



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**CIVIL SUIT NO. 47 OF 2002**

**MARINE CEMENT LIMITED ..... PLAINTIFF**

**VERSUS**

**SPANFREIGHT SHIPPING LIMITED ..... DEFENDANT**

**RULING**

In this application the Defendant seeks the dismissal of the Plaintiff's suit with costs. The application is brought under the provisions of order 4 rule 4 of the Civil Procedure and Section 3A of the Civil Procedure Act. It is grounded upon two grounds that is:

- (a)The summons to enter appearance required entry of appearance within (10) ten days.**
- (b)The summons to enter appearance is incurably defective and such the suit is incompetent and ought to be dismissed with costs.**

The Plaintiff's counsel did concede to the said error which makes my task simpler and went on to submit the same should not be visited upon the Plaintiff as it was purely a mistake by counsel and secondly that the court had wide discretionary power in such a case to order for an amendment. The Defendant did file a defence but no appearance was filed. I have been referred to various case authorities in PARKLANDS PROPERTIES LTD –VS- PATEL, HCCC 2of 1970 KLR (1981), D.T. DOBIE & COMPANY (KENYA) LTD. –VS- MUCHINA, HCCC 37 of 1978 1982 KLR and HAJI A. SHEIKH t/a HASA HAULIERS – VS- HIGHWAY CARRIERS LTD. The principle governing the exercise of the court's discretion as set in Shah -vs- Mbogo & Another, 1967 E.A. in my view are no different when dealing with an issue as in the present. In both situations, the party so applying seeks to convince the court to allow it a chance to put its case/defence across for it to be considered on its merits inspite of the obvious error, omission or otherwise. In this case, the defence was filed and a quick glance of the same shows. It does raise issues that need to be dealt with and this can only be through a trial. The summons having been defective the court could simply have the same struck out but this in my view will only prolong the litigation as it is an error that can be cured by the Plaintiff filing and applying for fresh summons.

For the said reasons, I will allow the Plaintiff a chance to prosecute his case by serving fresh summons upon the Defendants within 30 days.

The Defendant shall also have costs of the application.

Dated and delivered this 29th day of May 2003.

**P.M. TUTUI**

**COMMISSIONER OF ASSIZE**