IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Tunoi, O'Kubasu & Githinji JJ A

CIVIL APPEAL NO 298 OF 2001

MUTHAIGA ROAD TRUST COMPANY LIMITED …….. APPELLANT

VERSUS

FIVE CONTINENTS STATIONERS LTD

DEEPAN SHAH

PANKAJ THAKER………..…………………….........….DEFENDANTS

(Appeal from the ruling and order of the High Court at Nairobi (Visram J)

dated July 31, 2001 in HCCC No 1707 of 2000)

JUDGMENT

This is an appeal from the ruling of the Superior Court (Visram J) delivered at Nairobi on 31st July, 2001 in which the learned Judge set aside an *ex parte* judgment which had been entered on 22nd December, 2000.

The appellant herein, Muthaiga Road Trust Company Limited, sued the three defendants by way of a plaint seeking judgment against the defendants jointly and severally for:-

"(a) Shs.1,180,551.40.

(b) Interest thereon at the rate of 25% per annum with effect from 1st July 2000 until payment in full.

(c) Costs.".

The relevant paragraphs of the plaint were as follows:-

"1. The plaintiff is a limited liability company incorporated in Kenya whose address for the purpose of this suit shall be care of Onyango, Ohaga & Company, Advocates, 2nd Floor, 20th Century Plaza Mama Ngina Street, P O Box 59113, Nairobi.

2. The 1st defendant is a limited liability company (service by the plaintiff's advocates).

3. The 2nd and 3rd defendants are adults of sound mind residing and carrying on business for gain in Nairobi. (service by the plaintiff's advocates).

4. The plaintiff is registered as proprietor as lessee of all that piece of land known as LR No 214/250 situated in the Muthaiga area of Nairobi on which there is erected a building known as "Mobil Plaza' comprising of shops, offices and other accommodation.

5. The 1st defendant was until 30th June, 2000 a tenant in the said Mobil Plaza and occupied the premises identified as Unit No 19.

6. There thus, at all material times existed a landlord and tenant relationship between the plaintiff and the 1st defendant.

7. The 2nd and 3rd defendants, in consideration of the plaintiff granting to the 1st defendant a lease of the suit premises agreed and covenanted with the plaintiff that if at any time during the term of the 1st Defendant's tenancy the said 1st defendant made default in payment of the rents or in observing any of the other terms of the tenancy, the said 2nd and 3rd Defendants would pay the rents and observe the covenants in respect of which the 1st defendant was in default.

8. The 1st defendant terminated its tenancy of the Plaintiff's property with effect from 30th June 2000 to which time it was indebted to the plaintiff in the sum of 1,180,551.40 in respect of outstanding rents, service charges and electricity consumption charges. 9. In accordance with the tenancy agreement between the plaintiff and the 1st defendant, all amounts in arrears were to accrue interest at the rate of 6% per annum above the base rate published by Barclays Bank of Kenya Limited from time to time or 25% per annum from the date of default until payment in full.

10. The Plaintiff's claim against the Defendants is for payment of the sum of Shs1,180,551.40 together with interest thereon at the rate of 25% per annum from 1st July 2000 until payment in full."

The defendants failed to enter appearance and consequently the Principal Deputy Registrar of the High Court entered judgment as prayed in the plaint. That judgment was entered on 22nd December, 2000.

After that judgment had been entered the defendants took out a Chamber Summons application stated to be brought under "order IXA rules 5, 6 and 10 of the Civil Procedure Rules and section 3A of the Civil Procedure Act" seeking orders that the *ex parte* interlocutory judgment entered in default of appearance be set aside, that there be a stay of execution and that the annexed defence be deemed as filed. That is the application that came up for determination before the Superior Court.

The learned judge was satisfied that service had been effected on the 1st and 2nd defendants but since he was of the view that the defence raised triable issues he set aside the *ex parte* judgment and allowed the defendants application. In concluding his ruling the learned Judge stated *inter alia*:-

"It is clear from the Court records that Jackstone Oyia Owidhi effected service on the first and second defendants per his affidavit of service dated 14th

November 2000. There is no evidence of service on the third defendant. Although service on the first defendant is contested as having been on a non-officer (Mr. Sharaj), I do not think it has a serious effect as the summons were left in the Company's premises which is proper service under order V rule 2. Mr Ohaga's argument that the matter did not require formal proof as the claim is liquidated and not pecuniary cannot, with respect, stand. The word "pecuniary" denotes a monetary relationship. A liquidated sum is pecuniary and cannot be otherwise. The matter should have gone for formal proof under order IXA rule 5. I am satisfied that there is a defence on the merits of the case raising triable issues and hereby set aside the ex parte judgment of 22nd December, 2000 under order IXA rule 10."

The appellant being dissatisfied with the above ruling filed this appeal citing a total of eight grounds of appeal.

In his submission, Mr Ohaga, for the appellant, contended that as this was a liquidated claim and the learned judge having found that the service was proper, all he needed to consider was whether there was a *bona fide* defence. Mr Ohaga went on to submit that looking at the letters addressed to the appellant it was clear that there was no dispute as regards the amount claimed since all the defendants were asking was to be given time in which to pay.

On his part, Mr Musili, for the defendants, urged us not to interfere with the ruling of the Superior Court. As regards letters referred to by Mr Ohaga, it was Mr Musili's contention that these did not refer to any figures. It was Mr Musili's view that the appellant should have gone for formal proof. He asked us to dismiss the appeal with costs.

At the commencement of this judgment, we set out what we thought to be pertinent paragraphs of the plaint as they give a clear picture of what the appellant was claiming from the respondents. We also set out the relief sought. All that the appellant was seeking was judgment against the defendants, jointly and severally for the sum of Shs 1,180,551.40 plus interest at the rate of 25% pa from 1st July, 2000 until payment in full and costs of the suit. This amount (according to paragraph 8 of the plaint) was in respect of outstanding rents, service charges and electricity. In our view, this was a liquidated claim and hence the judgment which was entered was pursuant to order IXA rule 3(1) of the Civil Procedure Rules which provides:-

"Where the plaint makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the Court shall, on request in Form No 26 of Appendix C, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the Court thinks reasonable, to the date of the judgment, and costs."

The judgment which was entered on 22nd December, 2000 in favour of the appellant was, in our view, a regular judgment which could, however, be set aside pursuant to order IXA rule 10 of the Civil Procedure Rules.

The defendants were therefore entitled to go to the superior court and apply for the setting aside of that judgment. In setting aside a judgment, the Superior Court was exercising its very wide discretion granted under order IXA rule 10 of the Civil Procedure Rules. The principles to be followed in an application to set aside judgment were set out in *Patel v*

EA Cargo Handling Services Ltd [1974] EA 75 at p 76 where Duffus P said:-

"I also agree with this broad statement of the principles to be followed. 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 to it by the rules. I agree that where it is a regular judgment as is the case here the Court will not usually set aside the judgment unless it is satisfied that there is a defene on the merits. In this respect, defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan J, put it "a triable issue" that is an issue which raises a *prima facie* defence and which should go to trial for adjudication."

Hence, in the present appeal it was upon the learned judge to consider whether there was a defence or as often said "a *bona fide* defence" which ought to go for trial. In his submissions before us, Mr Ohaga, had contended that there was no basis for the matter to go for formal proof and that in view of the letters addressed to the appellant there were no triable issues. We would readily agree that there was no basis for this matter to go for formal proof since, as already stated earlier, this was a liquidated claim and what had been entered was final judgment. What about the defence by the defendants? Does it raise any triable issue? There were two letters which were referred to by Mr Ohaga in his bid to show that the defendants had no *bona fide* defence. The existence and contents of these two letters have never been in dispute. In the first letter dated 22nd February, 2000 the 1st defendant wrote to Mr Ohaga as follows:-

"Dear Mr. Ohaga,

Re: Five Continents Stationers and Mobil Plaza

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We are in receipt of your letter demanding rent but would like to advise that at no time have we said we will not pay but only advised that we are unable to pay due to the current market situation for the time being. We have written to our landlords, and their agents, Knight Frank regarding this account and appealed for time to pay for the outstanding rent and also for a discount as due to low business and the depressed market situation, we have really no funds to clear this our immediately. (sic)

However our landlords do not wish to engage in dialogue and we would like you to kindly advise them that it is important for dialogue to happen. If you see our records for the past 7 years, we have regularly paid rent and service charges but at the moment business is so low that we can hard (sic) make ends meet in the way of stocks and overall expenses apart from rent.

Furthermore the Plaza management is not doing anything in the way of promotions and therefore we feel that we are not being supported by the Plaza. Please assist in solving the situation amicably."

In that letter, the 1st defendant and, by extension, 2nd and 3rd defendants (as per paragraph 7 of the plaint) are acknowledging the fact that they owe the rent demanded but as business was low they were not in a position to pay. This is not the same as denying the claim. Six months later, the 1st defendant in its letter of 13th August, 2000 addressed to the Managing Director of the plaintiff company stated as follows:-

"Dear Sir,

Re: Termination of Lease and hand over of premises of Five Continents Stationers".

We are indeed very grateful to Muthaiga Road Trust Company for kindly allowing us termination of our lease as of 30th June 2000. Enclosed are the keys to the shop 19 which we occupied. Over the last 7 years we have enjoyed working at the Plaza but just to mention, over the last 2 years the management company nor Muthaiga

Road Trust Company have made any efforts to revive the Plaza.

As per our lease, you are supposed to provide for good marketing support by advertisements, promotions and other forms of marketing, which has not been done at all by the Muthaiga Road Trust Company. We have been frustrated to the point that we are almost bankrupt and therefore we were unable to make rental payments. As at now, we have absolutely no funds to pay you the outstanding account and request you to try waive off the entire sum of outstanding as we truthfully do not have any funds available.

We have lost out entire savings in the collapse of the banks and still tried hard to continue. However we have lost all hope and therefore are literally begging you to assist and waive this off. We would like to promise you that as soon as the funds are available, we will try and pay this off to you.

Once again, I would like to thank all the directors of Muthaiga Road Trust Company for their kind consideration."

In that letter the claim for rent, services charge and electricity was not denied. It was a very polite letter in which the 1st defendant was thanking the appellant and pleading to be given time as at that time the 1st defendant had no funds. The 1st defendant was asking for a waiver but with a promise that as soon as funds were available the claim would be paid. This is not the same as denying the claim.

In view of what was stated in the two letters from the 1st defendant and our comments thereon, it cannot

be said that there was a *bona fide* defence to the appellant's claim. It therefore follows that as the judgment entered on 22nd December, 2001 having been a regular and final judgment the only way to set it aside was pursuant to Order IXA rule 10 of the Civil Procedure Rules. Since we have found that the defendants had no *bona fide* defence to the appellant's claim, the learned judge erred when he proceeded to hold that the matter ought to have proceeded to formal proof.

He fell into error when he set aside the judgment entered on 22nd December, 2000.

In view of the foregoing, we allow this appeal, set aside the ruling of the learned judge dated 31st July, 2001 and in its place substitute an order dismissing with costs the defendants' application dated 22nd June, 2001.

The appellant will have the costs of this appeal and the costs in the Superior Court. Those shall be our orders.

Dated and delivered at Nairobi this 5th day of December, 2003

P.K.TUNOI

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JUDGE OF APPEAL

E.O. O'KUBASU

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR