REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 161 OF 1975

KENYA SAFARI LODGES & HOTELS LTD..... PLAINTIFF

VERSUS

TEMBO TOURS & SAFARIS LTD.....DEFENDENT

ORDER

The defendant, a limited liability company, applies under order IXA rule 10 to have set aside a judgment, entered against it on April 2, 1975 under rule 3(1) of that order in default of appearance, for payment to the plaintiff of a sum of Kshs. 20,387.31 with interest and costs.

The suit was filed on January 23, 1975 claiming payment of the said sum as being the balance due to the plaintiff in respect of lodging and boarding charges, money paid for and to the use of the defendant, and services rendered by the plaintiff to or at the request of the defendant or the payment whereof was undertaken by the defendant. The summons to enter appearances was sent on February 11, by the plaintiff's advocates, Messrs Kaplan & Stratton, by registered post to the defendant at its postal address, P O Box 20220, Nairobi being the address shown in the records of the registrar of companies. No appearance was entered and on April 2, judgment in default of appearance was entered in favour of the plaintiff.

On June 4, 1975 the defendant applied by summons to have the judgment set aside. The summons was supported by an affidavit of Mr. Kalsi, a director of the defendant company, in which he stated that the first intimation that he had had of the judgment was when the court brokers proceeded to levy execution against the defendant's goods. He said that he was informed by the defendant's auditors a firm known as Cook Sutton and Company, who were the renters of box number 20220, Nairobi, that at no time had they received the registered letter containing the summons sent by the plaintiff's advocates. The affidavit further stated that, following an enquiry from the General Post Office at Nairobi, the deponent had been told that the said registered letter was returned to the plaintiff's advocates on April 2, 1975.

The plaintiff, in resisting the application, filed an affidavit by its credit controller, Mr. Khandwalla which stated in paragraph 6 that the defendant

> "failed to take the delivery of the registered letter from the post office"

and that the letter was returned to the advocates unclaimed on April 3, 1975 after judgment had been entered against the defendant on the previous day. On November 5, 1975 a second affidavit by Mr. Kalsi was filed in reply to that of Mr. Khandwalla but no attempt is there made to challenge the correctness of the contents of paragraph 6 of Mr. Khandwalla's affidavit. The plaintiff relies upon the provisions of order V rule 2 of the Civil Procedures Rules and section 391(1) of the Companies Act (cap 486). By the former it is provided that, subject to any other written, law, where a suit is against a corporation the

summons may be served either (a) on the secretary, director or other principal officer of the corporation, or (b) by leaving it at, or sending it by post addressed to, the registered office of the corporation or, if none, then the place or postal address where the corporation carries on business. There can be no doubt that, for the purpose of this rule, whatever may have been its fate after having been delivered by the plaintiff's advocates to the post office, the packet containing the summons, and therefore the summons itself, was effectively served on the defendant when it was so delivered. Similarly section 391(1) of the Companies Act declares that a document may be served on a company either (a) by personally serving it on an officer of the company, or (b) by sending it by registered post to the registered postal address of the company in Kenya, or (c) by leaving it at the registered office of the company.

Here, again, there can be no doubt that when it was posted by registered post the summons was effectively served on the defendant for the purposes of this section. For these reasons I must hold as a matter of law that service of the summons was validly effective on the defendant on February 11, 1975.

The next question is as to whether, despite such service and the failure of the defendant to enter an appearance, the circumstances are such as to justify the court in setting aside the judgment.

The matters of fact which have been disclosed warrant a reasonably close examination. In the first place I must take judicial notice, as a matter of general or local notoriety, of the practice of the post office authorities in Nairobi of sending to the addressee of a registered postal package at his Post Office bore number a printed notification informing him of the fact that the package is awaiting collection at the local post office. The procedure is that the package is then delivered to the addressee in exchange for the printed notification duly signed by him as a receipt. It is to be observed that in neither of his affidavits does Mr. Kalsi either admit or deny that the defendant received such a notification. I cannot pretend to be unaware of the fact that if a person receives such notification and has reason to think that the registered letter to which it relates is such as he would prefer not to receive an effective method of declining to receive it is to refrain from presenting the notification at the post office. In present circumstances, the onus is on the defendant to satisfy the court as to its position on this matter.

Although the defendant's auditors may well not have received such a notification (which is not surprising since it would not have been addressed to them) there is nothing before me to show that the defendant did not itself receive at its box number this notification informing it that a registered packet was in the post office awaiting collection. If the defendant received this notification and took no action on it, the post office authorities would no doubt in the course of time have returned the registered letter to the senders, that is, the plaintiff's advocates. This in fact is what occurred for enquiries by the defendant elicited that the postal authorities returned the letter to the advocates on April 2, 1975 and the latter say that they received on the following day. All this is consistent with the omission by Mr. Kalsi in his affidavit to challenge the correctness of Mr. Khandwalla's assertion that the defendant "failed to take the delivery" of the registered letter.

It is also to be observed that no affidavit made by any person on behalf of the auditors has been filed, nor has any explanation been offered for the absence of such an affidavit. While it is clear that the registered letter containing the summons was not received by that firm there is nothing in evidence to displace the possibility that that firm found the printed notification in its post office box and, with or without informing the defendant, returned it to the post office. Mr. Kalsi in paragraph 3 of his second affidavit suggests that if the auditors had received this notification (to which he refers as a registered slip) there would have been no reason for them not to collect the registered letter. Yet they do not deny receiving such notification and the circumstances remains that the notification was not exchanged at the post office for the registered letter as is clear from the fact that the letter was itself returned by the post office authorities to the plaintiff's advocates. From the evidence I find that the summons was dispatched by registered post addressed to the defendant at its registered address and that the packet containing the summons was never collected by the defendant but was returned by the post office to the plaintiff's advocates on April 3, 1975 as having been "unclaimed."

In the absence of any evidence of suggestion to the contrary, I consider it highly likely on the balance of probabilities that the usual notification was given to the defendant in the customary way of the fact that

this registered letter was in the hands of the post office authorities awaiting collection and that the reason for its return to the advocates was the failure of the defendant to present, or cause to be presented, the notification to the post office and to collect the letter.

One more matter, however, remains to be considered. The defendant, in support of its application, contents that it has both a good defence on the merits to the plaintiff's claim and a valid counterclaim for a sum of Kshs.16,000 paid by it to the plaintiff, each of these being based upon an alleged mistake of law and of fact. This brings into the picture the decision of the House of Lords in *Evans v Bartlam*, [1937] AC 473, where the principles governing the setting aside of default judgments were considered. "In a case like the present," said Lord Wright (as page 489) "there is a judgment which, though by default, is a regular judgment, and the applicant must show grounds why the discretion to set it aside should be exercised in his favour. The primary consideration is whether he has merits to which the court should pay heeds; if merits are shown the Court will not *prima facie* desire to let a judgment pass on which there has been no proper adjudication …….. Here the appellant shows merits…… He clearly shows an issue which the court should try…….The court might also have regard to the applicant's explanation why he neglected to appear after being served, though as a rule his fault (if any) in that respect can be sufficiently punished by the terms as to costs or otherwise which the court in its discretion is empowered by the rule to impose".

In view of these factors and not without some hesitation, I will set aside the judgment on terms, namely, that the defendant do within the next 21 days file its defence and counterclaim and pay into court the said sum of Kshs 20,387.31, there to await the outcome of the case. The plaintiff will have the costs of the application and all costs thrown away (including costs of execution) in any event. Liberty to each party to apply.

Dated and delivered at Nairobi this 19th day of December, 1975.

L.G.E HARRIS

JUDGE