

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

Civil Appeal 218 of 2001

FAIRVIEW HOTEL LIMITED

APPELLANT

VERSUS

NISHA MAINI CHAL

RESPONDENT

JUDGMENT

The Appellant has appealed against the Ruling and Order of the Senior Principal Magistrate, Mr. Kanyangi, in Civil Suit No. EJ 9 of 2001 in the Chief Magistrate's Court at Nairobi, Milimani Commercial Courts. The Appellant has relied on eight grounds which have all been argued together and the appeal has been opposed.

Much has been brought to my attention but pressure of work does not permit me to say as much. The appeal has been prompted by the fact that an ex-parte judgment was on 2nd March 2001 entered against the Appellant on the ground that there was default in entering appearance and filing a defence yet the Appellant claims that appearance had been entered and defence filed, on 7th February 2001. On learning that the judgment had been entered, the Appellant applied to set aside the judgment. The application dated 14th March 2001 was dismissed, after interpartes hearing on 26th April 2001 and that is the order now appealed from.

At the time of hearing of the Application to set aside the judgment, the Memorandum of Appearance and the defence filed in Court as claimed by the Appellant, were not in the court case file. To support his application therefore, the Appellant had annexed his copies of the documents on which the court stamp did not exhibit the date stamped.

In his ruling dated 26th April 2001 therefore, while the learned trial Magistrate said the defence had been filed in court, he held that the defence had been filed after the judgment had been entered and that therefore the judgment was not irregular and he declined to set the judgment aside.

It has not been brought to my attention why the learned Magistrate found that the Appellant's defence had been signed on 6th March 2001. But having so found, he reasoned that the said defence could not have been filed earlier. As a result he said that the defence was filed on 6th March 2001.

The learned Magistrate was saying that using a defence annexed to the application showing it was signed on 6th February 2001. As to the filing, the copy of the defence exhibited in the application was accompanied with copy of the Appellant's receipt No. J 068688 dated 7th February 2001 for a total of Shs 150/= issued to the Appellant for filing of the Memorandum of Appearance and the Defence.

It is apparent the learned Magistrate made a mistake when he was writing the date the defence was signed and therefore the date the defence was filed. Had he not made that mistake, he may not have refused to set aside the ex-parte judgment as he should have found it irregular having been entered on the basis that the defence had been filed, yet the defence had not been filed. The fact that no Memorandum of Appearance and the defence were in the relevant case file and that the rubber stamp did not show the date

could have been investigated thereafter as that was a problem of the Court Registry and not of the Appellant who should not be victimized for such a failure by the Registry. The request for ex-parte judgment had been received after 7th February 2001.

On the basis of what I have been saying above and on the basis of the authorities cited during the hearing I find that the ex-parte judgment was irregular as there was no default to enter appearance and file a defence. Having come to that conclusion, I see no necessity to go into other reasons before closing this judgment.

Accordingly, this appeal be and is hereby allowed;

The ruling and orders of the learned Senior Principal Magistrate made on 26th April 2001 dismissing the Appellant's application dated 14th March 2001 set aside, and that application allowed;

The Respondent to pay costs of this appeal and costs of the application dated 14th March 2001 to the Appellant.

Dated this 30th Day of May 2003.

J.M. KHAMONI

JUDGE