

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO.120 OF 2000

GENERAL INSURANCE COMPANY LIMITED.....PLAINTIFF

V E R S U S

JOHN KIPROP CHEMETOI.....DEFENDANT

R U L I N G

This is Chamber Summons dated 24.1.2003 made under Order 21 Rule 22, Order 9B Rule 10 and Section 3A of Civil Procedure Rules and Act respectively, asking for a stay of execution pending application to set aside ex parte judgement and that ex parte judgement entered on 28.4.02 be set aside. The main reasons contained in the supporting affidavit of JOHN K. CHEMEITOI sworn on 24.1.2003 is that because the opposite party kept on serving Ms Kipkenda Lilan & Company Advocates with Court documents on behalf of the Applicant the information did not reach the party who by then had replaced the said advocates; hence the proceedings were conducted without the Applicant participating, but the Respondent opposes this application through the affidavit of KELVIN MOGENI sworn on 28.2.2003 stating that he was not served with the Notice of Change but got informed by the previous advocates and thereafter he never served the firm of Kipkenda Lilan & Company but dealt with M/s Wachakana & Company Advocates who he served with hearing notice dated 15.11.2001 on 9.1.2002

The question is whether the Applicant was served. The process server Samuel Githui Karingi depones that he served the legal clerk on 9.1.2002 but this was about 60 days later after the notice had been prepared and signed on 15.11.01. It is curious why it took so long to have it dispatched to the opposite party. Further, there is exhibited the copy of notice of hearing upon which the said legal clerk, "acknowledged service and endorsed his signature and stamp" as is stated by the process server. This is prima-facie evidence of service. The objective of notice of hearing is to inform the opposite party of the hearing date before that time, but I am not so sure if service on a legal clerk in the firm was due service. Was the clerk duly authorized to accept service on behalf of the firm? Normally, in legal practice, law clerks do accept service on behalf of their firms and this is a practice very much in existence. Setting aside ex parte judgement is provided under Order 9B Rule 8 and the principle is as was laid by Harris J., in SHAH vs. MBOGO 1967 EA 116 where he said that "it is a discretionary jurisdiction exercised not to aid a person deliberately trying to delay the hearing by evasion or otherwise but to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake".

If the Applicant was indeed served why did he not attend the hearing? His omission to attend can only be excused if it was caused by accident, inadvertence or excusable mistake. He has not said so. Instead he denies total knowledge and no service.

I have considered the arguments here and I feel the Applicant had an earlier knowledge of the hearing but did not attend. I therefore, dismiss the application with costs.

DATED and DELIVERED at Nairobi this 23rd day of May 2003

A.I. HAYANGA

JUDGE

Read to -

Mr. Nduna for Plaintiff

No appearance for Respondent

A.I. HAYANGA

JUDGE