



**DAVID GATONYE KIMANI.....APPLICANT.**

**VERSUS**

**UAP PROVINCIAL INSURANCE CO. LTD.....DEFENDANT.**

**RULING.**

1. On 16<sup>th</sup> June, 2010 an interlocutory judgment was entered against the defendant. On 29<sup>th</sup> September, 2010, the defendant/applicant filed an application under order 9 A, Order 5 of the Civil Procedure Rules seeking for an order of stay of execution and to set aside the ex parte judgment. This application is premised on the grounds that there was no proper service of summons to enter appearance and ex parte judgment was obtained in contravention of the provisions of order 5 Rule 9 of the Civil Procedure Rules. It is further contended that the defendant has a good defence and it is in the interest of justice to set aside the judgment and allow the suit to be determined on merit.

2. This application is supported by an affidavit sworn on 29<sup>th</sup> September, 2010 by Maryann Mung'ara, the Legal Claims manager of the defendant. According to the applicants, the plaint contains a prayer for general and exemplary damages and interlocutory judgment has been obtained for special damages of Ksh. 10 million. It was submitted that the summons were not served upon the principle officer of the defendant but summons were delivered by a messenger after the messenger realized that the summons were not the ordinary mail. After perusing the court file they realized there was an affidavit of service that claimed the summonses were served upon a clerk by the name Mr. Waweru.

3. The applicant contends that they do not have such a clerk. Moreover, the applicant is situated at Bishop's Garden and not Bishop's Tower that the affidavit of service is defective. In further arguments, it was submitted that the applicant have a good defence because the claim arises from an insurance policy and there are particulars of fraud which are pleaded. Counsel relied on the decision in the case of **Muthaiga Road Trust Company Ltd. Vs Five Continents Stationers Ltd. & 2 others [2003] KLR page 714.** In that case where the Court of Appeal held that:-

(i) Where a plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons the court shall on request enter judgment against the defendant for any sum not exceeding the liquidated demand together with interest.

(ii) Such judgment may however be set aside pursuant to Order IXA rule 10 of the Civil Procedure Rules.

(iii) The court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits.

(iv) A defence on the merits does not mean a defence that must succeed but rather a triable issue that is an issue which raises a prima facie defence and which should go to the trial for adjudication.

4. On the part of the respondent, this application was opposed. Mr. Miruka, learned counsel for the respondent relied on the replying affidavit of the plaintiff sworn on 8<sup>th</sup> December, 2010. It was submitted that his summons were properly served upon the defendant and a Mr. Waweru, duly acknowledged receipt of the summons at Bishop's Garden, Bishop's Road. It was contended that the applicant has not explained how the summons arrived at her desk and the name of the messenger who delivered them is not given, no one did the messenger swear an affidavit. The interlocutory judgment is for special damages and the rest of the claim is supposed to proceed for formal proof. According to the respondent, the applicant has no defence that raises triable issues as the applicant merely repudiated a contract unilaterally

thus the applicant has not even come to court within the reasonable time. Counsel urged the court to dismiss the application.

5. This application challenges the service of summons. The applicant claims that they do not have a legal clerk by the name Mr. Waweru and their offices are not at Bishop's House but Bishop's Garden. This information is denied by the respondent, however the process server a Mr. Martin Mutua who served the summonses is the only one who could have clarified this issue. He was not called for cross-examination to verify whether he served the summons at Bishop's House or Bishop's Garden and also to clarify whom he served. As the matters were left to court to determine, the court has no choice but to grant the applicant the benefit of the doubt, more so because it is claimed that the defence raises triable issues. The issue of a reasonable defence also becomes clearer from the respondent's claim that the defendant merely repudiated a contract unilaterally. In my humble view that alone is a triable issue.

6. In the upshot, I find the application has merit. It is also within the inherent powers of this court to grant orders that will facilitate parties to a fair hearing so as to determine a dispute substantively. The *ex parte* judgment is hereby set aside; the defendant is granted leave to file the defence within 14 days. The respondent is hereby awarded costs of this application.

Ruling read and signed this 25<sup>th</sup> day of March, 2011.

**M. KOOME.**

**JUDGE.**