



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: OMOLO, AKIWUMI & OWUOR, JJ.A.)
CIVIL APPEAL NO. 174 OF 1999**

**BETWEEN
CENEAST AIRLINES LIMITEDAPPELLANT
AND
KENYA SHELL LIMITEDRESPONDENT**

**(An Appeal from the Order of the High Court of Kenya
Milimani Commercial Courts (Commissioner of Assize
Gacheche) dated 20th July, 1999
in**

H.C.C.C. NO. 593 OF 1998)

REASONS FOR JUDGMENT OF THE COURT

In our judgment in this matter delivered on 30th March, 2000, we allowed the appeal by the Appellant Company (hereinafter referred to as the Appellant) with no order as to costs. We also ordered that the Appellant must enter appearance and file a defence within seven days from that date, in respect of High Court Civil Case No. 593 of 1998 wherein, the Appellant had been sued by the Respondent for Shs.21,438,007/93 being the balance of the amount due from the Appellant to the Respondent for goods sold and delivered by the latter to the former in 1993. We now give our reasons for our judgment.

On 23rd December, 1998, over three months after filing its plaint, the Respondent requested for judgment of the large sum it had claimed, on the grounds that the Appellant, though served with a copy of the plaint and summons to enter appearance on 9th December, 1998, had failed to do so.

The Respondent subsequently obtained on 4th January, 2000, judgment for the amount claimed in default of the appellant's failure to enter appearance and to file a defence.

In his request for judgment which appears at p.6 of the record of appeal, the defendant against whom the judgment was sought, was not named as mandatorily required by O.9A r.3(1) of the Civil Procedure Rules. But no matter. On 15th January, 2000, the Appellant applied to the High Court under O.9A r.10 of the Civil Procedure Code, for the setting aside of the judgment entered on 4th January, 2000, which the court can do upon such terms as are just, and which Duffus P. in C.A. Patel v E. A. Cargo Handling Service [1974] E.A. 75, had defined as conferring on the High Court "a very wide discretion".

The grounds in support of the application were firstly, that the Appellant had not been served with summons to enter appearance and secondly, and this became apparent in the various affidavits filed in connection with the application, that the amount claimed in the Respondent's plaint was not what the Appellant owed it. On 20th July, 1999, the application was dismissed by the learned Commissioner of

Assize Gacheche on the grounds that the summons to enter appearance had been properly served on a director of the Appellant and that the Appellant had not come to court with clean hands. It is against this ruling that the Appellant has now appealed to this Court.

Whilst the available evidence showed that one of the directors of the Appellant had indeed, been served with the summons to enter appearance, it did show, however, that there were indeed, triable issues involved in the suit, which according to the scanty plaint, was for "Shs.21, 438,007/95 the balance of the agreed and/or reasonable amount due for goods sold and delivered to the defendant at Nairobi during 1993". This large amount, it later became clear, was the cost of jet fuel and aviation spirit supplied by the Respondent to the Appellant and which included the value added tax imposed on such transactions at the time. It transpired that prior to this in 1992, the Ministry of Finance had exempted such products from value added tax and yet the Respondent had included this in its costs for the jet fuel and aviation spirit supplied to the Appellant. This alone, in our view, gives rise to a triable issue which together with the exercise of the High Court's discretion, under O.9A r.10, was described as follows by Duffus P. in Patel (supra):

"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 defence on the merits. In this respect defence on 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."

We think that the learned Commissioner of Assize should have in the circumstances of the matter before her, exercised her unfettered discretion in favour of the Appellant.

A matter which was not argued before us, but which came to our notice after we had on 30th March, 2000, allowed the Appellant's appeal and made our consequential orders, relates to the validity of the summons to enter appearance which was served on the director of the Appellant. An examination of this summons raises the following important issue as to its validity. Order 4 of the Civil Procedure Rules, having first provided in subrule (1) of rule 3 that when a suit is filed, a summons will issue to the defendant ordering him to appear within the time specified in the summons, then goes on in subrule (4) of r.3 to state as follows:

"The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear. Provided the time for appearance shall not be less than 10 days."

This mandatory provision means that the time for entering appearance cannot be less than 10 days or within 10 days of the service of the summons. It must at least, be on the 10th day of service or any day thereafter, as may be specified in the summons. The summons which was served on the Appellant in its pertinent part is as follows:

"YOU ARE REQUIRED within 10 days from the date of service hereof to enter appearance in the

said suit.

Should you fail to enter an appearance within the time mentioned about, the Plaintiff may proceed with the suit and judgment may be given in your absence.".

This is a clear breach of O4 r.3(4) and makes the summons invalid and of no effect.

Dated and delivered at Nairobi this 26th day of May, 2000.

R. S. C. OMOLO

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JUDGE OF APPEAL

A. M. AKIWUMI

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.



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