REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 247 of 2003

JOSAM LIMITED…….……..……..……
PLAINTIFF

-vs-

MARY WANJIRU…….…….....……1ST
DEFENDANT

CITY COUNCIL OF NAIROBI…….....…….2ND
DEFENDANT

R U L I N G

On the 6th June 2003 an Interlocutory Judgment was entered and recorded by the Deputy Registrar against both Defendants in default of filing their respective appearances and/or defences upon service of summons to enter appearance. The suit was then set down for formal proof on the 10th December 2003 but before the hearing thereof, the 2nd Defendant/Applicant took out a Chamber Summons dated the 2nd September 2003 under Order 9A Rules 3, 10 and 11 of the Civil Procedure Rules seeking, in the main, to set aside the Interlocutory Judgment.

In the grounds upon which the application is based as well as the two Affidavits in support thereof, the 2nd Defendant avers that failure to file its defence was as a result of a genuine mistake inasmuch as the 2nd Defendant's dispatch Clerk "erroneously and inadvertently excluded the said summons from the bundle of documents forwarded to our Advocates…… ."

Mr. *Njagi* for the Applicant, relying on the Court of Appeal decision in Philip Keipto Chemwolo and Mumias Sugar Co. Ltd. –vs- Augustine Kubende (1982 – 88) 1KAR 1036, contended that the 2nd Defendant should not suffer the penalty of not having its case determined on its merits by reason of the mistake on the 2nd Defendant's part. Mr. *Njagi* also referred me to the Ruling of Hayanga J dated the 11th July 2003 in Nairobi HCCC No. 172 of 2003- Nelson Mwanzia Kivuvani –vs- City Council of Nairobi in support of his argument that the intended draft defence of the 2nd Defendant raises triable issues.

In its Reply, the Plaintiff/Respondent stated, amongst other things, that the 2nd Defendant has no defence nor the legal basis to challenge the Plaintiff's proprietary rights in the suit property which is registered in the name of the Plaintiff having purchased the same for valuable consideration from the 1st Defendant.

Mr. *Njuguna* for the Plaintiff/Respondent ably advanced the Plaintiff's argument that the application should be dismissed for these and other reasons, citing various decisions including those of the Court of Appeal in Tree Shade Motors Limited -vs- D. T. Dobie and Company Kenya Limited and Another (Civil Appeal No. 38 of 1998) and Express Kenya Limited –vs- Manju Patel (Civil Appeal No. 158 of 2000).

Order 9A Rule 10 of the Civil Procedure Rules confers on the Court an unlimited discretion to set aside or vary a Judgment entered in default of complying with procedural requirements. The concern of the Court is to do justice to the parties: Patel –vs- E. A. Cargo Handling Services Ltd. [1974] E. A. 76.

Having carefully considered this application, I find that there is evidence of genuine inadvertence on

the part of the 2nd Defendant in not filing its defence. It would not be appropriate to punish such litigant on account of this mistake. As to whether there is a defence that should go for trial, I am satisfied that the intended draft Defence of the 2nd Defendant raises triable issues which should be heard and determined on merit.

Accordingly, it would be just that the default Interlocutory Judgment be set aside and the parties be allowed to go for trial on the issues in this suit. I therefore allow prayer (a) of the application dated the 2nd September 2003. The costs of this application and all throw away costs shall be borne by the 2nd Defendant/Applicant.

Dated and delivered at Nairobi this 5th day of March 2004.

P. Kihara Kariuki

Ag. Judge