



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 2513 of 1993**

EDWARD ALEXANDER DAVIDSONS & ANOTHER.....PLAINTIFF

VERSUS

SCAN FORWARDERS (K) LTD AND ANOTHER DEFENDANT

RULING

The background information to this ruling is that the first and second plaintiff filed suit vide their original plaint against the first and second defendant. The original plaint is dated 24th May 1993 and filed the same date. It was accompanied by a chamber summons dated and filed the same date seeking restraint orders against the defendants.

There is an amended plaint dated 8th July 1993 and filed on 15th July 1993. This amended plaint introduced the 3rd defendant Trade Mart Enterprises in addition to the Scan Forwarders Kenya Limited as the first defendant and Valley Auctioneers as the 2nd defendant. The averments relevant to this application are that on 30th day of November 1989, a company known as Mocans created a debenture over all its assets in favour of the second plaintiff in consideration of the second plaintiff agreeing to make financial advances to the company from time to time. The company defaulted in the repayment of the financial advances made to it by the second plaintiff and on the 14th day of April, 1993, the second plaintiff appointed the first plaintiff as manager of the company and receiver of all property and assets charged by the company under the debenture referred to in paragraph 5 hereof. On the 10th day of May 1993, the first Plaintiff in exercise of his powers as Receiver Manager of the company took possession of the machinery itemized in paragraph 7 of the amended plaint. On 13th day of May 1993 the second defendant acting on its instructions given to it by the first defendant removed the said machinery from the warehouse where they had been stored to a destination unknown to the plaintiffs. The first defendant purported to sell and deliver the machinery to the 3rd defendant in blatant disregard of the interests of the plaintiffs herein. The second Plaintiff stated that if the machinery is sold, it is likely to suffer very substantial loss and irreparable loss as the machinery are the only assets belonging to the company which owes it the sum of Kshs 25,766,513.85 which amount continues to accrue compound interest at the rate 22.5% last applied on the 1st day of April, 1993.

In consequence thereof, the plaintiffs sought a declaration that the first plaintiff is entitled to immediate possession of the machinery, a declaration that the purported sale of the machinery to the third defendant is null and void and of no effect whatsoever, an order directing the defendants jointly and severally to deliver up the machines to the first plaintiff or pay to the first plaintiff an amount equivalent to their values, an injunction restraining the defendants jointly, severally and by themselves their servants, agents, or otherwise from selling, disposing of or in any way dealing with the machinery or any of them without the consent of the Plaintiff, general damages for the detention and conversion of the machinery, costs of the suit together with interest at court rates.

The amended plaint was accompanied by an interim application also dated 8.7.93 and probably filed the same date as the amended plaint. A copy of this application is missing from the court file and so the court is not in a position to know what it was seeking. The first defendant had filed a notice of appointment of advocate on 7th June and on 22nd July 1993 the said advocates Messers, Lumumba & Ojwang Advocates put in grounds of objection to the chamber summons of 8th day of July 1993. They are to the effect that the court has no jurisdiction to grant an injunction in the circumstances herein where the crystallization of the second plaintiff's floating debenture occurred later in time than the 1st defendant's right of possession lien. In the alternative but without prejudice to the foregoing the 1st defendant's contract with M/S Blowmocans Ltd under receivership by virtue of which the 1st defendant's possessory lien is claimed was concluded before the crystallization of the 2nd Plaintiff's debenture and "*ipso facto*" the court has no jurisdiction to interfere by injunction. That in any event the plaintiffs have not been able to demonstrate that:-

- (a) This is a special case to warrant a grant of interlocutory mandatory injunction.
- (b) The plaint discloses reasonable cause of action with a probability of success.
- (c) If there is such cause of action the same is not adequately remediable by damages and in any event that
- (d) The balance of convenience is weighted in favour of the plaintiff.

The Counsels on record for the first defendant put in a notice of appointment to act on behalf of the 3rd defendant on the same date of 22.7.93 accompanied by grounds of objection to the effect that the 3rd defendant was an innocent purchaser for value without notice, and that an injunction does not lie against it as there is no privity of contract between it and the plaintiffs.

The record of the court proceedings shows that the said application of 8.7.1993 came up for inter parties hearing on 27.1.94 before Mr. Justice Pall as he then was. Submissions of the applicant were commenced and before conclusion the court on its own motion paused a question to the counsels appearing for the plaintiff/applicant and the respondents if it would be better to hear the suit instead of the interlocutory application. Both counsels agreed. A consent order to the effect that the suit be heard instead of the interlocutory application was made. An order was then made by consent to the effect that the affidavits of defendants shall be treated as their statement of defence to the plaintiffs claim. Summons for directions were dispensed with and the suit was set down for hearing on 22.2.1994. Liberty was given to the first defendant to file a further affidavit provided it is filed and served by 10.2.1994 and no viva voce evidence was to be adduced by either side.

On 22.2.94 when the trial commenced it is noted that the replying affidavits of Kiptanui sworn on 2.7.93 and Paul O. Abuor sworn on 7.6.93 and that of Samuel M. Gathogo sworn on 26.5.93 all form the defence to the plaintiffs claim. This court as observed earlier on has not traced the application of 8.7.93. It has not traced the replying affidavit of Kiptanui of 2.7.93 but traced that of Paul Abuor sworn on 7.6.93 and filed the same date. The court has not traced the replying affidavit of Samuel M. Gathogo sworn on 26.5.93.

Submissions were made on the basis of the documents filed and agreed upon by advocates for the plaintiff M/s Oraro and Rachier and Advocates for the defendants Lumumba and Ojwang as well as replying affidavits of persons mentioned.

Judgment was delivered on 28.4.1994. Assessment of the plaintiff's submissions is found at pages 1 – 3 first paragraph while that of the defendants is found at page 3 from the 2nd paragraph on page 3 to 4. The court used the term defendants but did not refer to them as 1st, 2nd and 3rd defendants. Case law is discussed at pages 4,5, conclusion is at page 6 where by orders were made to the effect that the defendants do jointly and severally deliver up the machinery in question to the first plaintiff and failing which, the defendants do jointly and severally pay to the first plaintiff Kshs 8.5. million being the amount equivalent to the value of the goods in question, costs of the suit together with interest thereon at court rates.

After delivery of the judgment an application for stay of execution was filed by advocates for the defendants on 6.5.94 seeking stay of execution pending appeal. There is a notice of appeal dated 5.5.94 with no filing stamp which indicates clearly that it is the 1st and 3rd defendants who had become aggrieved by the said judgment of 28.4.93 and were desirous of proceeding to the Court of Appeal for further reliefs. In addition to the foregoing there is an order dated 29.6.95 and filed on the same date to the effect that the application of 24.5.93 had been withdrawn as against the second defendant.

It is against the foregoing background information that the second defendant applicant moved to this court vide chamber summons under Order IXB rule 8 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act dated 19.1.2004 and filed on the same date seeking an order that judgment entered on 28th April, 1994 and all consequential orders be set aside and that costs be provided for. The grounds in support are those set out in the body of the application, supporting affidavit and oral submission in court and the major ones are:-

- The second defendant was never served with Summons to enter appearance. He had been served with an application in respect of which they filed notice of appointment and a replying affidavit to that application, which application was withdrawn at the inter parties hearing as against the second defendant.
- In the year 1995 the second defendant learned that the Plaintiffs had appointed an investigator to trace the assets of the second defendant where upon Counsel for the applicant wrote annexure SMY2 to inquire from the plaintiffs the current position and they wrote back vide their letter of 16.6.95 to the effect that there was no judgment against the second defendant.
- That in the year 2004 is when the second defendant was served with a bill of costs and when they made inquires is when they were informed that the matter had been heard in their absence and judgment entered against them.
- They content that the judgment was irregular as no appearance was entered and no summons for defence were taken out.
- That the advocates appearing for the other defendants were not on record for the second defendant.
- That there is no mention from the Plaintiffs' Counsels' deponents or annexures to show that they were not aware of the proceedings going on in court neither is there mention that they were served with the summons.

On the law Counsel for the applicant relied on the case of JOHN KAMAU ICHARIA VERSUS PAUL NJIRU AND ANOTHER: NAIROBI HCCC NO.1774 OF 1994. The ruling in this case relates to two applications asking the court to set aside the exparte judgment the court entered for the plaintiff against the defendants in the suit on the 17th day of June 1996. The main argument of both defendants in this cited case was that they were not served and the first time they learned of the suit was through daily Newspapers, when they learned that he plaintiff had obtained judgment against them, that they had good triable issues. In this case Khamoni J. reviewed at length authorities setting aside ex parte orders both from the High Court and Court of Appeal. The learned judge made findings to the effect that while it should be remembered that to deny the subject a hearing should be the last resort of a court, at the same time there must exist compelling reasons to deny the Plaintiffs/Respondents the fruits of a regular judgment. In this case the court declined to set aside the regular judgment because applicants lied that they had not been served when in fact they had been served.

The Plaintiff/Respondents Counsels advocate countered the applicant's submissions with grounds in the replying affidavit, annexures and oral submissions in court. The major ones are:-

- That the judgment entered herein was not in default but after a full hearing.
- The second defendant was all along aware of the existence of the suit as he took steps in the suit through his lawyers Ndungu Kimani and then Lumumba and Ojwang as shown by the record.
- The plaintiff cannot be blamed as the 2nd defendant never filed a defence and so judgment was entered on merit and in the body of the judgment at page 3, the learned judge referred to submissions on behalf of the 2nd defendant.
- After judgment an application was brought by counsel for the second defendant seeking to stay execution pending appeal but were not successful.
- The second defendant participated in the drawing up of issues for trial and thereafter went into hiding and only resurfaced when the plaintiff traced the 2nd defendant's assets and were about to execute.
- That it is the duty of this court to ensure that the powers of the court for setting aside *ex parte* judgments should not be abused. That the conduct of the 2nd defendant should be considered by this court as it all along misled the plaintiff in believing that all was well when in fact it was not
- That the applicants have not explained the delay in moving to upset the said judgment and as such they should not be indulged more so when they have denied their own lawyers.

Turning to case law Counsel for the Respondent submitted that the discretion to set aside is unlimited but it should not result in undue hardship to the successful party.

- That the applicants' move is merely calculated to prevent the respondents from executing.
- That the respondent will suffer undue hardship if the matter is reopened as the transaction took place in 1993 and witnesses may not be available or if available, then their memory is eroded and will also be obligated to incur costs to go through another trial.
- Considering the time that has elapsed since the judgment date great injustice will be suffered by the respondent if the judgment was to be set aside.
- That the second defendant, has not exhibited any defence to show that there will be triable issues to be gone into.

Reliance was placed on the case of *PITHON WAWERU MAINA VERSUS THUKA MUGIRIA* [1982-88] 1KAR 171 *where it was observed at page 172 by Potter JA as he then was quoting DUFUS P. in Patel versus E.A. Cargo handling services Ltd* [1974], E.A. 75 at 76 C & E that:-

“There are no limits or restrictions on the judges discretion except that if he does vary the judgment he does so on such terms as may be just.....The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules:”

Secondly, as Harris J. said in *SHAH VERSUS MBOGO* [1967] E.A. 116 AT 123 B “this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, in advertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion, or otherwise, to obstruct or delay the course of justice.”

The case of *PHILIP KEIPTO CHEMWOLO AND MUMIAS SUGAR CO. LTD VERSUS AUGUSTINE KIBUNDE* [1982 – 88] 1 KAR 1036 where it was held *inter alia* at holding 2 that where a regular judgment had been entered the court would not usually set aside the judgment unless it was satisfied that there was a triable issue.

The case of **PRICE AND ANOTHER VERSUS HILDER** [1986] KLR 95 where it was held *inter alia* that there would be great injustice in re-opening the case and subjecting the plaintiffs representatives to defending a counter claim over nine years after the demise of the plaintiffs chief witness. Further that the plaintiff was guilty of laches and it would be difficult to do justice to the partes after such a long time by setting aside the *ex parte* judgment.

In response to that submission counsel for the applicant reiterated that judgment sought to be set aside was not on merit nor regular, that the observations made at page 3 of the judgment were not made on behalf of the second defendant, they have annexed a defence to the further affidavit, they maintain that the second defendant has never filed an appeal, they came to court as soon as they learned of the judgment, there is no notice of appointment by Lumumba and Ojwang to the effect that they were acting for the second defendant, that if there is any hardship then the same was caused by the plaintiff who failed to serve summons that no injustice will be suffered as the case is based on documents which can be reproduced in evidence.

On the courts assessment of the facts herein, it is clear that there is no doubt that the application is for setting aside of a judgment. The

application is premised on the provisions of law cited namely Order 1XB Rule 8, Civil Procedure Rules which states

“where under this order judgment has been entered or the suit has been dismissed, the court on application by summons may set aside or vary the judgment or order upon such terms as are just”.

Section 3A of the Civil Procedure Act also cited aims at preventing abuse of the due process of the Court. Section 3A Civil Procedure Act and Order 1XB rule 8 is proof that this court has jurisdiction to set aside an *ex parte* judgment. The exercise of this jurisdiction is purely discretionary though there is a requirement that it be exercised judiciously. This judicial direction has been interpreted in a number of decided cases both by the High Court and Court of Appeal. Some of these were ably set out by Khamoni J. in his ruling JOHN KAMAU ICHARIA VERSUS PAUL NJIRU AND ANTOHER NAIROBI HCCC NO.1774 OF 1994 (*supra*). The exposition of these principles runs from page 7 through to page 11 of the said ruling. Quoting from MBOGO AND ANOTHER VERSUS SHAH [1968] E.A.93 a Court of Appeal decision upholding the High Court decision in **SHAH VERSUS MBOGO AND ANOTHER [1967] E.A.116** the principle enunciated is that *“the discretion is intended to be exercised to avoid injustice or hardships resulting from accident, in advertence or excusable mistake or error but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice”*. In the case of PITHON WAWERU MAIN A VERSUS THUKA MUGIRIA [1982-88] 1 KAR 171 Chesoni Ag. JA as he then was stated the principle as quoting with approval his decision in the Municipal Council of ELDORET VERSUS JAMES NYAKEMO ELDORET HCCC APPEAL 14 OF 1980 stated this *“the court goes by the principle that such an ex parte judgment having been entered neither upon merits nor by consent of the parties is subject to the courts power of revocation at its discretion”*

In the case of **PHILIP KEIPTO CHEMWOLO AND MUMIAS SUGAR CO LTD VERSUS AUGUSTINE KUBENDE [1982-88] 1 KAR 1036 PLAT JA** as he then was set the following principles at pages 1038 – 1039)

“(1) The main concern was to do justice to the parties and would not impose conditions on itself to fetter the wide discretion given it by the rules. On the other hand where a regular judgment had been entered, the court would not usually set aside the judgment, unless it was satisfied that there were triable issues which raised a prima facie defence which should go for trial

(2) The discretion is in terms unconditional. The courts however had laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits meaning that the applicant must produce to the court evidence that he has a prima facie”defence.

(3) “It is primarily important to ascertain whether there are merits which ought to be tried. At the same time this court will not lightly interfere with the discretion of the trial judge unless it is satisfied that he misdirected himself in some matter, and as a result arrived at a wrong decision or unless it is manifest on the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been a miscarriage of justice”

Chesoni Ag. J.A as he then was in the case of PRICE AND ANOTHER VERSUS HILDER [1986] KLR 95 at page 100 had this to say” In my view the judge could not too, have exercised the discretion in favour of the Respondent who had waited for nearly nine years to seek the courts’ order setting aside the *ex parte* judgment. The Respondent was guilty of laches and it was difficult to say that justice could be done to the parties after such a long time when in fact one of them was now dead”.

At page 9 of the ruling Khamoni J quoting Kneller JA as he then was in PITHON WAWERU MAINA *supra* at page 172 stated the following principle *“The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of a court”*

At page 10 of the ruling in JOHN KAMAU ICHARIA *supra* Khamoni J. quoting Bosire J as he then was in the case of KIMANI KIGANO AND COMPANY ADVOCATES VERSUS JIMBA CREDIT CORPORATION LTD (whose citation was not given) summarized the principles applicable namely:-

- 1). The power to set aside is discretionary
- 2) The discretion is unlimited provided it is properly exercised
- 3) It being a judicial discretion must be exercised on the basis of evidence and sound legal principles.
- 4) The court has power under order 1XA rule 10 of the Civil Procedure Rules to set aside on terms as are just.
- 5) The Court is obliged to look at the defence the applicant/defendant may be having to the claim.
- 6) *If a party establishes that he has a reasonable defence and which appears on the face of the pleadings to contain considerable merit, the court ought to be inclined towards setting aside”*

The foregoing principles are to be applied to the applicants’ complaints and the Respondents responses. The applicants’ first complaint is that he was not served with the summons to enter appearance. A perusal of the entire record reveals, that no summons were ever taken out and served on the defendants. The proceedings of 27.1.94 show that what the court was dealing with at that point in time was an interlocutory application dated 8.7.1993 filed after the plaint was amended or simultaneously with the amended plaint. In fact the

proceedings of 22.2.94 show that the second defendant had not responded to that application and that is why his affidavit of 26.5.93 to the application of 24.5.93 was transported by air and imported into the proceedings of the application dated 8.7.93. The rule under which the court invoked the power to so transport this affidavit is not stated. It was in the cause of presentation of arguments for and against the interlocutory application dated 8.7.93 that the court advised parties to proceed with the main suit and they agreed. No viva voce evidence was called, argument presented on the basis of depositions and documents agreed upon by counsels of the plaintiffs and the first and 3rd defendants. Thereafter the court proceeded to pronounce a judgment. The short-circuited procedure left no room for the filing and service of summons. Had this been the position the Respondent could have exhibited copies of the summons served and a return of service to that effect. Paragraph 3 and 4 of the Respondents replying affidavit only talks of service of the interlocutory application dated 24.5.93 and not service of the plaint or amended plaint.

In view of the foregoing assessment of facts as regards the applicants first complaint this court makes a finding to the effect that no summons were served on to the second defendant applicant. The second complaint is that the second defendant was not served with a hearing notice. The judgment sought to be set aside arises from proceedings relating to the interlocutory application dated 8.7.93. A perusal of the court record reveals presence of a hearing notice dated 19.10.93 addressed to M/S Lumumba and Ojwang advocates. The reverse of the notice show that it was acknowledged receipt and rubber-stamped by that firm of advocates with a receipt stamp of 25.10.93. There is no other hearing notice traced. It therefore follows that the 2nd defendant can only be pinned down on the issue of a hearing notice if it can be shown that they were being represented by Messers Lumumba and Ojwang advocates.

There are two notices of appointments filed by the firm of Lumumba and Ojwang. one dated 7th June 1993 and filed the same date. It indicates plainly that they were to appear for the 1st defendant. This was followed by grounds of objection filed on 22.7.97 in objection to the application of 8.7.93. It is indicated that the said grounds were filed on behalf of the first and 3rd defendant. The second notice of appointment was filed on 22.7.93. It is indicated in the body of the notice that it was in respect of the 3rd defendant. Grounds of objection filed show that they were in respect of the first and 3rd defendant. After delivery of the judgment the firm of Lumumba and Ojwang filed an application for stay of execution. The affidavit in support of that application talks of the defendants. However the notice of appeal indicates clearly that the parties, dissatisfied who were desirous of appealing were the first and 3rd defendants. All these documentations show that the firm of Lumumba and Ojwang Advocates were appearing on behalf of the first and 3rd defendant.

The application dated 24.5.93 to which the second defendant applicant had deposed an affidavit on 26.5.93 was withdrawn against him on 27.5.93. Then the application of 8.7.93 intervened. As noted earlier in the background information, this application is missing from the court file. There is nothing to show that the 2nd defendant having been absolved from the first application was included in the subsequent application. In the absence of such proof, the Respondent not having mentioned anything of the sort in their replying affidavit there is nothing to show that the second defendant was to participate in the proceedings relating to the interlocutory application of 8.7.93 which resulted in the judgment sought to be set aside. The second defendant having been excluded from the proceedings by an order of the court, there being no proof that summons to enter appearance were served on the 2nd defendant, and having established that the firm of Lumumba and Ojwang were on record for the 1st and 3rd defendants only, this court has no alternative but to make a finding that the second and 3rd complaint of the 2nd defendant that they were not served with summons and no advocate appeared for them at the hearing are upheld.

This brings me to the responses of the Respondent. Paragraph 4 and 5 of the Respondents replying affidavit avers that the suit was not withdrawn against the second defendant applicant and the second defendant did not file any defence to the plaintiffs claim. Indeed the record shows that the suit was not withdrawn against the second defendant. It is also correct that he 2nd defendant did not file any defence. However as observed earlier in this ruling that the suit was short circuited at the interlocutory stage there was no room left for taking out of summons to enter appearance and serve the same. This court has already made findings that none were taken out and served. Had that been the case the Respondent would have annexed a copy of the summons to enter appearance served on the second defendant. They would have also exhibited a copy of the return of service to show that indeed the second defendant was served. Service of summons is the only legally recognized mode of invitation to a party to enter appearance and defend the suit. It therefore follows that it is not the fault of the second defendant that he did not file a defence against the plaintiffs claim. He did not do so because he had not been properly invited to do so.

The next response is that there is no defence which raises triable issues. The authorities cited herein show that the court seized of such an application has to consider whether the defence intended to be put forward raises triable issues. The defence to be looked at is any that is shown to exist on the record however irregularity put. The counsel for applicant submitted that there is a draft defence annexed to the 2nd defendants further affidavit which is not traced on the court file. However there is one irregularly filed on 11th July, 2005. Paragraph 4,5,6,7,8 and 9 of the said irregular 2nd defendants defence raises triable issues as to whether they received instructions from the first defendants to repossess the goods in order to defeat the claim of the plaintiffs, whether they were aware of the debenture in respect of the same, whether they handed over possession of the goods knowing that a demand had been made for the said second defendant not to hand over the said goods. The finding of this court is that the intended defence of the second defendant raises triable issues.

The last response is one to the effect that up setting the judgment will cause hardship in view of the length of time it has taken to move the court to have it upset. In resolving this, this court has to bear in mind two cardinal principles namely:-

- (1) That denying a party a right to be heard is the last resort that a court of law can do to a litigant. More so like in this case where the process leading to denying him of a right of being heard appears to be flawed.
- (2) The court has to bear in mind the regularity and or irregularity of the judgment in question where the judgment is regular the court should be slow in upsetting it where a considerable length of time has passed and such upsetting is likely to cause hardship and injustice to the successful litigant. Where there is an irregularity no matter how caused a court of law has no alternative but to uphold the law and upset it irrespective of the injustice or the hardship that is likely to be caused to the successful litigant.

When these two cardinal principles are applied to the facts here in it is clear that the judgment cannot pass the test of regularity. The reason

for saying so is that proceedings having been commenced by way of plaint under the Civil Procedure Rules, they could only be finalized after due compliance with the provisions of Order VII, VIII, IX, 1XA, 1XB, X, XII, XIII, XIV, XV, XVI, XVIII and XX etc. In brief these steps were necessary.

1. Service of summons and entry of appearance and filing of defence.
2. Discovery and framing of issues.
3. Setting down of the suit for hearing either by way of viva voce evidence or submissions on documents.
4. Then writing and delivery of judgment.

There is no procedure known to this court under the Civil Procedure Rules where a suit commenced in accordance with the Civil Procedure Rules can be short circuited and finalized through deponents for and against an interlocutory application. It is this courts view that this is the correct position and that is why no rule of procedure was quoted by the learned judge on 27.1.94 when the judge advised parties to follow the advised procedure. The only instance where affidavits can be converted into pleadings to form the basis of a plaint and defence are instances where proceedings have been commenced under order 36 Civil Procedure Rules by way of originating summons. Order 36 rule 10 (1) reads “*where, on an originating summons under this order, it appears to the court at any stage of the proceedings that the proceeding should for any reason be continued as if the cause had been began by filing a plaint it may order the proceedings to continue as if the cause had been so begun and may, in particular order that any affidavit filed shall stand as pleadings, with or without liberty to any of the parties to add to or to apply for particulars of those affidavits.*”

(2). where the court makes an order under sub rule (1) order LI applies as if a summons for direction had been taken out and such orders as are appropriate under order LI may be made.

(3) This rule applies notwithstanding that the causes could not have been began by filing a plaint..

(4) Any reference in these Rules to proceedings began by a plaint shall unless the context otherwise requires be construed as including a reference to a cause proceeding under an order made under sub Rule (1)”

The foregoing rule has no room for converting proceedings commenced by a plaint into those commenced by an originating summon where by the court can be empowered to change the mode of procedure as was the case herein.

This court is alive to the inherent powers vested in the court under section 3A of the Civil Procedure Act. When making the orders of 27.1.94 the court did not indicate that it was invoking those powers. Even if it can be taken that this was the only probable provision which could have been invoked by the learned judge when he made the orders of 27.1.94, the same cannot hold in view of the clear provisions of law on how a suit commenced by plaint can be finalized. It is trite law that section 3A Civil Procedure Act cannot apply where there are clear provisions of law covering that particular situation like in this case.

This court also takes judicial notice of the fact that there are instances when disposal of an interlocutory application can finally determine a suit in its infancy like in this case. This arises in instances where the interlocutory application attacks the very base and foundation of the suit so that if allowed the result of the application uproots the suit completely and then brings the matter to its final rest. In this case the end result bringing the suit to an end is a ruling and not a judgment.

In view of the foregoing, the findings of this court is that there having been no jurisdiction on the part of the court to convert a suit commenced by a plaint to one that can be disposed off by way of affidavits, the court’s orders of 27.1.94 which gave birth to the proceedings that led to the judgment complained of were a nullity, void *abinitio* and cannot stand. This is a painful finding or order to be made in view of the age of the proceedings but this court has no otherwise but to hold that the entire process was irregular. Since the process was irregular, the resultant judgment was and still is irregular. Being an irregular judgment it cannot stand. Allowing it to stand in the circumstances displayed herein will amount to an abuse of the due process of the court notwithstanding the hardship that may be suffered by the successful party.

For the reasons given herein in this assessment the 2nd defendants application dated 19.1.2004 and filed the same date be and is hereby allowed with costs to the applicant. Parties are at liberty to regularize the pleadings and there after proceed according to law if they so wish.

DATED, READ AND DELIVERED AT NAIROBI THIS 27TH DAY OF APRIL, 2007.

R. NAMBUYE

JUDGE