

discretion exercised by the court under order 10 Rule 11 of the Civil Procedure Rules is unfettered. The court may, at its discretion, set aside or vary a default judgment or decree at any time upon such terms as are just. The exercise of the discretion is however not arbitrary or on whim or caprice.

In this case, the defendant has deponed that service upon it was improper as the same was not upon one of its principal officers. I think that averment cannot be seriously contested by the plaintiff. All the process server says, in his affidavit of service, is that he served a secretary of the defendant called **Esther**. He does not suggest that **Esther** was one of the principal officers of the defendant. *Prima facie*, therefore the defendants averment would appear to represent the correct position of what indeed happened i.e. that none of its principal officers was served with the summons to enter appearance as required under Order 5 Rule 3 of the Civil Procedure Rules. Even if service had been proper, the defendant has demonstrated to my satisfaction that its proposed defence raises triable issues which include allegations of the suit having been filed out of time and that the plaintiff's services were in any event lawfully terminated.

The defendant has also, in my view, satisfactorily explained the delay in lodging this application. In **Sebei District Administration -Vs- Gaysyali (1968) E.A. 300, Sheridan J.** stated as follows:-

“The nature of the action should be considered the defence, if one has been brought to the notice of the court, however irregularly, should be considered; the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally I think, it should always be remembered that to deny the subject a hearing should be the last resort of a court.”

In the premises, even if service of the summons to enter appearance was proper, the court would still have a discretion to set aside the default judgment if it is just to do so.

In the end, I have come to the conclusion that the default judgment be set aside. After all formal proof was still to be held. The defendant's application dated 23rd July, 2012 is allowed in terms of prayer 3 thereof. The annexed draft defence is deemed duly filed with the leave of the court on payment of the requisite court fees.

Costs of this application shall be the cause.

It is so ordered.

DATED AND DELIVERED AT ELDORET

THIS 14TH DAY OF NOVEMBER, 2012.

**F. AZANGALALA
JUDGE**

Read in the absence of the parties and their advocates, the date having been given in court.

**F. AZANGALALA
JUDGE**

14TH NOVEMBER, 2012