



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 399 OF 1995

MARINA MACHINERIES (K) LIMITEDPLAINTIFF

VERSUS

BANK OF BARODA (KA) LIMITED..... DEFENDANTS

R U L I N G

By a ruling dated 28th and delivered on 29th February 2008, the court (Waweru, J) allowed the Defendant's application by **amended notice of motion dated 18th July 2005**. The court ordered:-

“All the proceedings and processes herein commencing with service of the invalid summons to enter appearance issued on 15th March 1995 and the judgement delivered on 8th October 2004 and all consequent orders are hereby set aside. Let fresh valid summons to enter appearance be issued and served upon the Defendant....”

The Application that was allowed was heard *ex-parte* in that there was no appearance for the Plaintiff despite the hearing date having been given in court in the presence of counsels for both parties. But the failure to attend court was subsequently explained in the affidavit sworn in support of the application that is the subject of this ruling.

That application is the notice of motion dated 11th March 2008 filed the by the Plaintiff under **Order 44, rule 1** of the **Civil Procedure Rules** (the **Rules**). It seeks to review and/or set aside the order of 29th February 2008 upon the ground that there is a sufficient reason to do so. The application is opposed by the Defendant.

I have read the affidavit sworn in support of the application. There is no replying affidavit. I have also considered the submissions of the learned Counsel appearing.

Those submissions involve a point of law. That point of law would have been best considered in the original application that gave rise to the order of 29th February 2008 sought to be reviewed and set aside in the present application. That application was the amended notice of motion dated 18th July 2005 by which the Defendant had sought the main orders that judgement delivered in this suit on 8th October 2004 and all processes and proceedings from the date of incision of the suit be set aside and that a valid summons to enter appearance be served upon the Defendant.

As already pointed out, that application was heard *ex-parte* as there was no appearance for the Plaintiff when it came up for hearing. The point of law now raised by the Plaintiff in the present

application was thus not raised nor canvassed nor decided in the ruling dated 28th and delivered on 29th February 2008.

That point of law, briefly stated is that when summons to enter appearance in the present suit were issued and served (in 1995) there was no requirement in law that the time within which to enter appearance given in the summons be not less than ten days as at that time (1995) **Order 4, rule 3 (4)** of the **Civil Procedure Rules** had not been amended by **Legal Notice No. 5 of 1996** to introduce a proviso to the effect that the period within which to enter appearance stated in the summons to enter appearance must not be less than **10 days**.

I reiterate that this point of law would have been best canvassed at the hearing of the amended notice of motion dated 18th July 2005. As it happened, there was no attendance at the hearing for the Plaintiff, and the Defendant was heard *ex-parte*. The Plaintiff's learned counsel has fully and properly explained that non-attendance at paragraph 7 of the supporting affidavit. That explanation has not been challenged in any way by the Defendant.

In the circumstances, the justice of this matter requires that the Plaintiff be accorded an opportunity to be heard in the application by amended notice of motion dated 18th July 2005. The point of law that is now raised in the present application can thus be properly canvassed. It would not be procedurally proper for that point of law to be canvassed in the present application.

The order that therefore commenced itself in the interests of justice is that the *ex-parte* proceedings of 29th November 2007 and the subsequent ruling dated 28th and delivered on 29th February 2008 are hereby set aside. The amended notice of motion dated 18th July 2005 shall be heard afresh *inter-partes*. The Defendant shall have the cost of the present application and also such thrown away costs as may have been necessitated by the setting aside of the order of 29th February 2008. Those shall be the orders of the court.

There has been considerable delay in the preparation and delivery of this ruling. The same was caused by an oversight and is regretted.

DATED AT MACHAKOS THIS 6TH DAY OF JANUARY 2011

H. P. G. WAWERU
JUDGE

DELIVERED THIS 11TH DAY OF FEBRUARY 2011