



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 232 OF 2014**

CORNELIA ELAINE WAMBA..... PLAINTIFF

V E R S U S –

UAP INSURANCE CO. LIMITED..... DEFENDANT

**RULING**

1) The subject matter of this ruling is the motion dated 2<sup>nd</sup> December 2014 taken out by UAP Insurance Co. Ltd, the defendant herein, whereof it sought for the following orders:

- 1. THAT this application be certified urgent and proceeds ex-parte in the first instance.***
- 2. THAT there be a stay of proceedings pending the hearing and determination of this application.***
- 3. THAT this honourable court be pleased to set aside the ex-parte judgment that was delivered on 15<sup>th</sup> September 2014 against the defendants.***
- 4. THAT the defendants be granted leave to file their defence in terms of the draft annexed to the affidavit of James Otieno Okeyo.***
- 5. THAT the costs of this application be provided for.***

2) The motion is supported by the affidavit Ruth Momanyi and that of James okeyo. When served, Cornelia Elaine Wamba, the plaintiff herein filed grounds of opposition to oppose the motion. When the motion came for interpartes hearing learned counsels recorded a consent order to have the motion disposed of by written submissions.

3) I have considered the grounds stated on the face of the motion plus the facts deponed in the supporting affidavit. I have further considered the rival submissions. It is the submission of the defendant that its failure to enter appearance nor file a defence was not intentional. It further argued that it has a good defence with triable issues hence it should be given a chance to defend the suit.

4) The plaintiff vehemently opposed the defendant's motion arguing that the defendant has not given good reasons why it delayed in bringing the application. The plaintiff further pointed out that the defendant's draft defence does not raise triable issues worth of going to a full trial.

5) The history behind this motion is short and straightforward. The plaintiff in this case filed a suit against one Thuki B. Kamau vice Nairobi H.C.C.C no. 754 of 2008. Thuri B. Kamau had an insurance policy with UAP Insurance Co. Ltd, the defendant herein. It is said that the aforesaid insurance cover had a limit of ksh.3,000,000/=. The plaintiff eventually obtained judgement in the sum of ksh,56,383,362/= against Thuri B. Kamau. Cornelia Elaine Wamba, the plaintiff herein filed this suit to recover the aforesaid sum from UAP Insurance Co. Ltd, the defendant herein. The defendant admits that the plaint with the summons to enter appearance was served upon it through is legal officer M/s Ruth Momanyi who in turn instructed the firm of Muthoga Gaturu & Co. Advocates to enter appearance in the suit through an email sent to Mr. Okeyo of the said firm. It is the submission of the defendant that the email was never delivered hence no appearance was entered, prompting the plaintiff to obtain judgement against the defendant in default of appearance on 15.09.2014. The defendant avers that it came to learn of the judgment when it was served with a notice of formal proof dated 20.11.2014 prompting it to file the instant motion.

6) The defendant has beseeched this court to find that the failure to defend the suit was not intentional but occasioned by inadvertent mistake of the defendant's legal officer through a technological error. James Okeyo in his supplementary affidavit confirmed that he did not receive the email sent to him by Ruth Monyanyi hence the failure to enter appearance nor file a defence. The defendant annexed to the supporting affidavit a draft defence showing that it has a defence with triable issues. It is stated that the insured (plaintiff) had already exhausted his insurance policy which was capped at kssh,3,000,000/= in conducting the defence of civil case no. 754 of 2008.

7) I have already set out the grounds advanced by the plaintiff to oppose the motion. Basically the plaintiff avers that the defendant has not given good reasons for its failure to enter appearance nor file a defence. It is also stated that the draft defence raised no triable issues. I have carefully considered the rival arguments. It should be noted that the plaintiff did not controvert by way of an affidavit the averments of the supporting and supplementary affidavits filed by the defendant in which the defendant stated that the email sent to instruct the firm of Muthoga Gaturu & Co. Advocates to enter appearance had not been delivered. I have no reason to doubt this assertion. It has also been submitted that the draft defence raises triable issues which should go to trial. I have examined the draft defence and I am convinced the same clearly states that the defendant had issued an insurance cover with a limit of kshs.3,000,000/=. It is said the aforesaid has been exhausted. In my humble view, this is a triable issue which can only be interrogated via a trial.

8) In the end, I am convinced that the defendant's motion has merit.

It is allowed in terms of prayers 3 and 4. Costs of the motion to

Abide by the outcome of the suit.

Dated, Signed and Delivered in open court this 20<sup>th</sup> day of May, 2016

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant