



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPEAL NO. 220 OF 1995**

**KINGSWAY TYRES & AUTOMART LTD.....APPELLANT**

**AND**

**RAFIKI ENTERPRISES LTD.....RESPONDENT**

**(Appeal from the Order of the High Court of Kenya at Nairobi (Justice A. Hayanga) made on 4<sup>th</sup> October 1995**

**in**

**H.C.C.C. NO. 800 OF 1995)**

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**JUDGMENT OF THE COURT**

KINGSWAY TYRES AND AUTO MART LIMITED, the appellant, challenges the exercise of judicial discretion by the High Court (Hayanga, J.), in NAI High Court Civil Case No. 800 of 1995, under O.IXA rules 10 and 11 Civil Procedure Rules. That court granted the defendant's application, set aside the ex parte judgment in default of appearance and consequential orders and ordered that the defence be filed. The appellant argues that the learned Judge, improperly exercised his discretion in the matter in view of clear evidence on record that service of summons to enter appearance and the plaint had been duly effected. On the other hand RAFIKI ENTERPRISES LIMITED, as defendant in the suit but the respondent in this appeal, denies it was ever served with the processes and prays that this appeal be dismissed.

The principles upon which a court exercises its discretionary jurisdiction under O.IXA, as well as O.IXB rule 8, Civil Procedure Rules, are well settled. The jurisdiction is exercised to obviate injustice or hardship resulting from accident, inadvertence, or excusable mistake or error (see Shah .v. Mbogo, [1967] EA 116. It is, also, trite law, that an appellate court will not lightly interfere with exercise of discretionary jurisdiction unless it is based on a wrong premise. Nor is it proper for an appellate court to substitute its discretion for that of the trial court (see Haji Ahmed Sheikh t/a Hasa Hauliers .v. Highway Carriers Ltd., [1982-88] 1 KAR 1184.

This matter started with the filing of a plaint, in the High Court, Nairobi, in which this appellant, as plaintiff, made a liquidated demand for Kshs.1,755,816.65. It averred, inter alia, that the money was for goods sold and delivered at the defendant's request. Summons to enter appearance was issued and was later allegedly served by prepaid registered post pursuant to the Provisions of O.V rule 2, Civil Procedure Rules. An affidavit of service was duly filed in court accompanied by a certificate of posting showing the

name and address of the party to whom the process was sent, the date of posting, and the sender's address. The process was posted on 16<sup>th</sup> March, 1995. However by 16<sup>th</sup> May, 1995, when a request for judgment was filed in court, the respondent had not taken any step on record.

In its application to set-aside the ex parte judgment, the respondent; categorically, denied having been served with summons to enter appearance.

After hearing arguments from both sides, and while accepting that service of summons by prepaid registered post was proper service, Hayanga, J. nonetheless, proceeded to rule that the appellant should have in addition, made a follow up by either letter or telephone, we presume, to find out whether the summons had been received by the respondent. He, also, held that the appellant did not answer, sufficiently, or at all, the respondent's denial of service of summons. On, substantially, those grounds he proceeded to grant the respondent's application, set aside the ex parte judgment and consequential orders, and ordered that the respondent could file its statement of defence in the suit. This appeal was thereby provoked.

The memorandum of appeal has fourteen grounds. However, counsel for the appellant, Mr. Ochieng Oduol, decided to argue them en bloc. The crux of his submission was that the learned Judge in the court below misdirected himself when he held that the appellant was obliged to do more than is statutorily required by O.V. rule 2 Civil Procedure Rules. Further, that, in view of the clear evidence in the court file as to the mode of service of summons, the learned Judge misdirected himself when he held that the appellant had not rebutted the respondent's denial of service.

Mr. Muin Malik, appeared for the respondent in this appeal. In his view, it was incumbent upon the appellant to place evidence before the Judge below to rebut the respondent's denial of service, which he said it failed to do. Consequently, he urged, the Judge properly exercised his discretion in favour of setting aside the judgment. Too, that in view of the parties previous business relationship, inter se, undue hardship would be occasioned to the respondent if the ex parte judgment was left to stand.

O.V rule (2), Civil Procedure Rules, makes provision for service of Summons on corporations. It provides, in pertinent part, as follows:

"subject to any other written law, where the suit is against a corporation the summons may be serviced.

(a) .....

(b) .... By leaving it at the registered office of the corporation or sending it by prepaid post .... to the registered postal address of the corporation, ...."

Rule 15 (1) of the same order provides, in pertinent part, as follows:-

"The serving officer in all cases in which summons has been served under any of the foregoing rules of this order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons ....."

There was no allegation made in the court below that the affidavit of service, which we were told from the bar was on the court file, did not comply with the above provision. We have on our part looked at the affidavit and are satisfied that all the essential details are included in it. Accordingly, and with due respect to the learned Judge in the court below, the appellant had clearly placed on the court file evidence to rebut denial of service. It was a misdirection to hold otherwise. Similarly, it was a clear misdirection when the learned Judge held that the appellant should have but did not make a follow up to confirm service. Those two factors clearly weighed heavily in his mind and affected the exercise of his discretion in the matter.

To our minds, the onus was on the respondent to fault the service. Having failed to do so, and in

absence of evidence on record to lead us to hold that the service was improper, it is our view and so hold that the ex parte judgment was a regular judgment. It would only, if at all, be properly, vacated on grounds other than non-service of summons.

There are ample authorities to the effect that, notwithstanding the regularity of it, a court may set aside an ex parte judgment if a defendant shows he has a reasonable defence on the merits. The respondent did not annex to its application in the lower court a draft defence. A director of the company did, however, swear an affidavit to state that the appellant's claim was based on certain L.P.O.s which had been stolen from it (the respondent) by its employees. Too, that the employees had been arraigned in court on criminal charges relating thereto. In view of that, it did not think the claim, properly, lay against it. It was desirable, we think, for the respondent to annex to its application a draft defence to include all that and any other defences it may have had to the appellant's claim. Be that as it may, the defence, above, were not such as would have, properly, influenced the court below to exercise its discretion in favour of setting aside. That is the more so considering the manner the parties conducted business transactions between themselves.

In the above circumstances, we come to the conclusion that the learned Judge in the court below, improperly exercised his discretion in setting aside the ex parte judgment. We, therefore, allow the appeal, set aside the order vacating the ex parte judgment, and order that that judgment be restored. The appellant shall have the costs of this appeal and of the suit in the court below.

Dated and delivered at Nairobi this 14<sup>th</sup> day of November 1996.

**J.E. GICHERU**

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**JUDGE OF APPEAL**

**A.A. LAKHA**

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**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

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**AG. JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**