



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(Coram: Kneller, Hancox, JJA and Nyarangi, Ag JA)**

**CIVIL APPEAL 48 OF 1983**

**BETWEEN**

**KENYA RAILWAYS CORPORATION.....APPELLANT**

**AND**

**SELFEES SILVERING COMPANY LIMITED.....RESPONDENT**

**(Appeal from a ruling of the High Court of Kenya at Mombasa (Aragon, Ag J) dated May 16 1983  
In**

**Civil Suit 1012 of 1982)**

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**JUDGMENT OF THE COURT**

The Kenya Railways Corporation, the appellant, asks this court to set aside the order of the High Court (Aragon, Ag J) in Mombasa of May 16, 1983, and direct that its [www.kenyalawreports.or.ke](http://www.kenyalawreports.or.ke) summons in chambers of May 5, 1983, be restored to the lists and heard by a different judge.

The respondent is a limited liability company and the appellant, a body corporate established under the Kenya Railways Corporation Act (Cap 397). The respondent's claim was that its Mombasa clearing and forwarding agent delivered 30 cases of float glass on December 4, 1981, to the appellant to transport from Kilindini to Nairobi and paid it Shs 5,726 to do so. The appellant undertook the carriage of these goods, upon the terms contained in its owner's risk Consignment Note 013541. The appellant delivered 21 cases in the same good order and condition as they were in when railed, but 9 were damaged, so that 108 pieces of this glass were damaged, for which the respondent claimed Shs 119,568/60.

The respondent served written notice containing the particulars of the claim to the appellant's Managing Director, waited at least a month for a reply and or payment of that sum and in default, filed its plaint for it on October 18, 1982. All this complied with the provisions of section 87 of the Act (ibid). Appearance was entered for the applicant by the Attorney-General on November 24, 1982.

The respondent's advocates, Bryson, Inamdar & Bowyer, sent a letter on December 17, 1982 asking the Attorney-General to file the appellant's defence before the end of the year. On January 12, 1983, they wrote again saying that if the appellant's defence was not filed by January, 23, they would apply for judgment against it in default. Still no defence was filed, so the respondent made the application, and judgment in default was entered for it against the application on February 3, 1983. The Attorney-General

then filed the appellant's defence on March 10, 1983. It admits most of the respondent's allegations in the plaint, but denies 9 cases were not delivered in sound or the same condition in which they were accepted. The respondent had also pleaded:

"6 ... it was the duty of the defendant [appellant], or the defendant expressly or impliedly contracted to take due and proper care of the said 30 cases and to deliver them to the plaintiff [respondent] at Nairobi in the same condition in which they were when railed." .with which the appellant did not specifically deal, but appears to have tacitly admitted. The Attorney-General applied by, summons in chambers of May 5, 1983, under Order IXA Rules 10 and 11 (Cap 21), to have the judgment set aside.

It was supported by the affidavit of a Nairobi State Counsel, Mr Ogoti Kenani, who explained the default was .due to his being on leave, when the defence was due, and finding this was still so when he returned, he buckled to and had it ready by March 4, but it took 6 days by post to reach the Mombasa High Court registry. It would seem, therefore, that Mr Kenani was on holiday from November 24, 1982, to March 4, 1983, and someone in the Attorney's chambers marked the file for his attention, though he was not there. Mr Kenani also attested in his affidavit to the appellant's written statement of defence and added that it was a good one.

The learned judge in his May, 16 ruling, said the delay and failure to file the defence in time was due to the negligence of a clerk in the Attorney-General's chambers, from which he expected a higher standard than that of private practitioners. He did not condone this negligence and he dismissed the application. Order IXA Rules 10 and 11 provide:

"10 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.

11 Applications under this Order shall be made by summons/" There were two grounds of appeal. First, the ruling of the learned judge was delivered without hearing either party to the application and, secondly, the proceedings were, therefore, against the rules of natural justice. Today, Mr Nanji, for the respondent, concedes that the learned judge did not hear either party so faced with this serious error of law, the appeal must be allowed with no order as to costs, the chamber summons filed on May, 5 must be heard by another judge according to the usual correct rules of procedure and we so order.

**Delivered at Mombasa, this 30th day of January, 1984.**

**A A KNELLER**

**JUDGE OF APPEAL**

**A R W HANCOX**

**JUDGE OF APPEAL**

**J O NYARANGI**

**AG JUDGE OF APPEAL**

**I certify that this is a true copy of the original**

**DEPUTY REGISTRAR**