



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MOMBASA**

**CIVIL SUIT NO. 443 OF 2002**

**KENYA COLLOID LIMITED ..... PLAINTIFF**

**VERSUS**

**JAPHETH M'MUGAMBI (K) LIMITED..... DEFENDANT**

**RULING**

The defendant has come under the provisions of Order 9A, and 25 rule 10 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking 3 substantive orders as follows

- a) That this honourable court be pleased to stay execution of the decree herein either by garnisheor howsoever until the hearing and determination of this application.**
- b) That stay orders in terms of prayer (b) above do issue pending the hearing of this application inter parties.**
- c) That this honourable court be pleased to set aside and/or vacate it's orders and decree herein obtained and issued against the defendant."**

The application is supported by an affidavit sworn by the defence counsel Peter Gichuki King'ara. The plaintiff filed suit and served summons upon the defendant and thereafter obtained judgment in default of an appearance and/or defence. Thereafter the plaintiff went on to take out garnishee proceedings against Kenya Tea Development Agency Limited in a bid to recover the decretal sums Shs.6,336,000.00 together with costs of Kshs.229,590.00. It is the said judgment and subsequent orders therein that the defendant now seeks to set aside.

Mr. King'ara for the defendant argued that the application ought to be allowed as the entry of the judgment in default was prompted by reason of failure on his part to ensure the appearance was filed on time and secondly that the summons were not properly served

On the issue of failure to enter appearance, he says his Firm had send the relevant documents to another Firm of lawyers in Mombasa for purposes of filing the same but they were filed 2 days after entry of judgment because court file was missing.

Mr. Mogaka strongly and correctly so, opposed this line of argument as there was no affidavit from the law Firm based at Mombasa nor any other documents to proof that indeed the court file was missing.

As regards, the service of the summons, the defendant denies the service on the grounds that they were

served upon a relative of a Director known as Nicholars M'Mugambi. Mr. Mogaka however did point out that the same person alleged to be a relative of the director, swore an affidavit on 24th April 2003 in the same matter in which he says he is indeed a Director of the defendant company. I am inclined to agree with Mr. Mogaka that both counsel and the Mr. Nicholas M'Mugambi are being dishonest in issues touching on this matter.

In the circumstances the issue of improper service need not be considered any further.

Having found as I have, can the orders sought be granted in the circumstances? The defence on record and paragraph 7 and 8 allege the goods supplied which give rise to the debt were defective and returned to the plaintiff.

I have read the documents annexed to the various affidavits and note that this is a new dimension the defence is introducing in the matter. Even when they issued the plaintiff with post-dated cheques, the issue of goods being defective or having been returned was never raised. In the circumstances, I am inclined to agree with the plaintiff that the defendant is only seeking to use the court machinery to buy time.

I will now re-visit the only other issue that I think is worth only consideration and that is the issue of the advocates Firm failing in its duty to file the necessary appearance and/or defence in good time. The counsel does concede the mistake and although I have found the defendant may not have much of a defence I will allow the application on the ground of the advocate's mistake only but only if the following conditions are met.

- 1. The garnishee order to remain in force until the determination of the suit.**
- 2. In the event the money held by the garnishee is not adequate to cover for the full decretal sums together with certified costs the Director Nicholas M'Mugambi to personally provide adequate security acceptable to the plaintiff within a period of 15 days.**
- 3. The defence counsel to personally pay the plaintiffs thrown away costs accessed of Kshs.10,000/= within 15 days.**
- 4. In default the judgement and the garnishee orders to be executed.**

**Dated and delivered this 16th day of May 2003.**

**P.M. TUTUI**

**COMMISSIONER OF ASSIZE**