



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 370 OF 2001 (RD)**

**FATUMA ABDALLA SWALEH ..... PLAINTIFF**

**- VERSUS -**

**GOLDEN CRUST BAKERY LTD. .... DEFENDANT**

**R U L I N G**

The Defendants have applied to set aside an interlocutory judgement entered on 9.4.01 in default of filing an appearance. The application by Summons is brought under Order IXA rule 10, Order XLIX rule 5 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It is made on the grounds that the delay in filing an appearance was caused by the Insurance Brokers and the Insurance Company who received them late from the defendants and that the defence raises triable issues.

In support of the application are 3 Affidavits, by Mohammed Balafif, a manager of the Defendant Company who admits having received the summons on 23.10.01 but he did not forward them to the Insurance Brokers for onward transmission to the Insurance Company immediately as it took him a while to trace their filing relating to the motor vehicle in issue. He forwarded the summons to A.M.S. Insurance Brokers by letter of 5/11/01 and they in turn forwarded them to Fidelity Insurance who received them on the 8/11/01 and they in turn forwarded them to their lawyers who received them on 9/11/01 but were unable to file the appearance immediately as a weekend fell in between. The same was finally filed and served on 13/11/01.

Anne Aluku a legal officer with Fidelity Shield Insurance Co. Ltd. has in her affidavit confirmed summons were received from A.M.S. Insurance Brokers on 8/11/01 and forwarded to their lawyers. In the Affidavit, Anita Shah, Counsel for the Defendant appointed by the Insurance Company confirms receipt of the summons on 9.11.01 vide letter by the Insurance Company of the 8/11/01.

There is no denial that the Defendant took too long to forward the Summons from 23/10/01 to the 5.11.01. This in my view is a long time for the defendant took looking for their motor vehicle records unless of course they want to create an impression that they are such a disorganized lot, that tracing records of their own assets is a major task. This delay was for a period of over 7 days when the summons clearly had given a time period within which summons are to be entered is such that it can not be excused in the absence of another reason.

In her submissions, Anita Shah for the Defendant also raised the issue of summons having been defective in that they required the Defendant to enter appearance within 10 days. The defence Counsel Mr. Kiambya decided to say nothing on this point. Order 4 rule 3 subrule 4 states as follows:

*“The time for appearance shall be fixed with reference to the place residence of the defendant so as to allow him sufficient time to appear, provided the time for appearance shall not be less than 10 days”*

The provision of this sub-rule is Mandatory and therefore the plaintiff has no discretion to reduce the period to less than 10 days. And although the summons are actually issued by the court, the same are prepared and typed by the plaintiff's Counsel. The Deputy Registrar therefore is in my view to blame for having signed summons which on the face of it contravene the provisions of order 4 rule 3(4). It matters

not that the Defendant in fact had entered the appearance late once it is established the summons were defective and the judgement entered is nothing less than an irregular judgement, consequently it would mean therefore the Defendant cannot be penalized for having failed to abide by the rules once it is established the summons were irregular.

I will now consider the issue of the Defence although this may not have any effect on what I have herein aforesaid. The claim is based on negligence and the Defence denies this and attributes the negligence to the deceased on behalf of whose Estate the claim is brought. This in my view is a triable issue. In deciding whether to allow the application, the words of Ainley, J. as he then was in the case of JAMNABAN SODHA –VS- GORDHANDAS HEMRAI (1952) of ULR come to mind.

*“The nature of the action should be considered, the defence if one has been brought to the notice of the Court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally, I think, it should always be remembered that to deny a subject a hearing should be the last resort of a court”.*

Keeping in mind these principals and having found the summons were defective, I hereby allow the application. However the Defendant too contributed to the state of affairs in the circumstances will not get any costs. The Defendant is to file it's appearance within 12 days from the date hereof and a defence 15 days thereafter.

**Dated and Delivered at Mombasa this 4th day of April, 2003.**

**P.M. TUTUI**

**COMMISSIONER OF ASSIZE**