

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

ELC Case 2047 of 2007

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

EVA M. GAITHA.....DEFENDANT

R U L I N G

This is an application by the defendant brought under Order IXA Rule 10 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking orders to set aside interlocutory judgment entered by the Deputy Registrar on 1st March 2007 for having failed to file a defence and the defendant be granted leave to file a defence and that the draft defence annexed to this application be deemed duly filed and serve. The application is premised on the grounds as stated on the body of the Chamber Summons and supported by an affidavit sworn by Kimamo Kuria.

The application is opposed by the respondent who has filed a replying affidavit giving grounds.

Mr. Kibicho counsel appearing for the defendant concedes that there was proper service of the summons upon the applicant and he entered appearance. But by inadvertent error the file was misplaced and also erroneously omitted from his regular bring ups and hence failure to file the defence. He further submitted that the defendant has a good defence to the plaintiff's claim as demonstrated by the draft defence annexed to the application.

Mr. Murei Counsel for the applicant in opposing the application submitted that there is no explanation given why the defence was not filed in time and that the negligence on the part of the applicant's advocate is inexcusable and the defence does not raise triable issues.

As I have said earlier there was proper service and therefore the interlocutory judgment entered by the Deputy Registrar on 1st March 2007 in favour of the respondent was in my view a regular judgment which can however be set aside pursuant to Order IXA Rule 10 of the Civil Procedure Rules which gives the court very wide discretion but the court should exercise its discretion judiciously. In the case of TREE SHADE MOTORS LTD v. D.T. DOBIE CO (K) LTD AND ANOTHER [1995] 1 EA 324 the Court of Appeal had this to say. In exercising its setting aside discretion the trial court should also consider whether the defence on record or draft defence is reasonable and whether it raises triable issues.

The law is well settled that in an application for setting aside ex parte judgment the court must consider not only reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred to as whether the defence if filed already or if a draft defence is annexed to the application raises triable issues. Where the litigant has not deliberately sought to obstruct or delay the cause of justice ex parte judgment should be set aside to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. On perusal of the draft defence annexed to this application I am satisfied that it raises triable issues and I therefore the defendants application is allowed in terms of prayer (ii) (iii) and (iv) of the Chamber Summons dated 12th February 2008.

Delivered and dated at Nairobi this 25th day of July, 2008.

J. L. A. OSIEMO

JUDGE