



**IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: KWACH, TUNOI & SHAH, J.J.A.)
CIVIL APPEAL NO. 158 OF 2000**

BETWEEN

EXPRESS (KENYA) LIMITED APPELLANT

AND

MANJU PATEL RESPONDENT

**(Appeal from the Ruling and Orders of the High Court of Kenya
at Nairobi (Justice Ole Keiwua) dated 23rd April, 1997**

in

H.C.C.C. NO. 2979 OF 1996)

JUDGMENT OF SHAH, J.A.

This is an appeal against the ruling of the superior court (Ole Keiwua, J. as he then was) whereby the learned judge declined to set aside an ex-parte judgment entered against the appellant, **Express Kenya Limited**.

The facts giving rise to this appeal are as follows. By a plaint dated 29th November, 1996, the respondent, **Manju Patel**, sought judgment against the appellant for a liquidated sum of **Shs.4,893,512/80**. The cause of action arose out of an alleged breach on the part of the appellant of a contract of bailment between the appellant and the respondent. A company known as Pride International Limited had on 30th March, 1995, entrusted to the appellant a total of 49,000 gunny bags for safe-keeping in bond. The said gunny bags were warehoused in the appellant's premises referred to as Sorghum 6 Store in Nairobi. The gunny bags were packed in 499 bales. 100 bags were stored loose. On 11th January, 1996, the ownership of 381 bales and 100 loose bags was transferred to the respondent by Pride International Limited and on 13th January, 1996 the ownership in 118 bales was transferred by Pride International to the respondent so that the respondent was at the material time the owner of the said goods, that is, 49,000 gunny bags. The bailment was for a consideration. It was not gratuitous. The respondent was to pay Shs.15/= per bale per week for storage charges.

The said warehouse was guarded at all material times by guards employed by an entity known as Collingdale Security which entity was employed by the appellant.

The said warehouse was burgled on two occasions, first between 10th and 12th February, 1996 and second on the night of 16/17 February, 1996. The fact of the two burglaries was reported to the police by the appellant and the abstract as supplied to the appellant (who was the complainant) by Industrial Area

Police Station reads as follows where

m"Tahtee ricaolm:p-lainant reported that on the 10 February, 1996 at about 10:45 a.m., the warehouse Number S6 was closed by the warehouse clerk and went home leaving the place guarded by the security guards from Collindale Security firm. On the 12th February, 1996 the warehouse was opened and found it had been broken into through the main door and stole (sic) 18 bales and 100 loose gun (sic) bags.

On the 17th February, 1996 the warehouse was opened and found it had been broken on the night of 16th February, 1996 through the rear side door where they stole 163 bales valued at K.Shs.3,086,937/=.

Scene was visited and there was no recovery. Case "PBC" (meaning pending before court)."

The respondent's claim consisted of the particulars of the goods warehoused and an assertion of failure to deliver (or re-deliver) the same to her.

The summons issued by the superior court was served on the appellant, together with a copy of the plaint, on the 17th day of January, 1997. The appellant forwarded the same to its insurance brokers on 20th January, 1997 for onward transmission to the insurer, Insurance Company of East Africa Limited, (the insurer). The insurer did not enter appearance although it may have been bound to do so under its subrogation rights, whereby the insurer would step into the shoes of the insured and would take over the conduct of defence of any claim (e.g. claim for loss such as would be insured, or such as in which it may have an insurable interest) made against the insured, in this case the appellant.

The insurer did not enter any appearance and the respondent moved the superior court for entry of judgment in respect of her liquidated claim. It was only after execution was levied against the appellant that the appellant moved the superior court to apply to have the judgment set aside. The affidavit in support of the application to set aside the judgment was sworn by Mr. James Mugambi, the Claims Manager of the appellant company. There is absolutely no mention in the affidavit sworn by Mr. Mugambi as regards what happened to the summons and the copy of the plaint after the same were despatched to the insurance brokers for action. There is no mention therein of any factor which caused the delay in filing the memorandum of appearance, which was not filed at all. It was only after execution of the decree that the appellant lodged its Chamber Summons, on 19th February, 1997, by which summons it applied for stay of execution of the decree and setting aside of the ex-parte judgment.

The application in the superior court was heard by Ole Keiwua J (as he then was) who with reference to the delay in entering appearance or filing defence said:-

"It is submitted that the defendant (the appell ant here) did not explain to the court the delay in filing defence as the insurers who are alleged to have delayed instruction to counsel have not come forward to say so. I agree with the plaintiff (the respondent here) that this Court cannot accept any information on behalf of those insurers unless they themselves have come forward and they have not done so."

I discern no misdirection whatsoever on the part of the learned judge when he criticised the insurer for not coming forward to say what caused the non-filing of the memorandum of appearance or defence. The appellant has not set out the reason (if any) for non-filing of the memorandum of appearance on the part of the insurer. When the service of the summons is proper, and here there was no suggestion that it was not so, any delay in entering appearance must be satisfactorily explained as to entitle the applicant to seek the exercise of undoubted discretion of the court, to set aside the judgment. In the absence of any explanation as regards the delay, the learned judge was absolutely right in saying what he said as pointed out earlier by me. But that is not all. Not only the insurer has failed to show what was the cause of the delay, but also, the appellant has not stated what caused the delay in entering appearance. Judgment entered properly cannot be set aside on the mere say so of the applicant. The applicant has to explain, plausibly, the cause of such delay. The appellant's application lacking this very basic attribute, was bound

to fail and the learned judge cannot be faulted for what he said, in that regard.

Nevertheless the learned Judge considered the issues of the defences available to the appellant, as he was bound to do and in my view, he did a commendable job. He considered at length the defences raised by the appellant in its proposed defence.

It is trite that once the judgment is regular, before it is set aside, the applicant ought to show merits of the defence. In the **Supreme Court Practice**, 1976, Volume I, it is stated as follows:-

"Regular Judgment. If the Judgment is regular, then it is an (almost) inflexible rule that there must be an affidavit of merits, i.e. an affidavit stating facts showing a defence as the merits (Farden v. Richter (1989), 23 Q.B.D. 124. "At any rate where such an application is not thus supported, it ought not to be granted except for some very sufficient reason" Per Huddleston, B., at p. 129 approving Hopton v Robertson [1884] W.N. 77, reprinted 23 Q.B.D. p. 126(n); and see Richardson v. Nowell, 8.T.L.R. 445)".

In my view, the rule as regards showing merits in defence is a golden rule. The court ought to be satisfied that the applicant is not applying to set aside a regular judgment with a view to delaying the inevitable.

The appellant had admitted in the affidavit sworn in support of the application to set aside the judgment that gunny bags "were stolen and/or burglarised from our premises which theft is the subject of **Criminal Case No. 130 of 1996** in which the security guards employed by Collingdale Security were arrested and charged and the case is Pending in Court."

The fact of theft or burglary was, therefore, not in issue. It was also not in issue that 49,000 gunny bags were stolen from the appellant's warehouse during the course of two burglaries that took place in February, 1996. It is also not in dispute that the persons responsible for the theft were guards employed by Collingdale Security which security company (or firm - it is not known) was engaged by the appellant to guard its premises.

It was stated clearly, and in no uncertain terms, by this Court in the case of **Securicor (Kenya) Limited v. E.A. Drapers Limited & Another** (Civil Appeal No. 67 of 1985) (unreported) as follows:-

"And paragraph 8 of the agreed statement of facts clearly shows that Moses Aila stole the goods "while purporting to act as such nightguard" i.e. he took advantage of his presence at the godown on duty to steal the property. In our respectful view the learned trial judge quite properly applied to these facts the principle stated in Lloyd v. Grace Smith & Company 1911/13 ALL E.R. 51: "

"If an agent commits a fraud while acting or purporting to act in the course of the business which he is authorized to transact on account of his employer the principal, although innocent of the fraud, is liable for the fraud of the agent whether the fraud results in a benefit to the principal or not."

This Court in the case of **Securicor (Kenya) Limited (supra)** quoted with approval the English case of **Morris v. C.W. Martin & Sons Limited (1965) 2 ALL E.R. 725** wherein Lord Denning M.R. puts it as follows:-

"When a principal has in his charge the goods or belongings of another in such circumstances that he is under a duty to take all reasonable precautions to protect them from theft or deprecation, then, if he entrusts that duty to a servant or agent, he is answerable for the manner in which that servant or agent carries out his duty. If the servant or agent is careless so that they are stolen by a stranger, the master is liable. So also, if the servant or agent himself steals them or makes away with them." (emphasis supplied is mine).

The exemption clause relied upon by the appellant to deny its liability reads as follows:-

"2.The company (the appellant here) shall not be liable for any loss or damage of the goods by burglary, theft, fire, dampness, fungi, vermin or otherwise howsoever caused unless the same shall be directly caused by the negligent or wrongful act or omission of the company or any servant of the company within the scope of his employment;"

Quite clearly the security guards who stole the gunny bags were servants or agents of the appellant. A bailee looks after a bailor's property himself, by his servants or his agents and as pointed by Lord Denning M.R. in the case of **Morris v. Martin** (supra), if the servant or agent steals the goods the master is liable.

In the case **United Manufacturing Company Ltd. v. Wafco Ltd** [1974] E.A. 233 the majority of this Court's predecessor held that the bailee would be vicariously liable for its employees' acts. Mustafa, J.A. said at page 243:

"I think it is clear that the respondent's employees were engaged in bonded warehouse to safeguard and look after the goods stored by the appellant. In stealing or helping to steal such goods while in their custody they would clearly be acting in the course or within the scope of their employment, albeit in unlawful manner. The respondent would be liable for its employees' acts."

In the **United Manufacturers vs Wafco** case the finding of probable theft was made by Court after re-evaluating the evidence but in this case the appellant itself admits that the security guards employed by its own security company stole the goods. I see, therefore, no defence on liability of the appellant and I think it would be futile to go through a trial in the face of that admission. There is no cogent defence on liability. I would not want to waste judicial time in search of a defence that does not exist.

I come now to the issue of value of the goods stolen. It is not in doubt that the respondent was the owner of the goods. She deponed to the fact that she paid **Shs. 97/=** per gunny bag. That would place the value of stolen gunny bags at **Shs.4,753,000/=**. That is the amount she claimed. She brought forward evidence to show that she could have purchased such bags at about **Shs. 94/65** per bag after obtaining several quotes from suppliers or sellers of gunny bags. Quite obviously that evidence was brought forward to show what was the market value of gunny bags as at the date of theft. Also I do not see why the respondent should pay storage charges when the goods were stolen. She was entitled to a refund thereof and the learned Judge quite properly allowed that item as loss suffered by the respondent.

I revert to what the learned Judge said as regards his discretion to set aside a judgment. I have said earlier that the learned Judge was exercising his undoubted discretion when considering the fate of the application before him. I would hesitate to interfere with the exercise of that discretion. More so because I agree fully with the learned Judge when he said:

"In view of the fact, that the explanation as to why steps were delayed, has not come from those who were responsible for the delay namely the insurers, it is impossible to say the hardship now faced by the defendant in this respect is attributable to accident or inadvertence or mistake. As the court's discretion is not intended to assist a person who has sought to delay the cause of justice, I am not in the foregoing circumstances persuaded that the delay in question was not deliberate. Coupled with the absence of defence on merit, I am of the view that no purpose other than delay can be served by grant of unconditional leave to the defendant and I dismiss the defendant's application with costs to the plaintiff."

But that is not all. The learned Judge's findings are further supported by the decision in **United Manufacturers vs. Wafco Ltd** case (supra). Musoke, JA in the **Wafco** case said:

"As, on the evidence on record, only the servants of the respondent, either by themselves or in collusion with the Customs Officer could have stolen the goods in question, the position is

governed by this Court's decision in Kisumu Trading Stores vs. Shah (1965) E.A. 314;"

In the **Kisumu Trading Stores** case (supra), the Court of Appeal for Eastern Africa pointed out that the employer is liable for fraud or crime committed by his servant in the course of his employment.

In this case in the face of admission by the appellant that its own agents were thieves the defence of 'no liability' cannot be relied upon by it.

I have considered all that was said by Mr. Okwach in support of the appeal. At no stage did he attempt to explain what happened during the period when the summons was handed over to the insurance brokers and when the execution was levied.

For the reasons given by me both as regards the nonexplanation of the delay and there being no good defence I would dismiss this appeal with costs.

Dated and delivered at Nairobi this 29th day of June, 2001.

A.B. SHAH

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JUDGE OF APPEAL