



**REPUBLIC OF KENYA**

**High Court at Machakos**

**Civil Case 353 of 2011**

**GICHIMU MWAU.....PLAINTIFF**

**VERSUS**

- 1. MACHO CREDIT LIMITED**
- 2. MESSERS MUHORO t/a EDMUND**

**ENTERPRISES**

- 3. KINLAND KENYA LIMITED**
- 4. COASTAL SEA FOOD.....DEFENDANTS**

**RULING**

Before me is an application by way of Chamber Summons dated 8<sup>th</sup> April 2010. The application was filed by the 1<sup>st</sup> defendant under **section 3A** of the **Civil Procedure Act (Cap 21)** and **Order 1XA Rule 10** and **11** of the **Civil Procedure Rules**. It seeks for orders as follows:-

- 1. THAT this Honourable court be pleased to stay execution of the decree arising from the ex-parte judgment entered on the 28<sup>th</sup> day of November 2002, particularly requiring the directors of the 1<sup>st</sup> defendant to appear in court for examination as to means of satisfying the decree.**
- 2. THAT this Honourable Court be pleased to set aside the ex-parte (judgment) entered against the 1<sup>st</sup> defendant on 28<sup>th</sup> November 2001 together with all consequential orders made thereunder.**
- 3. THAT the Honourable Court be pleased to grant the 1<sup>st</sup> defendant leave to enter appearance.**
- 4. THAT costs of this application be provided for.**

The application was filed with a supporting affidavit sworn on 8<sup>th</sup> April 2010 by **Muktar Parker** described as a director of the 1<sup>st</sup> defendant. Annexed to the said affidavit as “**MP3**” is a draft statement of defence. It is deponed in the said affidavit that service of summons was not proper, as it was alleged to have been done through the post. It was also deponed that the 1<sup>st</sup> defendant had a good defence.

The application is opposed. A replying affidavit sworn on 21<sup>st</sup> July 2010 by **Gichimu Mwai** the plaintiff was filed. It was deponed that the summons and plaint sent through the post were received by the 1<sup>st</sup> defendant and, after opening the same, they sealed the envelope and returned it to the post office with remarks “**unknown on this address RTS.**”

The 1<sup>st</sup> defendant filed a supplementary affidavit sworn by **Muktar Parker** on 20<sup>th</sup> September 2010 in response to the replying affidavit. It was denied that the summons sent by registered mail was collected by the 1<sup>st</sup> defendant's employee **Mr J.K. Katisya**.

The 1<sup>st</sup> defendant through counsel **M/s Odera Obar & Company** filed written submissions on 15/11/10. The plaintiff through counsel **M/s C Muriithi** filed his written submissions on 21/2/2011. Case authorities were relied upon in the submissions on both sides.

I have considered the application, documents filed and the authorities cited. In **Patel –vs- EA Cargo Handling Services Ltd (1974) EA 75 at page 76**, the Court of Appeal for East Africa stated:-

**“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just.....**

**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 by the rules.”**

The court also held that the exercise of the court’s discretion to set aside an *ex-parte* judgment should be anchored on there being an arguable defence, that is, a defence that raises triable issues.

I have perused the copy of the envelope that was said to have been posted under registered mail to **Macho Credit Ltd** the 1<sup>st</sup> defendant. It is endorsed **“unknown on this address RTS”**. The plaintiff has not come out affirmatively to confirm that the address used was for **Macho Credit Ltd**. The fact that a director used that post office box number is neither here nor there as the letter was not addressed to the director. There is no evidence that the envelope was opened by anybody in the company. The legal requirements for service of process on a company were not satisfied by the plaintiff – *See Remco Ltd. – vs- Mistry Jadva Parbat Ltd (2002) 1 EA 233*. Posting a letter as a means of service of process is a last resort, after attempts are made to serve the Secretary, Director or other Principal Officer of the company. No such attempt was made herein. Therefore, even assuming the correct address was used, the postage *per se* cannot be said to be proper or adequate service.

I have also perused the draft defence, and find that it raises triable issues.

Considering all the facts and circumstances of the matter, I find sufficient reason to allow the application, as this court should promote dispensation of substantive justice in line with the principles of the **Constitution (2010) Article 159 (2) (d)**, which requires courts not to give undue weight to technicalities. After all, the plaintiff can always be compensated in costs, if he wins the case.

In conclusion, I allow the application dated 8<sup>th</sup> April 2010 and grant prayers 1, 2 and 3. The filing of the 1<sup>st</sup> defendant’s documents will be done within the next 14 days. Costs in the cause.

Dated and delivered this **21<sup>st</sup> day of November** 2012.

**George Dulu**

**Judge**

**In the presence of:**

Mr Mureithi for Plaintiff/Respondent

Mr E.K. Gitonga holding brief for Ms. Migiro for 1<sup>st</sup> Defendant/Applicant

N/A for 2<sup>nd</sup> – 4<sup>th</sup> Defendants

Nyalo – Court clerk