REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case 501 of 2011

RIFT VALLEY RAILWAYS LIMITED.....PLAINTIFF

VERSUS

GARISSA PARCEL SERVICES LIMITED…….....……..1ST DEFENDANT

ABUBAKAR MOHAMED.....2ND DEFENDANT

R U L I N G

By a Notice of Motion expressed to be brought under the provisions of Order 10 Rule 11 of the Civil Procedure Rules, 2010, Sections 1A, 1B, 3, and 3A of the Civil Procedure Act, Cap 21 and all other enabling provisions of the law and procedure, the Defendants seek the following orders:

1. This Honourable Court be pleased to certify this Application as urgent.

2. This Honourable Court be pleased to dispense with the requirement of service and hear this Application ex parte in the first instance.

3. Pending the hearing and determination of this Application, this Honourable Court be pleased to issue and/or grant an Order for stay of execution of the ex parte interlocutory default Judgement entered herein.

4. Pending the hearing and determination of this Application, this Honourable Court be pleased to issue and/or grant an order releasing the 1st Defendant's Motor vehicle Registration Number KBN 429F Mitsubishi Truck seized or attached by Messrs Gladsom Auctioneers on Thursday, 5th July 2012 in execution of the ex parte interlocutory default Judgement entered herein.

5. This Honourable Court be pleased to set aside the ex parte Interlocutory default Judgement entered herein and allow the Defendant to defend this suit on merits.

6. This Honourable Court be pleased to issue and/or grant an Order releasing the 1st Defendant's Motor Vehicle Registration Number KBN 429F Mitsubishi Truck seized or attached by Messrs Gladsom Auctioneers on Thursday, 5th July 20102 in execution of the *ex parte* interlocutory default Judgement entered herein.

7. The costs of this Application be in the cause.

When the said application came up for directions on 20th September 2012, **Mr. Wananda**, learned counsel for the defendants clarified that there is no judgement against the 2nd defendant hence the application is directed against the judgement entered against the 1st defendant only. The application is supported by an affidavit sworn by **Abubakar Salim Omar**, a Director of the 1st Defendant on 6th July 2012. According to the said affidavit, the 1st defendant was unaware of the judgement herein as the matter was being handled by the 1st defendant's insurers **Kenindia Assurance Company Limited** (hereinafter referred to as the Insurance Company). According to the said affidavit the said Insurance Company had instructed a law firm to act for the defendant but due a mix up between the Insurance Company and the Advocates, the latter neither entered appearance nor filed a defence. The defendant are however unaware of any previous notices informing the defendants of the judgement or of attachment. As a result of the foregoing, the defendants have now instructed their own independent advocates to act for them and it would be unjust to penalise them for the said mixed-up. Considering the fact that the defendant's driver was acquitted in the traffic case, it is deposed that the defendants have a strong defence. Accordingly the defendants seek that the application be allowed. There was also a supplementary affidavit sworn by the same deponent on 10th July 2012 to which was annexed a copy of the draft defence which in the deponent's view was inadvertently omitted from the supporting affidavit.

In opposition to the application the plaintiff filed the following grounds of opposition:

1. **The application is totally (sic) defective.**

2. **The application has no merit.**

3. **The application is an abuse of the court process.**

The application was prosecuted by way of written submissions. According to the submissions filed on behalf of the defendants, the ex parte judgement entered herein is for a substantial sum of Kshs. 7,188,538.00 being compensation for damage caused to the plaintiff's bridge in Mombasa by the defendants' motor vehicle. In the said submissions the defendants reiterated the contents of the said affidavits and contend that the defendants' vehicle was removed and driven to the Auctioneer's premises in breach of Rule 12 of the Auctioneers Rules, 1997 and that breach is sufficient to warrant the attachment being set aside or nullified. Since the vehicle attached is co-owned by the defendants and Equity Bank which is not a party to these proceedings it is submitted that the said vehicle cannot be attached or sold in execution of the Judgement herein. Relying on **Shah vs. Mbogo & Another [1967] EA 116**, it is submitted that this discretion is intended so to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.

On the part of the plaintiff it is submitted that the defendants do not dispute service of summons yet the application is brought under Order 10 rule 11 of the Civil Procedure Rules which provision anticipates a challenge by the applicant of the ex parte Judgement based on non-service of Summons to enter appearance. There is no affidavit from the insurers, it is submitted confirming the said insurer's involvement in the matter hence paragraph 7 of the supporting affidavit ought to be expunged for containing hearsay matters. It is submitted that the supporting affidavit contains untruths and the court's discretion is to be exercised in a fair and judicial manner and cannot be intended to assist a party that is not candid or one who has been indolent. It is further submitted that the attack on the Auctioneer's conduct even if true does not justify the setting aside of the judgement. Citing **Njagi Kanyunguti alias Karingi Kanyunguti & 4 Others vs. David Njogu Civil Appeal No. 181 of 1994 [1997] KLR,** it is submitted that the Court is enjoined to consider all the circumstances of the case, both before and after the Judgement being challenged, before coming to a decision whether or not to vacate the Judgement. It is submitted that there is no indication of what steps the defendants took to follow up the matter an indication of inaction on the part of the defendants. It is submitted that the plaintiff is a person who has sought by evasion and deliberately to obstruct or delay the cause of justice and hence the application ought to be dismissed.

I have considered the application, the affidavit in support of the application, the grounds of opposition as well as the rivalling submissions and the authorities cited. In **CMC Holdings Limited vs. Nzioki [2004] 1 KLR 173** the Court of Appeal expressed itself as follows:

"**In an application for setting aside ex parte judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously….. In law the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle. In the instant case the learned trial magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant's unchallenged allegation that its counsel did not inform it of the hearing date for the hearing that took place *ex parte* and hence it would appear was true and not if true, the effect of the same on the *ex parte* judgement was entered as a result of the non-appearance of the appellant and on the entire suit. The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate...The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the *ex parte* judgement is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues. The law is now well settled that in an application for setting aside ex parte judgement, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if draft defence is annexed to the application, raises triable issues. The Court has wide discretion in such cases to set aside *ex parte* judgement. In the instant case, the defence and counterclaim was already in the file when the matter was heard *ex parte* and the trial magistrate stated that she considered the same and dismissed the same defence and counterclaim when the appellant was not in court to put forward its case. Further it appears that certain matters raised in the defence were not considered at all and indeed could not be considered without the appellant's input..... What the Trial Court should have done when hearing the application to set aside the *ex parte* judgement was to ignore her judgement on record and look at the matter afresh considering the pleadings before her and see if on their face value a prima facie triable issue (even if only one) was raised by the defence and counterclaim. If the same was raised, then whether the reasons for the appellant's appearance were weak, she was in law bound to exercise her discretion and set aside the *ex parte* judgement so as to allow the appellant to put forward its defence. Of course in such a case, the applicant would be condemned in costs or even ordered to pay thrown away costs. The learned judge should not have considered what the learned Trial Court had concluded on the evidence before her but should have in the same way looked at the pleading and considered whether a triable issue was raised by the defence and if so, then the appeal should have been allowed".**

In **Branco Arabe Espanol vs. Bank of Uganda [1999] 2 EA 22, Oder, JSC** stated:

"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered".

The defendants' failure to enter appearance and file defence was due to the fact that they was lulled into a sense of false security that their case was being handled by their insurers. The plaintiff has challenged the defendants' version as being inconsistent with the documents exhibited. However, the depositions in the supporting affidavit have not been challenged by way of an affidavit thereby rendering the same largely

uncontroverted. I have perused the documents exhibited and in my view the defendants' contention that the matter was being handled by their insurance company and that there was a misunderstanding between the said insurance company and the advocates who were instructed is clearly borne out by the documents. I have also looked at the draft defence and I am unable to say that the same does not raise triable issues. A triable issue is not necessarily an issue which must succeed but one that demonstrates a plausible defence.

One other issue that has caused me concern is the propriety of entering a final judgement. Whereas the claim was pecuniary in nature, taking into account the nature of the claim involved it is doubtful whether the claim fell within the category of a liquidated claim in order for a final judgement to be entered. That, however, does not fall for determination in light of my findings herein.

Taking all the circumstances into account, I am prepared to set aside the ex parte judgement entered against the 1st defendant herein in order to afford all the parties an opportunity of being heard. In **Sarfraz Motors Limited & Another vs. Kisii Hardware Civil Appeal No. 98 of 1990**, the Court of Appeal held that 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 any delay occasioned should be considered, and finally, it should always be remembered that to deny the subject a hearing should be the last resort of a court.

With respect to costs, it is the defendants' contention that they were never served with both auctioneers notices and a notice of judgement under Order 22 Rule 6 of the Civil Procedure Rules. In **Sarfraz Motors Limited & Another vs. Kisii Hardware** (supra) **Kwach, JA** expressed himself as follows:

"In this case the Judge awarded the respondent a very large sum in respect of damages and refused to reconsider the matter when objection was raised by the appellants at the earliest possible opportunity. He also did not deal adequately with the point about notice under Order 21 rule 6 of the Civil Procedure Rules. He dealt with and determined the application on very peripheral and secondary issues".

It follows that the Notice of Motion dated 6th July 2012 succeeds, the ex parte judgement entered herein against the 1st defendant is set aside together with all consequential orders. The 1st defendant's properties attached pursuant to the said ex parte judgement be released. The defendant is granted leave to file and serve his defence within 14 days. As the procedure for attachment was not followed there will be no order as to costs.

Dated at Nairobi this 9th day of October 2012

G V ODUNGA
JUDGE

Delivered in the presence of

Mrs Githae for Plaintiff

Mr Wananda for the Defendant