



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Civil Suit 485 of 1995**

**GERTRUDE PHILOMANA.....**  
**.....APPLICANT**

**VERSUS**

**1. DUNCAN CHENGO BANDARI.....RESPONDENTS**

**2. ZIANI HOLDINGS LIMITED**

**R U L I N G**

The defendants herein have applied by Chamber Summons dated 5.2.2008 mainly for an order setting aside the Ex-Parte Judgment entered against them and for leave to defend the suit. When the application came up for hearing on 3.7.2008, Learned Counsel for the plaintiff raised a Preliminary Objection to the application upon the grounds set out in the Notice dated 1.4.2008. In his oral submissions before me, counsel for the plaintiff argued that the application is incompetent as none of the provisions of the law cited apply. Counsel further argued that the judgment sought to be set aside was as a result of failure of the defendants to give discovery and not for non-attendance as counsel for the defendants seemed to contend. Counsel further submitted that the application has been filed by an advocate who was not properly on record at the time of filing. It is also contended for the plaintiff that allegations have been made against the defendants' former advocates who are not joined to these proceedings without affording them an opportunity to be heard on those allegations and finally that judgment having been delivered on 19.1.1996, the defendants' application has been lodged too late in the day. For those reasons counsel for the plaintiff urged me to uphold the Preliminary Objection.

In his response to the Preliminary Objection, counsel for the defendants submitted that the application is properly before the court and reference to fraud by the defendants' former advocates was borne from the record and the affected advocates need not have been served with the application.

I have considered the above arguments of learned counsel on the defendant's application. The turning point in my view, is whether it is open to the defendants in the light of admitted facts to move the court to set aside the judgment entered against them in the manner they have chosen to do. The judgment was not entered in default of appearance or defence. So, Order IXB Rule 8 does not apply. The defendants' defence and counter-claim were struck out and dismissed for failure by the defendants to comply with an order to give discovery which order paved way for formal proof which in due course happened. In those circumstances, it is not open to the defendants to seek to set aside the judgment as though it had been entered in default of appearance or defence.

In my view if the defendants desire to be heard on the application which sought to strike out their defence, they should have sought orders in that regard. The defendants cannot now seek unconditional leave to defend the suit without challenging the order striking out their earlier defence and counter claim.

It is also my view that it is too late for the defendants to seek to challenge the original Summons to enter appearance on the ground that they were not given adequate time to enter appearance when they

entered appearance, filed defence and, set up a counter-claim and fully participated in all the trial proceedings before their defence and counter claim were struck out for failure to comply with the order to give discovery.

In the premises, I uphold the Preliminary Objection and strike out the defendant's application for being incompetent. The plaintiff shall have the costs of the application.

Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 24<sup>TH</sup> DAY OF JULY 2008.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of: Kasmani for the plaintiff and Kithi for the defendant.

**F. AZANGALALA**

**JUDGE**

**24<sup>TH</sup> JULY 2008**