



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI COMMERCIAL & TAX DIVISION)
CIVIL CASE NO. 101 OF 2008

**RESOLUTION HEALTH EAST AFRICA
LIMITEDPLAINTIFF/RESPONDENT**

VERSUS

**INVESCO ASSURANCE COMPANY
LIMITED.....DEFENDANT/APPLICANT**

R U L I N G

The application dated 9th June, 2010 has been brought by way of Chamber Summons under Order IXA Rules 10 and 11 and Order XXI Rule 22 of the Civil Procedure Rules, Section 1(A) and (B) and 3B(1) of the Civil Procedure Act and all other enabling provisions of law. The same seeks the following orders.

1. **THAT this application be heard exparte in the first instance.**
2. **THAT this application be certified as urgent.**
3. **THAT this Honourable Court do order a stay of execution pending the hearing and determination of the Defendant's application herein.**
4. **THAT the default judgment entered herein on the 14th March, 2008 against the Defendant/Applicant and all proceedings and consequential orders issued herein be set aside.**
5. **THAT the Defendant/Applicant be granted leave to file its defence to the suit unconditionally.**
6. **THAT this application be heard interpartes on such date and time as this Honourable Court may deem.**
7. **THAT the costs of this Application be provided for.**

On 9th June, 2010, the applicant's counsel appeared before this court to argue the application. After carefully considering the application, this court granted prayer No. 3 for a period of 14 days only. Subsequently on 21st June, 2010, the applicant's counsel returned to court after duly serving the respondent's counsel. Unfortunately the respondent's counsel never turned up in court for unknown reasons. Since the respondent's counsel had been duly served, the court decided to allow the applicant's counsel to proceed with his application. In his submissions, Mr. Tigiti urged the court to set aside the

default judgment and that the defendant be allowed to file his defence. Further to the above, he also submitted that the requirements of Order V rule 2 were not complied with since the process server expressed difficulties that he went through while performing his work. According to the learned counsel the defendant only came to know about this case on 22nd April 2010 when execution was about to be carried out. It was his contention that the applicant has a defence that raises triable issues and hence he should be allowed to defend his suit. Besides the above, he also submitted that the applicant was put under Statutory Management on 20th February, 2010. That was confirmed by Hon. Lady Justice Lesiit in her order. Apart from the above, he also submitted that all the execution proceedings were not proper following the moratorium. He also informed the court that the applicant has just come out of Statutory Management on 14th January 2010. He was of the opinion that the applicant being an insurer, he may suffer prejudice if the application is not granted. He concluded his submissions by stating that the applicant has moved to court with due despatch.

After carefully considering the application it is apparent that the respondent has decided not to oppose the same. The reasons for the position taken by the respondent are not known to this court. Apart from the above, it is a general principle of law that each party must be given a chance to ventilate its case. This court has had the benefit of perusing the draft defence which has been annexed to the application. Whereas it is not appropriate at this stage for the court to make any comment on the defence, I am of the considered opinion that the same raises a number of triable issues. It is therefore important that the defendant be granted an opportunity to reply to the allegations which have been made in the plaint. Consequently, the court will be in a better position to give an informed and reasoned judgment. In view of the above, I hereby concede to the application and in terms of prayer No. 4 prayer and No. 5.

Specifically,

- (a) **I hereby set aside the judgment entered on the 14th March, 2008 against the defendant/applicant and all the proceedings and consequential orders.**
- (b) **I hereby grant the applicant 14 days leave to file and serve his defence on the plaintiff.**
- (c) **Costs in the cause.**

Those are the orders of this court.

MUGA APONDI
JUDGE

Ruling read signed and delivered in Open Court in the presence of:

Chigiti - Applicant's Counsel

MUGA APONDI
JUDGE
24TH JUNE 2010