REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 584 of 2006

MOHAMMED HASSIM PONDOR (Suing on behalf of I.A.T.A)…...…1ST PLAINTIFF/RESPONDENT

MERCANTILE ASSURANCE CO. LTD….....2ND PLAINTIFF/RESPONDENT

VERSUS

TOPDECK TRAVEL AND TOURS LTD…....….1ST DEFENDANT/APPLICANT

KIZITO CHARLES MACHANI….....…2ND DEFENDANT/APPLICANT

MONICAH AKINYI SEWE MACHANI…..….....…3RD DEFENDANT/APPLICANT

RULING

The Applicant is the Defendant who seeks three orders that is, a stay of execution of the ex-parte judgment entered on 23rd April, 2007 together with all the consequential orders; an order setting aside the ex parte Judgment and all the consequential orders and finally the unconditional leave to defend the suit. The application is brought under Order 1XA rule 2,3,10 & 11 and Order XX1 rule 22 of Civil Procedure Rules and Section 3A and Section 63(e) of Civil Procedure Act.

The main grounds upon which the application is based are

cited on the face of the application as follows:-

(i) The Defendants were never served with summons to Enter Appearance as required.

(ii) The Defendants have a good Defence to the Plaintiff's suit.

(iii) The Defendants ought to be heard in Defence of the suit.

(iv) In the interests of justice, the ex parte interlocutory judgment ought to be set aside as the Defendants are entitled to natural justice together with other grounds in the Supporting Affidavits herein sworn by Chalres Machani and Monicah Machani and Lazarus M. Odongo Advocate and other grounds to be adduced at the hearing of this application.

The application is supported by the affidavit of the 2nd and 3rd Defendants/Applicants and by that of Lazarus Odongo Advocate.

The application was opposed. The Respondent filed a replying affidavit sworn by the process server Henry Mutisya who swore that he served a person identified to him as the 3rd Defendant at the offices of the 1st Defendant Company.

The brief facts surrounding the application before court is that after this suit was filed on the 27th October 2006, summons in the suit were issued on 30th October 2006. Thereafter, the 1st Defendant was served through a son of the 2nd and 3rd Defendants on the 4th September 2006 at the offices of the 1st Defendant. The 3rd Defendant was served the next day. This information is contained in the affidavit of service dated 4th January 2007 sworn by Henry Mutisya.

No defences were filed and therefore the Plaintiff's Advocate applied for judgment against all three Defendants on 12th April 2007. Which was entered on 23rd April 2007.

The Applicants have challenged the service of the summons to enter appearance on basis no person by name Machani Jnr, whom the process server alleges he served on behalf of the 1st Defendant and who introduced the 3rd Defendant for service, ever existed. The 2nd Applicant has deponed that he found the summons to enter appearance pushed under his office door on 26th March 2007.

Machani, the 2nd Defendant brought in a new angle to the case when he depones that he passed the summons and plaint to his lawyers immediately he found them. The lawyer who received them was Lazarus Odongo whose affidavit explains that he misplaced the summons and the plaint thus causing further delay as a result of which judgment was entered.

I have considered the submissions by both counsels and cases relied upon by the Applicants Advocate in the matter. I have also considered the evidence given by the process server during cross-examination by the Applicants Advocate under Order V rule 16 of Civil Procedure Rules. Service of summons to enter appearance is a fundamental requirement of procedural law without which all subsequent actions and steps are voidable at the instance of the aggrieved party. **Ringera J,** as he then was in **REMCO LTD V**

MISTRY JADVA PARBAY & CO. & TWO OTHERS, HCCC NO. 171 OF 2001 put it quite succinctly thus:-

"I begin by stating the applicable law as I understand it. First, if there is no proper or any service of the summons to enter appearance to the suit, the resulting default judgment as an irregular one which the court must set aside ex debito justititiae (as a matter of right) on application by the defendant. Such a judgment is not set aside in exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself. Secondly, if the default judgment is a regular one, the court has an unfettered discretion to set aside such judgment and any consequential decree or order upon such terms as are just as ordained by Order IXA rule 10 of the Civil Procedure Rues. Case law on the exercise of the discretion is plenty. The cases show that the main concern of the court is to do justice between the parties: PATEL V. E. A. CARGO HANDLING SERVICES LTD(1974) E.A. 75.

The discretion is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice:

The 1st Defendant is a limited liability Company and service on a Corporation as prescribed by Order V rule 2 of Civil Procedure Rules should be effected on the Secretary, Director or other principle officer. The process server alleged that he served the son of the 2nd and 3rd Defendants whose name was given only as Machani Jnr, by some lady by name Ms. Lucy, and which lady said that the said Machani Jnr, was the Managing Director of the Company. Both the 2nd and 3rd Defendant have denied the existence of such a character. In fact the 3rd Defendant in her affidavit stated that the only son she had was a minor aged 16 years and who never worked at the 1st Defendants offices as he was a student. Even if I was to believe that one Machani Jnr, was served with the summons on behalf of the Corporation, I am not satisfied that this was proper service as contemplated under Order V rule 2. The 3rd Defendant has deponed on oath that her son is a minor and did not work at all at the offices of the 1st Defendant Company. Mr. Billings has tried to punch holes on the affidavits of the 2nd and 3rd Defendants on this point and even went to the extent of saying that the birth certificate of the Defendants son ought to have been annexed to prove he was a minor. In my view, it is the process server who should have commented about Machani Jnr's age in his evidence but he failed to do so. There is no evidence placed before me to show that an officer of the 1st Defendant Company was served on 4th December 2006 as alleged, There was no proper service in my view.

As for the service on the 2nd Defendant, the evidence adduced by the process server is that he did not serve him but rather served his wife on his behalf. The 3rd Defendant, the 2nd Defendants wife has denied being served with the summons or ever meeting the process server in the 1st Defendants offices at any

time. In fact the 3rd Defendant denied ever going to the said offices at any time. The 3rd Defendant was not called to give oral evidence on the issue of service and neither did the Defendants Advocate offer her for cross-examination by the Respondent's Advocate.

I find myself in a difficulty in determining whether the 3rd Defendant was served with the summons on her own behalf and that of the 2nd Defendant. Her denial is on oath before a commissioner for oaths. The process server swore on oath both before a commissioner for oaths and in court. The only observation I can make of the matter is that it is rather curious that the service was effected on the Defendants in December 2006 and the affidavit of service sworn one month later and further that the request for judgment was not made until four months after the alleged service.

There is a possibility that the service was not effected on the Defendants as alleged by the process server. Be that as it may, the 2nd Defendant admits getting the summons under the door of his office on 26th March 2007. Even going by the letter date there is delay in filing defence between 26th March 2007 to 23rd April 2007 a month later, when the ex-parte judgment was entered. An attempt is made to explain that delay by the Defendants counsel.

I am not convinced by the explanation offered by Mr. Odongo Advocate. However, as **Apaloo, J** observed in **PHILIP CHEMWOLO & ANOTHER VS AUGUSTINE KUBENDE [1982-88] I UAR 1036.**

"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on the merits."

On that conclusion I will end by stating that in view of lack of service or unproper service of summons on the Defendants in this case the ex-parte judgment is set aside *ex debito justitiae.*

On the other hand I have considered the annexed draft statement of defence by the 1st, 2nd and 3rd Defendants and I am of the view that it is a good defence which raises triable issues particularly on whether or not the Plaintiff was guilty of breaching the contract between it and the Defendants and also whether the deed of indemnity between the Plaintiffs and the Defendants are enforceable in law. In exercise of my discretion, I am of the view that the Defendants should be given a right to defend the suit. I will grant the prayers sought in total subject to the Defendants paying thrown away costs to the Plaintiffs and subject to filing and serving the statement of defence within 14 days from date hereof. The costs of the application goes to the Plaintiffs.

Dated at Nairobi this 21st day of September 2007.

LESIIT, J.

JUDGE

Read, signed and delivered in presence of:-

Ibrahim holding brief Muguku for Applicant

Ms. Munyasi for Respondent

LESIIT, J.

JUDGE