



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**MILIMANI LAW COURTS**

**HCCC NO. 337 OF 2018**

**VEHICLE AND EQUIPMENT LEASING LIMITED.....PLAINTIFF**

**VERSUS**

**KEROCHE BREWERIES LIMITED.....DEFENDANT**

**RULING**

1. Upon the request by the Plaintiffs, judgment was entered on 5<sup>th</sup> December 2019 against the Defendant. A Decree was subsequently issued on 11<sup>th</sup> December 2018 as follows:-

1. That Kshs.5,157,533.91/= being the rental arrears with accrued interest thereon at 24% p.a.

2. That Ksh.2,077,910.28/= being the contractually agreed sum that is to say 100% of the remaining rental /lease fees to the end of lease period/term on account of the 200 Refrigerators chargeable in respect of the first batch and in respect of the second batch.

3. That Kshs. 103,895.51/= on account of early break costs.

4. That an order compelling the Defendant to return 200 fridge to the Plaintiff, consistent with the brand and model leased, or in the alternative, reimbursement of Kshs. 13,774,101/= being the cost of replacement of the 200 refrigerators illegally detained and/converted by the Defendant i.e USD 57,072.00 (as regards model FSL 270) plus USD 78,300 as regards Model FV 280, total USD 135,372 at the exchange rate of Kshs. 101,75/= to the dollar at the time of filing suit.

5. That interest at the Court rate on (a) and (b) above from the date of filing suit to payment in full.

6. That Costs of the suit.

2. The Defendant has through a Notice of Motion dated 7<sup>th</sup> May 2019 sought the setting aside of the Decree and the deeming of their defence filed on 23<sup>rd</sup> April 2019 as duly filed and properly on record.

3. If an *ex parte* judgment has been entered irregularly then it must be set aside as a matter of right. If on the other hand the entry is regular then the setting aside is discretionary and to be considered in exercising that discretion is whether the Defence proposed to be filed raises triable issues.

4.. Although there has been back and forth accusations made because some of the Court proceedings herein are missing, this Court proposes to resolve this straightforward matter without being drawn into that conversation.

5. The record shows that the Defendant was served with summons to enter appearance on 17<sup>th</sup> October 2018. About thirteen days later the Defendant entered Appearance herein. The Memorandum of Appearance was served upon counsel for the Plaintiff on the same day, that is, on 30<sup>th</sup> October 2018.

6. The Defendant had up to 13<sup>th</sup> November 2018 to file Defence but that did not happen.

7. The Court record shows that the firm of Kilukumi & Co advocates came on record on 10<sup>th</sup> June 2019 and whilst the firm filed a Notice of

Change of Advocates, this was unnecessary because the Defendant Corporation had filed a Memorandum of Appearance in person and a Notice of Appointment of Advocate was sufficient.

8. This Court is inclined to grant the order sought for two reasons. For some reason, at the time of requesting for Judgment the Plaintiff indicated that the Defendant had failed to enter appearance and to file Defence. See the request for Judgment of 20<sup>th</sup> November 2018 and filed on the same date. This was not entirely true because the Defendant had entered appearance on 30<sup>th</sup> October 2018 and the Plaintiff's advocates would be well aware of this because they had been served with a copy of the Memorandum of Appearance.

9. A party moving the Court, and particular in the absence of the other side, ought to be particularly careful to make accurate representation to the Court. On this occasion the Plaintiff made the Defendant's default look worse than it actually was. While the Court cannot say that the Plaintiff intended to mislead the Court, I will exercise discretion in favour of the Defendant for purposes of striking a blow for the need of parties to be careful about the accuracy what they represent to Court. On the basis that the request for Judgment was in a way misleading, this Court would set aside the Judgment entered on 5<sup>th</sup> December 2018.

10. Secondly, it was conceded by the Plaintiffs' counsel that they would be willing to have judgment set aside in respect to items (b), (c) and (d) of the Decree (I think he meant 2, 3, and 4) as these are not liquidated sums. The concession is well taken as the prayers should not have been granted without formal proof.

11. All in all the Court allows the application of 2<sup>nd</sup> July 2019 with costs to the Defendant.

**Dated, Signed and Delivered in Court at Nairobi this 17<sup>th</sup> Day of April 2020**

**F. TUIYOTT**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this Ruling has been delivered to the parties online with their consent. They have waived compliance with Order 21 Rule 1 of the *Civil Procedure Rules* which requires that all Judgments and Rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159 (2) (d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of Civil disputes.

**F. TUIYOTT**

**JUDGE**

**PRESENT:**