



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL & TAX DIVISION – MILIMANI**

**CIVIL CASE NO. 51 OF 2010**

**KENWEST CABLES LIMITED.....PLAINTIFF**

**VERSUS**

**JOZELEN ELECTTRICAL SERVICES& SUPLIES.....DEFENDANT**

**R U L I N G**

The Applicant in the Chamber Summons dated 5<sup>th</sup> October, 2010 has moved the court under **Section 3A** of the **Civil Procedure Act, Orders 1XA Rules 3, 5, 10 and 11** and **XX1 Rule 22** of the **Civil Procedure Rules**, praying that the exparte judgment entered against the Defendant/Applicant on 12<sup>th</sup> March 2010, be set aside, execution in respect thereof be stayed and the suit be heard on merits, with the defendant being allowed to file its defence as per the draft annexed to the Supporting Affidavit.

The said judgment was entered in default, as a consequence of the Applicant's failure to file a memorandum of appearance and/or defence despite the service of Summons to enter appearance and Plaintiff. The application is supported by the affidavit of one JOSEPH MATELONG who depones that he is a retired Civil Servant, authorized to swear the Supporting Affidavit on behalf of the Applicant Company, which he says is in liquidation.

The application is opposed on the strength of the Replying Affidavit of SHAMJI MULJI SHAH, the Managing Director of the Plaintiff/Respondent in which he depones to the fact that Summons to Enter Appearance and the Plaintiff herein were duly served upon the applicant at its registered office as would be proved by the court record itself.

The Respondent has annexed to the Replying Affidavit copies of documents evidencing the invoices sent to the Applicants for goods supplied to it by the Respondent, the relevant Statement of Account and some dishonoured cheques issued by the Applicant in part payment thereof. The Respondent depones that the supporting affidavit contains untruths, does not deny having had offices at the place where the service of Summons was effected and that the debt remains undisputed and due. The Respondent prays therefore that the application, which the Respondent considers to be an afterthought, be dismissed, the Applicant having not demonstrated that he has sound defence.

I have considered the arguments made by counsel at the hearing of this application on 2<sup>nd</sup> November 2010, and perused the affidavits filed and documents annexed thereto. I have also perused the draft defence attached to the Supporting Affidavit The Defence does not deny the existence of the

Defendant/Applicant Company, nor does it deny the existence of the debt, purporting only that the debt was liquidated in cash without any particulars of such repayment being provided.

This courts record shows quite clearly that an affidavit of service of summons was filed on 6<sup>th</sup> April, 2010, to which is annexed the duly served Summons to Enter appearance duly stamped by the Defendant/Applicant in acknowledgement of service of the same ion the 22<sup>nd</sup> of February, 2010 at 9.23 a.m.

The connection between the deponent of the Supporting Affidavit and the Applicant is not disclosed as to prove his authority to swear the said affidavit on behalf of the Applicant. Even if such authority were proved, the deposition that the company is in liquidation is not supported by any evidence and the service challenged by the Applicant related to the service of the Notice of Entry of Judgment and not the Summons to Enter Appearance in the suit, which is confirmed by the record. I am therefore not persuaded that the failure by the Applicant to enter Appearance and/or file a defence can be excused on the basis of lack of knowledge of the existence of the suit as deponed to in the Supporting Affidavit.

In the absence of any Supplementary Affidavit being filed to counter the documentary evidence produced by the Respondent to demonstrate the Applicant's indebtedness. I find that there can be no arguable defence to warrant the suit going to trial.

For all the above reasons I refuse to allow the application and do hereby dismiss the same with costs to the Respondent.

**DATED SIGNED and DELIVERED at NAIROBI this 9<sup>TH</sup> day of FEBRUARY, 2011**

**M. G. MUGO**  
**JUDGE**

In the presence of:  
No appearance

For the Applicant

Ms Ongeti

For the Respondent