



IN THE HIGH COURT OF KENYA

AT NAKURU
Civil Case 226 of 2005

TOM CHERUIYOT KIPNG'ETICH, JANE ABE KOGEI

***(The Administrators of the Estate of REAL JEPCHUMBA CHERUIYOT)* PLAINTIFF**

VERSUS

THE HON. ATTORNEY GENERAL1ST
DEFENDANT

ELDORET EXPRESS LIMITED2ND
DEFENDANT

RULING

The plaintiffs in this suit instituted this action against the 1st and 2nd defendants on 2nd November 2005. The 1st defendant duly filed their statement of defence but the second defendant did not. Interlocutory judgment was thus entered against the 2nd defendant. The second defendant filed the application by way of Chamber Summons under the provisions of **Order IXA Rule 10 and 11** of the **Civil Procedure Rules** and **Section 3A and 63 (e)** of the **Civil Procedure Act** whereby they have sought for orders to set aside the interlocutory judgment entered on 16th December 2005 and leave be granted to the 2nd defendant to enter appearance and file the defence out of time. The grounds upon which this application is predicated are stipulated in the body of the application and elaborated in greater detail in the supporting affidavit of **Charles Owinyo Adede**, the Senior Claims Examiner – Legal Department with AIG Kenya Insurance Company Ltd the insurers of motor vehicle registration number KAQ 695B which is registered in the name of the second defendant. According to the applicant, the summons and copy of the plaint were forwarded and received by the Insurance Company on 1st February 2006 when the time to enter appearance and defence was long overdue. The reason why the applicant was late in filing the pleadings is that there was mix up in the Insurance Broker’s office. The applicant urged this court to allow the application so that certain triable issues which are raised in their draft defence can be ventilated. Counsel argued that the plaintiff had filed a similar suit in **Nairobi H.C.C.C No. 1195 of 2003** which was struck out for reasons that the suit was not representative of the beneficiaries of the trust and that the same mistake has been repeated in the present suit. Besides, Counsel argued that the plaintiff will not suffer any prejudice and it will be in the interest of justice to grant the applicant the opportunity to defend the suit as the matter has not been determined by way of formal proof.

On the part of the plaintiffs, this application was opposed on three principle grounds: -

Firstly, Counsel for the plaintiff contended that the present application is incurably defective as the

supporting affidavit is not in accordance with the provisions of **Order III Rule 2 (c)** which requires that any application made on behalf of a corporation shall be made by an officer of the corporation who is duly authorized under the seal of the company.

Counsel argued that the deponent of the supporting affidavit, **Charles Owinyo Adede** did not indicate that he is an authorized officer of the company. Counsel put forward the case of **H.C.C.C Milimani Commercial Court No.1735 of 2000 Commercial Bank Limited –Vs- Paradiso Court Limited** where the High Court, (*Emukule, J*) struck out an affidavit whereby the deponent did not indicate that he was an authorized officer of the corporation.

The *second* issue raised by the respondent was in regard to the merit of the defence, which Counsel contended was a mere denial which has not at all challenged the claim as set out in the plaint.

Lastly, Counsel dismissed the reasons advanced by the applicant for setting aside the interlocutory judgment which he submitted are not cogent as they are being litigated by a stranger who is not a party to the suit. The applicant, the Insurance Company is not a party to the suit, and the court broker who kept the summons is similarly a stranger.

I have considered these rival arguments by both parties and the issue of utmost concern is whether this application is properly before this court. Obviously the Insurance Company that has insured the motor vehicle has an interest in the outcome of the matter and it is in order for them to seek to defend the suit on behalf of the insured. I have also considered the provisions of **Order III Rule 2 (1)** with an anxious mind and the issue of whether the deponent of the supporting affidavit, **Charles Owinyo Adede** is an authorized officer of the applicant. Under the provisions of **Order III Rule (2)**

“The recognized agents of parties by whom such appearances, applications and acts may be made or done are –

(a) persons holding powers of attorney authorizing them to make such appearances and applications and do such acts on behalf of parties.

(b)

(c) In respect of a corporation, an officer of the corporation duly authorized under the corporate seal.”

In this case, it would appear that the court processes were served on the defendants’ recognized agent who forwarded them to the Insurance Company late. The affidavit is sworn by an officer of the Insurance Company. There is no indication by the Insurance Company that this is not their authorized agent and **Order III** does not state that the person authorized to represent a company should exhibit the authority under seal. In my humble view unless this contrary view is expressed in court, I am satisfied by his averment in the affidavit that he is authorized to represent the company. I have also considered the aspect of whether the plaintiff would be prejudiced if this application is allowed, and apart from a possible delay and thrown away costs, it would be in the interest of ends of justice that this application should be allowed so that all the issues raised in the draft defence can be effectively adjudicated upon.

I have taken into account all the matters raised in the application especially the fact that the matter had not proceeded for formal prove and the delay in filing the appearance and draft defence is not so inordinate as to occasion prejudice on the part of the defendants.

For the foregoing reasons, I allow the application but grant the costs to defendants as well as thrown away costs assessed at Kshs.20,000/- to be paid to the plaintiffs by the 2nd defendant within fourteen (**14**) days.

The interlocutory judgment is set aside and the 2nd defendant is granted leave to file a defence within fourteen (**14**) days.

It is so ordered.

Ruling read and signed on 3rd November 2006.

MARTHA KOOME

JUDGE