



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**Civil Case 2694 of 1998**

**LONRHO MOTORS EAST AFRICAN LIMITED**

**t/a BRUCE TRUCKS & ENGINEERING..... PLAINTIFF**

**VERSUS**

**INDEPENDENT ADJUSTERS (K) LTD**

**t/a MCLARENS TOPLIS .....1<sup>ST</sup> DEFENDANT**

**KENYA WILDLIFE SERVICES..... 2<sup>ND</sup> DEFENDANT**

**RULIN.G**

By their Chamber Summons of the 28.1.2005 the Applicant seeks to set aside the judgment in default entered herein for the Plaintiff on the 9.5.2000.

The Applicant contends that the summons herein had not been served upon it and that the service of the proceedings on a Mr. Geoffrey Waurumo was not on a person authorized to receive any summons and that he was not a principal officer of the company.

This dispute led to Mr. Kiambo being called to give evidence in support of his affidavit filed on the 1.4.2005 in which he admitted being employed by the Applicant Company but that he was not a principal officer of the Applicant Company. He admitted receiving the summons to enter an appearance.

In cross examination he said he was a Loss Adjuster who did reports for the Applicant. He was not in management but was an employee at the time he was given the summons.

Order V rule 2(a) of the Civil Procedure Rules states that:

**“Subject to any other written law, where the suit is against a corporation the summons may be served**

**(a) on the secretary, director or other principal officer of the company or**

It is not in dispute that Mr. Kiambo was neither secretary nor a Director of the Applicant. Was he a principal officer?

I accept that he was a senior employee of the Applicant. A principal officer must be some person other than the Company Secretary or a Director of the company. He must in fact be a senior officer of the company.

In the case of **Remco Ltd v Mistry Jadra Pastat & Co. Ltd & Others (2002) I EA 233 (CCK)** Ringera, J (as then was) held that a company was not properly served as a receptionist who received the proceedings was neither a secretary, director nor principal officer of the company.

In this case although Mr. Kiambo was an employee of the company I am of the view that he was sufficiently senior to perform the duties of a principal officer.

That, however, does not dispose of the matter for even if the proceedings were served a court has discretion to set aside the ex parte judgment if the judgment debtor has shown it has a prima facie reasonable defence to the suit.

It appears that the Applicant was instructed by an insurance company in Japan to have repairs done to some of the vehicles which belonged to the Second Defendant and instructed the Plaintiff/Respondent to conclude the work.

In the proposed statement of defence annexed to the replying affidavit of the Applicant it is admitted that the Applicant instructed the plaintiff/respondent to carry out repairs to the said vehicles but states that it was an authorized agent of the said insurance company.

In the replying affidavit sworn by Victor Majani the Group Credit Manager of the plaintiff he depones that on the 23.4.1994 the Applicant instructed the plaintiff/respondent to undertake repairs on the vehicles belonging to the 2<sup>nd</sup> defendant but did not disclose that the instructions were given on behalf of the said insurance company.

In paragraph 5 and 6 of the said affidavit the deponent states:

***“5. That the 1<sup>st</sup> defendant while disclosing to the plaintiff that the 2<sup>nd</sup> defendant was the owner of the motor vehicles and even insisting that on completion of repairs would have to meet the 2<sup>nd</sup> defendant’s approval, did not at all state that the 2<sup>nd</sup> defendant would be responsible for the repair and related charges. Thus when the 2<sup>nd</sup> defendant sought to know whether the repairs of the motor vehicles had been completed and thus whether the same could be collected, the plaintiff sought the following documents from the 2<sup>nd</sup> defendant pending such release:***

***(i) A letter from the 1<sup>st</sup> defendant authorizing release and undertaking to pay the repair costs; and***

***(ii) A clearance satisfaction note.***

***“6. That on completion of the repairs the 1<sup>st</sup> defendant expressly authorized release of the said motor vehicles by the plaintiff to the 2<sup>nd</sup> defendant and undertook to effect payment for the workshop services rendered which were totaling Kshs. 3,373,941.70 (being made of repairs and storage charges) and indeed effected payment of a sum of Kshs.2,600,000/= being part payment leaving a balance of Kshs.1,036,741.70, which it kept promising that it would settle”.***

The documents annexed to the affidavit shows that the applicant by a letter of the 28.12.1994 confirmed it was in order to release the vehicles to the 2<sup>nd</sup> defendant. This letter refers to the Applicant having received part of the funds towards the cost of repairs and they had been in touch with the said insurers with regard to settlement of the sums due.

From the correspondence it appears that the Applicant was acting for an insurance company in Japan in the settlement of an insurance claim made by the 2<sup>nd</sup> defendant. However, the Applicant took on itself the responsibility of authorizing the release of the vehicles having authorized the plaintiff/respondent to receive the same.

The question of agency does not therefore arise as the vehicles belonged to the second defendant and were repaired at the request of the Applicant. The insurers in Japan were not in anyway parties to the transaction.

In the result I do not find that the Applicant has a defence to the claim.

In the event I dismiss this application with costs to the 1<sup>st</sup> respondent.

**Dated and Delivered at Nairobi this 30<sup>th</sup> day of September 2005.**

**P.J RANSLEY**

**JUDGE**