REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2012 OF 2001

HAILE SELASSIE AVENUE DEVELOPMENT

CO. LIMITED……………………..……………..PLAINTIFF/RESPONDENT

VERSUS

JOSEPHAT MURIITHI…………..…..….……1ST DEFENDANT/APPLICANT

JAMLECK MUGO KANAMBIU….……...2ND DEFENDANT/APPLICANT

ROSE F. MUSYOKI……………………..……3RD DEFENDANT/APPLICANT

MARGARET W. NGONG….……...………4TH DEFENDANT/APPLICANT

TERESIA MBEVA……………………..………5TH DEFENDANT/APPLICANT

SABINA NGANGA……………………..……….6TH DEFENDANT/APPLICANT

JOEL SANE……………………..………….…..7TH DEFENDANT/APPLICANT

SABASTIAN NJAGI……………...…………8TH DEFENDANT/APPLICANT

JOSEPHENE MUMBUA MUTUA……..….9TH DEFENDANT/APPLICANT

E.L. KISAME…………………………...10TH DEFENDANT/APPLICANT

THE BOARD OF GOVERNORS,

KENYA POLYTECHNIC……..…..….11TH DEFENDANT/RESPONDENT

RULING

The Defendants/Applicants moved the Court through a Chamber Summons application brought under Orders IX rule 10, XLIX rule 5 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act (Cap 21), and dated 9th October, 2003. They prayed for Orders setting aside an interlocutory judgement entered against the Defendants, upon such terms as may be considered just. They prayed also that the assessment of damages in respect of the *ex parte* judgement be stayed. They prayed as well that the Court do grant them leave to file their Defence out of time.

The suit was commenced by Plaint dated 21st November, 2001 and filed the same day. An amended Plaint was later filed, on 18th June, 2002. The Plaintiff described itself as a private company incorporated on 11th October, 1996 to take over as a going concern the business previously carried out by Haile Salassie Avenue Development Company. The claim was that the Defendants had wrongfully held themselves out as shareholders and/or directors of the Plaintiff; wrongfully seized the Plaintiff's official documents; prevented the directors and shareholders of the company from carrying out the affairs of the company; wrongfully interfered with the finances of the company; wrongfully purported to call meetings of the company without consent from the directors and shareholders; conspired with other parties to derail and stop the smooth operations of the Plaintiff; and refused to cease committing such acts after being requested to.

Filed with the Plaint was an application by Chamber Summons, seeking an injunction as well as several other orders against the Defendants. This application was heard by the Honourable Mr. Justice Mbito on 6th February, 2002. The learned Judge remarked that it was not clear whether or not the Defendants had a legitimate interest in the Plaintiff company, and that in the circumstances, it was not clear that the Plaintiff/Applicants were bound to succeed. The learned Judge held that the balance of convenience dictated a refusal of the prayers, and he accordingly dismissed the application.

On 23rd July, 2003 the Deputy Registrar entered interlocutory judgement against the Defendants. This judgement is set out as follows:

> "The 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th Defendants herein, 1st Mr. Josephat Muriithi, 2nd Mr. Jamleck Mugo Kanambiu, 3rd Rose F. Musyoki, 4th Margaret W. Ndongo, 5th Teresia Mbeva, 6th Sabina Nganga, 7th Joel Sang, 8th Mr. Sebastian Njagi, 9th Josephine Mumbua Mutua having been duly served with summons to enter appearance and having failed to enter defence within the prescribed period and on the application by the Plaintiff Advocates dated 9th July, 2003 I enter interlocutory judgement against the said 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, and 9th Defendants as prayed in the Plaint. The award of costs shall await judgement when the suit shall be set down for formal proof."

At the hearing of the Defendants' application of 9th October, 2003 counsel asked for the setting aside of the interlocutory judgement that had been entered by the Deputy Registrar in favour of the Plaintiff. Counsel also asked for a stay of formal proof that would otherwise come in the wake of the interlocutory judgement.

Counsel for the Defendants sought to anchor his case on a consistent statement in the Supporting Affidavits of each of the Defendants: that it was only on 3rd October, 2003 that they were shown a notice of entry of judgement against them and in favour of the Plaintiff. Each of the Defendants had sworn that he had not been served with summons to enter appearance, and had not seen nor signed the same. The Defendants asserted in their affidavits that they did have a Defence that raised triable issues. And in the premises counsel argued that the Defendants had a credible and meritorious Defence and that this justified the case for setting aside the interlocutory judgement. In support of this position he cited the Ruling of Mbito, J. when he determined the Plaintiff's Chamber Summons application on 6th February, 2002: the Ruling was to the effect that the Defendants had raised triable issues. Counsel challenged the genuiness of the return of service offered by the Plaintiff as evidence that the Defendants had been served with summons to enter appearance ahead of the interlocutory judgement. Counsel submitted, on the basis of the affidavit evidence, that the Plaintiff's process server had apparently left the litigation papers at the registry of the Kenya Polytechnic, rather than serving upon each Defendant individually.

Mr. Omotii for the Plaintiff/Respondent submitted that the Defendants had made no case for the setting aside of the interlocutory judgement. He stated that the affidavit of service was sufficiently detailed as to the manner in which the Defendants had each been served, and was sufficient proof that service to enter appearance had been duly effected. Counsel argued that the Defendants had not seriously challenged the affidavit of service, and that if they had thought that the process server had perjured himself, then they

should have applied for the process server to be called for cross-examination. Mr. Omotii submitted that if service had been properly effected – as he urged that it had – then there was no need to go to the merits of the Defence case and the interlocutory judgement should be upheld. Counsel argued that the earlier ruling by Mbito, J. would have no bearing on the present application; as even if it would be desirable for the matter to proceed to full trial, still entering of appearance and filing of Defence by the Defendants was mandatory. This, with respect, is a correct argument in its legal import. Mr. Omotii concluded with the submission that the Plaintiff/Respondent had proceeded with all due diligence in securing the interlocutory judgement which deserved to the upheld.

While I accept the finding of Mbito, J in his ruling of 6th February, 2002, that the Plaintiff's case did not necessarily have a likelihood of success, the merits of the relevant issues could only be determined if the Defendants entered appearance and filed their Defence. This is a crucial step in the litigation process and if they failed to do it in time and without good cause, then the correct position in law is to uphold the interlocutory judgement.

This brings the matter back to a focus on the events surrounding the service of summons. Mr. Omotii for the Plaintiff/Respondent addressed the case of each individual Defendant, describing the manner in which service had been effected. He showed the exact office where the first Defendant was served; he presented an account of how the other Defendants were served – the second Defendant, the third, fourth, fifth, sixth, seventh, eighth, etc. He stated that there had been difficulties with service to the seventh Defendant, who had to be served a second time before the Deputy Registrar felt prepared to enter the interlocutory judgement.

Counsel for the Defendants did not address the details of service as presented on behalf of the Plaintiff, in a focussed manner. Mr. Gitau for the Defendants did, for instance, indicate that there had been no need to insist on the appearance of the process-server for cross-examination.

On file there is a letter from M/s. Tongoi & Co. Advocates, dated 24th January, 2003 and filed on 6th February, 2003. It is addressed to the Deputy Registrar and reads in part as follows:

> "We have been unable to enter appearance for the Defendants herein because the Court file has gone missing from the Registry to enable us [to] file our Memorandum of Appearance within the prescribed time. Urgently assist us in tracing the file to enable us [to] file the necessary documents."

So, well before the interlocutory judgement given on 23rd July, 2003 the Defendants had not only been aware that they were required to enter appearance but also to file the necessary documents, in response to the suit documents. The detailed affidavit of service (19 paragraphs) was sworn by Peter K. Gichuhi on 15th May, 2003 and indicates service took place about the first week of March, 2003. The duty to enter appearance and file a Defence appears to be certainly in the mind of the Defendant, and must have become still more compelling with the service of summons which Peter K. Gichuhi depones to in so much detail. He swore a supplementary affidavit on 14th July, 2003, filed on 15th July, 2003 indicating the service of summons to those Defendants who still needed to be served, and more specifically the seventh Defendant.

The outcome of this application must turn on the facts. The critical question is whether the Defendants were duly served with summons to enter appearance after the Plaintiff filed suit, and did know that it was a duty incumbent upon them to file a Defence in time or, if delay was occasioned by factors out of their control, to seek leave of the Court with all due dispatch to enter appearance and file a defence out of time.

All the facts from the affidavit evidence, as well as my own assessment of conviction and candour in the submissions by counsel, lead to the conclusion that the Defendants had no reasonable excuse for not filing and serving entry of appearance and Statement of Defence.

The rules of procedure which regulate the trial process are intended to serve the constructive purpose of

expediting trials, and facilitating judicial decision-making with finality. These rules cannot be said to be oppressive to parties, or that they necessarily wreak injustice. On the facts of this particular case, the Defendants ought to have complied with these rules of procedure. They did not. And I must then make the following Orders:

1. The prayer to set aside the interlocutory judgement entered against the Defendants is refused.

2. The Plaintiff/Respondent has the liberty to prosecute the suit to the next stage, of formal proof.

3. The Defendants’ prayer for leave to file a Defence out of time is refused.

4. The costs of the Plaintiff/Respondent in this application shall be paid by the Defendants/Applicants.

DATED and DELIVERED at Nairobi this 13th day of February, 2004.

J. B. OJWANG

Ag. JUDGE

Coram: Ojwang, Ag. J.,

Court clerk: Mwangi

For the Defendants/Applicants: Mr. Gitau, instructed by M/s. Njeri Mburu & Co. Advocates

For the Plaintiff/Respondent: Mr. Omotii, instructed by M/s. Omotii & Co. Advocates