



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
COMMERCIAL DIVISION, MILIMANI
CIVIL SUIT NO 687 OF 2000

PRUDENTIAL BANK LIMITEDPLAINTIFF

UNDER STATUTORY MANAGEMENTPLAINTIFF

VERSUS

HUNJAN MOTORS LIMITED1ST DEFENDANT

SURJEET SINGH HUNJAN2ND DEFENDANT

R U L I N G

The application filed by the defendants dated 16th June 2004 is brought under Order IXA Rules 2,3,4,10 and 11 and Order IV, V and 21 Rule 6 of the Civil Procedure Rules.

The application seeks an order that the *exparte* judgment, Decree and costs entered against the defendants herein be set aside and the defendants be given unconditional leave to defend the suit.

The application is supported by the affidavit of **SATWINDA SINGH HUNJAN** who described himself as a director of the 1st defendant. It is important to note that he does not state that he is authorized by the 2nd defendant to swear the affidavit. It therefore can correctly be assumed that the 2nd defendant does not have an affidavit in support of the present application.

I have also noted that on 25th November 2003 a firm of advocates namely M/s **A. RAUKUNDALIA & CO.** Advocates filed a notice of appointment to act on behalf of the 2nd defendant. Judgment having been entered in this matter it was necessary for the firm of Otieno Okeyo & Co Advocates obtain leave to take over the conduct of the case for 2nd defendant from his former advocates, see Order 3 Rule 9A.

The said advocate Otieno Okeyo & Co. Advocate therefore acted without leave of this court in respect to the 2nd defendant and accordingly for the purpose of this ruling I will ignore the submissions made on behalf of the 2nd defendant.

The deponent of the affidavit in support who described himself as the director of the 1st defendant stated, *"I have just arrived in the country from Italy where I have been since the year 2001."* The deponent does not exhibit any evidence of such absence from the country.

The applicant's counsel then raised in argument the lack of validity of the summons. He first argued that Order 46 rule 7 proves that the defendant was given only 9 days to enter appearance and accordingly the summons were invalid. Later he said it was not order 46 but order 49 rule 7 which made that provision. On being asked by the court what exactly invalidated that summon counsel fumbled and never gave an outright answer. What I believe the advocate had in mind was order 4 rule 3 (4) which provides

that the time for appearance shall not be less than 10 days. Indeed by the summons providing only 10 days they contravene this order. The case of **CENEAST AIRLINES LTD V KENYA SHELL LTD (2000) 2 EA 362** the Court of Appeal held that per curium: -

“It was a mandatory requirement of the Civil Procedure Rules Order 4, Rule 3 (4) that the time given for entering appearance had to be at least ten days. A summons that require a defendant to enter appearance within ten days of service was invalid and of no effect.”

In view of the above I will set aside the judgment in respect of the 1st defendant.

The orders of the court are as follows: -

(a) That the ex-parte judgment entered against the 1st defendant is hereby set aside and the defendant is given leave to defend this suit.

(b) The 1st defendant shall file its defence within seven (7) days from the date of this ruling.

(c) The application dated 16th June 2004 in respect of the 2nd defendant is hereby dismissed with costs to the plaintiff.

(d) There shall be no orders as to costs as against the 1st defendant in regard to the application dated 16th June 2004.

Dated and delivered this 16th day of December 2004.

MARY KASANGO

AG JUDGE