

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI
CIVIL CASE 22 OF 2003 (1)

NJOYA FARMERS KENYA LTD.....PLAINTIFF/RESPONDENT

VERSUS

NJOYA FARMERS & PARTNERS.....1ST DEFENDANT/APPLICANT

KINGORI MBOGO.....2ND DEFENDANT/APPLICANT

RULING

The defendant by way of this Chamber Summons application seeks orders that the interlocutory judgment entered in favour of the plaintiff in default of appearance be set aside. The application is expressed to be brought under **Order IXA Rule 10 and 11 of the Civil Procedure Rules and Section 3A of Civil Procedure Act**. The application is based on the ground that there was no proper service and the supporting affidavit of the applicant in which he has deponed that service was effected on his 13 years old daughter. He further depones that he stays away from the firm where service is alleged to have been made.

He came to know about it after the interlocutory judgment had been entered. The application is opposed on the ground that there was proper service. The applicant is asking the court to exercise its discretion to set aside the interlocutory judgment in favour of the plaintiff who failed to enter appearance.

Before the court exercises this discretion, the applicant must show that he has some serious defence to the action and that he has some satisfactory explanation for his failure to enter appearance the suit.

The judge should consider whether any useful purpose could be served by setting aside the judgment and obviously no useful purpose would be served if there were no possible defence to the action and now it came about that the applicant found himself bound by a judgment regularly obtained, to which he could have set up some serious defence.

The applicant has shown that he has a serious defence to the action which he has filed herein and that he has given satisfactory explanation for his failure to enter appearance to the suit service was made on his 13 years daughter and he came to know about it after the interlocutory judgment had been entered. Service on the 13 years old daughter was not proper service. It contravenes the provisions of **Order V Rule 12 which provides:-**

“Rule 12” “When in any suit the defendant cannot be found, service may be made on any agent of the defendant empowered to accept service or any adult member of the family of the defendant who is residing with him.”

Having been satisfied that the applicant has a serious defence to the action and that he has given satisfactory explanation for his failure to enter appearance to the suit, I allow the application and I do order that the said interlocutory judgment entered herein on 7th March 2003 be set aside. The defendants are granted leave to enter Memorandum of Appearance and file Defence within 10 days from today.

Costs in the cause.

Those are the orders of this court.

Dated at Nairobi this 14th day of June 2005.

J.L.A. OSIEMO

JUDGE