**Ceneast Airlines Ltd v Kenya Shell Ltd**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of judgment:** 26 May 2000

**Case Number:** 174/99

**Before:** Omolo, Akiwumi and Owuor JJA

**Sourced by:** LawAfrica

**Summarised by:** H K Mutai

*[1] Judgment – Judgment in default of appearance – Application to set aside – Factors to be considered*

*– Existence of* prima facie *defence – Exercise of judicial discretion – Whether the trial court’s discretion*

*should have been exercised in favour of the Appellant – Order IXA – Civil Procedure Rules.*

*[2] Practice – Summons to enter appearance – Time within which to enter appearance – Summons must*

*provide at least ten days – Order IV, Rule 3(4) – Civil Procedure Rules.*

**JUDGMENT**

**OMOLO, AKIWUMI AND OWUOR JJA:** In our judgment in this matter delivered on 30 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 number 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 23 December 1998, over three months after filing its plaint, the Respondent requested judgment for the large sum it claimed, on the ground that the Appellant, though served with a copy of the plaint and summons to enter appearance on 9 December 1998, had failed to do so.

The Respondent subsequently obtained, on 4 January 1999, 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 page 6 of the record of appeal, the Defendant against whom the judgment was sought, was not named as mandatorily required by Order IXA, Rule 3(1) of the Civil Procedure Rules. But no matter. On 15 January 1999, the Appellant applied to the High Court under Order IXA, Rule 10 of the Civil Procedure Code, for the setting aside of the judgment entered on 4 January 2000, which the court can do upon such terms as are just, and which Duffus P in *CA Patel v EA Cargo Handling Service* [1974]

EA 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 20 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 include 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 Order IXA, Rule 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 in 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 30 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 rule 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 tenth 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 above, the Plaintiff may proceed with the suit and judgment may be given in your absence”.

This is a clear breach of Order 4, Rule 3(4) and makes the summons invalid and of no effect.

For the Appellant:

*Information not available*

For the Respondent:

*Information not*