justice to the parties and the Court will not impose conditions on itself to fetter the wide discretion given it by the rules."

In the **UGANDAN** case of **SEBEI DISTRICT ADMINISTRATION .V. GASYALI 1968 E.A 300**, **SHERIDAN J** adopted the following words of **AINLEY J** in **JAMNADAS .V. SODHA GORDANDAS HEMRAJ 1952 7 ULR II**: -

"The nature of the action should be considered, the defence if one has been brought to the notice of the Court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally I think, it should always be remembered that to deny the subject a hearing should be the last resort of a Court." Emphasis added.

In setting aside, a regular exparte Judgment, the Court will normally do so on terms that are just. It will also consider if there are any triable issues. The Court will also take note of **Article 50(1)** of the **Constitution** which provides that: -

"Every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body."

Each case must however be considered on it's own peculiar circumstances. No two cases can be similar in all aspects.

In this case, it is clear that all that the plaintiff has an interlocutory Judgment. The final Judgment is yet to be determined after the plaintiffs closed their case following a formal proof. I did not hear the plaintiffs allege that they will be unable to recall their witnesses if the hearing commences de – novo. Although the Court was informed that **MR MUTEI** had been un – well, no evidence was placed before the Court as proof. It is clear to me however that there was a mistake by Counsel for the defendant because his brief was held by other Counsel in the matter on two occasions and surely they must have appraised him on the progress of the file. He did not therefore have to wait until he was served with the notice of Judgment. A simple request to peruse the file or be served with the proceedings would have sufficed to keep him abreast of the matter and make appropriate orders. But as has been held by superior Courts, the doors of justice should not be closed because a mistake has been made – **MURAI .V. WAINAINA No 4 1982 KLR 38**. I also do not discern any inordinate delay in this matter. The defence annexed to the application cannot be regarded as hollow. It raises triable issues including whether or not there was notice and whether or not the structures erected by the plaintiffs are within the **VISIBILITY DIAMOND** on a Rail/Road level crossing.

I am persuaded that this is a proper case in which this Court can exercise its wide discretion to set aside the interlocutory Judgment, stay the proceedings and arrest the intended Judgment. In doing so however, the Court will make orders that it considers to be just and fair.

With regard to the leave to defend, the summons to Enter Appearance served upon the defendant made it clear that the defence was to be filed within 15 days from date of service. That was not done. However, as the Court of Appeal held in the case of **NICHOLAS KIPTOO** arap **KORIR SALAT .V. I.E.B.C & OTHERS 2013 Eklr per OUKO J A** (**KIAGE J A** dissenting): -

> ***"Deviations from and lapses in form and procedure which do not go to the jurisdiction of the Court or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should raise to it's highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have any invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness."*** per **OUKO JA** (as he then was).

CHRISTINE MACHARIA the Legal Officer of the defendant and who was served with summons to enter appearance on 5th February 2021 is certainly not in the class of persons to whom the rules of procedure are ***"complex and technical."*** She obviously knew what was required of her. It is not clear if she gave instructions to their Counsel as soon as service was effected upon her or if Counsel went to sleep after service. Both of them have been rather cagey on that issue. No wonder in his replying affidavit, the 1st plaintiff describes the application as ***"full of falsehood lies."*** Having said so, the right to be heard is an inalienable one protected under the Constitution and the rules of Natural Justice but as I have already stated above, each case must be considered on it's own peculiar circumstances. The plaintiffs have yet to obtain a final Judgment in this case and the only prejudice which they will suffer is a further delay in the determination of this case. That is a matter that can be atoned for with appropriate orders including costs.

The application for filing a defence out of time is hereby also allowed.

Ultimately therefore, having considered the Notice of Motion dated 21st July 2021, I make the following orders: -

1. The ex – parte proceedings herein are set aside and the intended Judgment is arrested. The matter to commence de – novo.

2. The defendant shall within 10 days from the date of this ruling file and serve it's defence and witness statements as well as any documentary evidence.

3. The defendant shall deposit the sum of Kshs. 9,976.699/= in an interest earning account in the names of both the plaintiffs and defendant's Counsel within 10 days from the date of this ruling.

4. The plaintiffs shall have 5 days from the date of service upon them of the defence, statements and any documents, to file and serve their reply to the defence as well as any further documents in support of their case.

5. The defendant shall also pay thrown away costs to the plaintiff assessed at Kshs. 15,000/= within 10 days from the date of this ruling.

6. In default of any of the above, the ex – parte Interlocutory Judgment shall revert and the Court shall proceed and deliver it's Judgment.

7. The matter shall be mentioned virtually before the Deputy Registrar on 15th November 2021 to either take a date for pre – trial, if there will have been compliance, or a date for Judgment which shall be delivered by electronic mail, in case of non – compliance.

Boaz N. Olao.

J U D G E

28th October 2021.

Ruling dated, singed and delivered at **BUNGOMA** on this 28th day of October 2021 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

Boaz N. Olao.

J U D G E

28th October 2021.

Explanatory notes: -

This ruling was due on 20th September 2021. However, I was un – well. The delay is regretted.

Boaz N. Olao.

J U D G E

28th October 2021.