



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL CASE NO. 431 OF 2009**

**NESTLEKENYALIMITED.....PLAINTIFF**

**VERSUS**

**KEVINANDHANNINGTONINTERNATIONALLIMITED.....DEFENDANT**

**R U L I N G**

Before the court is a Notice of Motion application dated 25<sup>th</sup> January 2012. It seeks the ex-parte judgement entered on 15<sup>th</sup> July 2011 and all consequential decree and orders be set aside and that the Defendant be granted unconditional leave to enter appearance and file defence and the costs of the application. It is supported by affidavit of Jacob Mbuvi Musee dated 25<sup>th</sup> January 2012.

The brief history of the application is that by a suit filed on 16<sup>th</sup> June 2009 the Plaintiff sought various claims among than Kshs.22,577,054 as principal and Kshs.22,347,920 as penalties.

It appears that the Plaintiff was not able to serve summons to enter appearance and the same became stale. On 26<sup>th</sup> May 2010 the Plaintiff sought and was granted orders extending the validity of the summons to enter appearance. In the said application the Plaintiff's advocate had stated that they were unable to trace the Defendant's directors. On 20<sup>th</sup> May 2011 the Plaintiff was given leave to serve the Defendant through advertisement. Again they stated that they were unable to trace the Defendant's directors. On 12<sup>th</sup> July 2011 the Plaintiff filed a request for judgement and judgement was entered on 15<sup>th</sup> July 2011 on the strength that service was served through advertisement on 23<sup>rd</sup> May 2011 in the Standard newspapers.

The Applicant submits that the Defendant was never served with summons to enter appearance or any papers in respect of the suit and that in any event the Plaintiff did not make reasonable attempts to serve the Defendant before seeking to serve it through advertisement.

The Plaintiff responds that the said judgement was entered pursuant to a lawful provision of law. Order 5 Rule 17 (2) provides for the substituted service and once granted it amounts to personal service. The court which granted the order was satisfied that the application was merited. The Plaintiff submits **BN 2** as evidence of attempted service. In further response the Plaintiff states that the draft defence is a sham.

I have considered the application and the opposing submissions.

In my view the judgement which was entered for the Defendant was regular and lawful. However, the

substituted service achieved the aim of availing the Defendant before this court, and this was the initial intention of the personal service. Given the amount involved in the claim i.e. over Kshs.44,000,000/=, and considering that this court is under the obligation to deliver substantive justice with little reliance on technicalities, I hereby, under the inherent jurisdiction of this court, allow the Notice of Motion application dated 25<sup>th</sup> January 2012 in terms of prayers 2 and 3 with costs in the cause.

It is so ordered.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 20<sup>TH</sup> DAY OF APRIL 2012.**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

*Mwangi H/B for Litoro for the Plaintiff*

*N/A for the Defendant*

*Teresia – Court clerk*