**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**Civil Case 38 of 2003**

**ALEXANDAR MUGAMBI ……. PLAINTIFF**

**VERSUS**

**1. FESTUS MIRITI (LIQUIDATOR-CHOGORIA F.C.S 1986 LTD**

**T/A NDII & COMPANY CERTIFIED PUBLIC ACCOUNTANTS**

**(K) LTD.....1ST DEFENDANT**

**2. REGISTRAR OF CO-OPERATIVE SOCIETIES**

**F. F. ODHIAMBO.....2ND DEFENDANT**

## RULING

By an amended plaint filed on 9th May, 2003 the respondent claim against the applicants is for Kshs.546,921.50 being his dues following termination of his employment with Chogoria F.C.S (1986) Ltd. He also claims 15% interest on the above figure. The respondent further seeks a declaration that the 1st defendant is unfit person to undertake the liquidation of the society and that, he be ordered to account for the society's property.

On 22nd July, 2003 the respondent requested for judgment against 2nd defendant in default of appearance which was granted on 5th August, 2003. It is that interlocutory judgment that the 2nd defendant (the applicant) is seeking to set aside in this application and to be granted leave to file his defence.

The application is based on the grounds that he was not served with summons to enter appearance or statement of claim. That the summons were instead received by a State Counsel by the name S. Riechi Orina. That the applicant was neither informed of the suit herein nor was he aware of any consequences incidental thereto.

That the hearing notice was sent to a wrong address. Finally the applicant pleads that the mistakes of his counsel should not be visited upon him.

To these averments the respondent has filed grounds of opposition in which he argues, *inter alia*, that Mr. Orina was duly served as a corporate lawyer. It is further argued that the hearing notice of 27th April, 2006 was sent by Securicor Courier and the same having not been returned the presumption is that it was received and therefore duly served. Finally the respondent argues that the application has been brought too late in the day.

These averments have duly been considered. The starting point in considering this application is Order 9A Rules, 9,10 and 11 of the Civil Procedure Rules under which this application is expressed to be brought.

Specifically under Rule 10 the court has an unlimited discretion to set aside or vary any judgment entered in default of appearance or by failure of the defendant to file a defence, upon such terms as are just.

The concern is to do just to the parties. See Patel V East African Cargo Handling Services Ltd(1974) EA 75. The applicant must demonstrate that the failure to enter appearance within the time stipulated was due to a reasonable cause.

On the other hand, if a judgment is shown to have been entered regularly, the court will not normally set it aside, unless it is satisfied that there are triable issues raised in the defence.

The applicant contends that he was not served with summons to enter appearance. Secondly that hearing notice for formal proof was not addressed to him. It is common ground that the applicant, the Registrar of Co-operative Societies is a Government Official. That being so and in terms of Section 13 of the Government Proceedings Act (Cap.40) as read with Order 5 Rule 9A of the Civil Procedure Rules, service ought to have been effected on the Attorney General.

Rule 9A (2) aforesaid provides that only an agent nominated by the Attorney General can be served on behalf of the Government. The only other way is to post the document to be served in a prepaid registered envelop addressed to the Attorney General or to the dominated agent.

From the above, it is clear that the summons in question were not properly served – as no evidence was led to show the capacity of Mr.Orina apart from the statement that he is a corporate lawyer. Was he an agent nominated by the Attorney General to receive processes?

Similarly service by courier is alien. By sending the hearing notice by courier, the respondent failed to comply with Sub Rule (2) (b) of Rule 9A aforesaid.

Secondly, the procedure adopted in obtaining the interlocutory judgment was irregular, noting that it was against the Government in which case the respondent ought to have complied with Order 9A Rule 7 which stipulates;

" 7. No judgment in default of appearance or pleading may be entered against the Government without the leave of the court and any application for leave shall be served not less than seven days before the return day"

The leave envisaged here must be distinguished from the request for judgment. The respondent did not obtain leave before seeking interlocutory judgment against the applicant.

Finally on the issue of a *prima facie* defence, I have looked at the defence which appears to have been filed but which ought to be a draft and annexed to the application, and find that there are triable issues. For instance, what is the relief being sought against the applicant?

In conclusion I borrow the wise words of Lord Atkin in Evans V Bartlam (1973) AC 473 where he stated at Page 480 that;-

"…… The principle obviously is that unless and until the court has pronounced a judgment upon the

merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of rules of procedure"

I will allow this application and set aside the interlocutory judgment entered against the applicant on 5th August, 2003. The applicant will have leave to file and serve statement of defence within 14days of the date of this ruling.

Costs to the applicant.

Dated and delivered at Meru this11TH day of OCTOBER, 2007

W. OUKO

JUDGE