



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 33 OF 2010

SIMBA COMMODITIES LIMITED PLAINTIFF

V E R S U S

KENYA PORTS AUTHORITY1ST DEFENDANT

AWANAD ENTERPRISES LIMITED2ND DEFENDANT

JUDGMENT

1. Plaintiff **SIMBA COMMODITIES LTD** filed this case against both Defendants on 9th November 2010 claiming Kshs. 4,195,335/- being the value of two of Plaintiff's containers containing sugar. That container was amongst consignment of 20 containers under the bill of lading MP900990. That consignment was shipped on motor vessel "**JOLLY ROSSO**" from Maputo to Mombasa Port. Plaintiff pleaded breach duty by the Defendants for failing to deliver two of those containers.
2. 2nd Defendant, **AWANAD ENTERPRISES LTD**, filed through its then Advocates, Robson Harris & Co. Advocates, a Notice of Appointment on 17th November 2010.
3. On 16th December 2010 the Plaintiff requested for judgment against the 2nd Defendant in default of an appearance.
4. On 10th January 2011 the Deputy Registrar of this Court entered judgment against the 2nd Defendant as sought by Plaintiff for the amount claimed in the Plaint.
5. The 2nd Defendant filed its defence on 11th January 2011 through its then firm of Advocates.
6. The above is the chronology of events in this case. The 2nd Defendant filed a Notice of Motion dated 28th February 2011 seeking an order to stay execution of the judgment entered on 10th January 2011; an order to set aside ex parte judgment against it; an order declaring that the Notice of Appointment filed on behalf of 2nd Defendant to constitute a valid appearance; and an order deeming the defence filed on behalf of 2nd Defendant as properly filed and served.
7. I have considered the affidavit evidence, the parties written submissions and oral submissions before Court. Having done so I will consider the procedures and case Law for application to set aside ex parte judgment.

8. The ex parte judgment against 2nd Defendant was entered under the provision of Order 10 Rule 4(1) of the Civil Procedure Rules. Rule 11 of that order is in the following terms-

“Where judgment has been entered under this order the Court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

That is the discretion donated to the Court.

9. That discretion has been the subject of many previous decisions and to just name but a few is as follows:-

- i. **PATEL –Vs- EA CARGO HANDLING SERVICES [1974]EA 75**. The Court

stated in that case as follows-

“There are no limits or restrictions on the Judge’s discretion except that if he does vary the judgment he does so on such terms as may be just. 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.”

- ii. **SHAH –Vs- MBOGO [1967]EA**. In that case the Court had this to say-

“This discretion is intended so as to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who had deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

- iii. Similarly, in the **CMC HOLDINGS LTD –Vs- NZIOKI [2004]I KLR** the Court expressed itself thus-

“We are fully aware that in an application before a Court to set aside ex parte judgment, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously.”

10. Judgment was entered in default of appearance on 10th January 2011. By that date the operative Civil Procedure Rules were the Civil Procedure Rules of 2010. Looking at Order 6 of those Rules it does become very clear the purpose for which a Memorandum of Appearance is used in a suit. It is clear that its purpose is to inform the opposite parties the address of service. Order 6 Rule 3(1) provides-

“The Advocate of the Defendant shall state in the Memorandum of Appearance the address for service being the place of business within Kenya and postal address.”

Rule 2(4) then provides-

“Where a defence contains the information required by Rule 3 it shall where necessary be treated as an appearance.”

11. Since those Rules require that a Defendant do provide address of service and bearing in mind that the 2nd Defendant had filed a Notice of Appointment, which Notice had the full address of the 2nd Defendant’s Advocate and bearing in mind the discretion afforded to a Court considering an application to set aside ex parte judgment I do find that there is merit to grant the 2nd Defendant’s prayer to set aside ex parte judgment.

12. The 2nd Defendant's defence was filed out of time, if one considers the Notice of Appointment to represent a Memorandum of Appearance. I have looked at that defence and I do find that on a prima facie basis it raises triable issues that the Court should consider. I appreciate the Plaintiff's argument in regard to documents in its possession which seem to suggest the lost containers were cleared by an employee of the 2nd Defendant. But that as it may be I find that there is need to allow the 2nd Defendant to ventilate its defence that such clearance of those two containers were done by a person who fraudulently used their employees Port Pass No. 9047782. In that regard I am guided by a Court of Appeal decision **BARAKA APPAREL EPZ (K) LTD -Vs- ROSE MBULA OJWANG T/A FAIDA 2002 CATERER (2007)eKLR** where the Court held-

“It is our humble view that where there is a Defence which raises bona fide triable issues, or even a solitary bonafide issue, the same ought to be allowed to proceed to hearing and final determination on merit.”

13. Before I conclude this Ruling I need to state that this is a case that should be tried before the Chief Magistrate's Court. I will therefore order for its transfer.

CONCLUSION

14. Having made the above findings I grant orders that-

- a. **The ex parte judgment entered on 10th January 2011 against 2nd Defendant is hereby set aside.**
- b. **The Court declares the Notice of Appointment filed on 17th November 2010 on behalf of 2nd Defendant to be a Memorandum of Appearance.**
- c. **This case is hereby transferred to Mombasa Chief Magistrate's Court.**
- d. **The Plaintiff is awarded costs of the Notice of Motion dated 28th February 2011.**

DATED and DELIVERED at MOMBASA this 5TH day of MARCH, 2015.

MARY KASANGO

JUDGE