



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 1701 of 2001

INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION..PLAINTIFF

VERSUS

ANTHONY MWAU WAMBUA1ST DEFENDANT

LIZ KATHINI GIDEON2ND DEFENDANT

EMILY MWENDE GIDEON3RD DEFENDANT

RULING

The Applicant in this Chamber Summons dated 20th June 2006, is the 3rd Defendant in the suit. The application is brought pursuant to Order IXA Rule 10 and 11 of Civil Procedure Rules and sections 3A, 20 and 63(e) of Civil Procedure Act. The substantive orders sought are No. 2 and 3 of the application which provides:

- (2) THAT Exparte judgement entered on the 22nd October 2003 and the decree issued on the 2nd December 2003 and all other and/or further consequential orders subsequent to be set aside *ex-debito justitiae*.**
- (3) THAT the 3rd defendant be allowed to defend this suit unconditionally.**

There are five grounds cited for this application as follows:

- (a) That upon a request of judgment by the plaintiff an exparte judgement was entered against the 3rd defendant and a decree thereafter issued on the 2nd December 2003.**
- (b) The 3rd defendant was and has been served with any summons or pleadings to enable her defend herself.**
- (c) The 3rd defendant has a defence that raises triable issues, which can only be determined by means of viva voce evidence.**
- (d) Failure of the 3rd defendant to enter either an appearance or file a defence herein was caused**

by the non-service of pleadings.

(e) This matter is fixed for Notice to Show Cause on the 22nd June 2006 whilst the 3rd defendant has not been served with any pleadings.

There is also a replying affidavit sworn by the 3rd Defendant dated 20th June, 2006. The gist of the affidavit is the fact that the 3rd Defendant was not served with any summons to enter appearance. The Applicant relies on an affidavit of service which is annexed to the application as annexure “EKG 3”. The Process Server **MOKUA OTARA**, depones that he served the 1st Defendant with the summons to enter appearance in this suit, who received service on his behalf and that of the 2nd and 3rd Defendants.

There are no papers filed in response to this application and neither did the Respondent attend the hearing of the application. Therefore the application stands unopposed.

Mr. Mokaya for the Applicant submitted that the judgement entered herein was illegal and should be set aside. He relies on the MILIMANI HCCC NO.1058 OF 2000 where **Ringera J**, as he then was, dealt with the distinction between a regular and an irregular default judgement and the principles that apply to each.

It is undisputable that the discretion of the court to set aside an ex-parte judgement is unfettered save for the fact this should be done on terms that are just.

Order IXA Rule 10 provides:

“Where judgment has been entered under this Order the court may set aside or vary such judgement and any consequential decree or order upon such terms as are just”.

The exparte judgement in the instant case was irregular in that there was no service at all upon the 3rd Defendant/Applicant with the summons to enter appearance. The Process Server, who served the summons, deponed on oath that he served a co-defendant who received service on behalf of the Applicant. No other service was effected upon the 3rd Defendant. The court has no option but to infer that the service on the Co-defendant was the only attempt made to serve the Applicant.

Where the judgement sought to be set aside is an irregular one, no exercise of discretion is required. The Court has to set it aside ***ex-debito justitiae***. The exparte judgement herein was irregular and on that account alone it must be set aside.

The upshot of this matter is that the exparte judgement entered against the 3rd Defendant is set aside together with all consequential orders. The Applicant is granted unconditional leave to defend.

I also order that the 3rd Defendant/Applicant do file and serve upon the Plaintiff Memorandum of Appearance and defence within 15 days from the date herein. The costs of this application be in the cause.

Dated at Nairobi this 16th day of November, 2007.

LESIT, J.

JUDGE

Read, signed and delivered in the presence of:

N/A

LESIT, J.

JUDGE