

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO 939 OF 2002

TOTAL KENYA LIMITED PLAINTIFF

VERSUS

SUPA HAULIERS LIMITED DEFENDANT

RULING

The defendant's application dated 27th March, 2003 and filed on the same date seeks an order that the judgment entered against the defendant on 27th January, 2003 in default of appearance be set aside and that the defendant be granted leave to file a defence. The application is brought under the provisions of Order IX A Rule 10 and 11 of the Civil Procedure Rules (the Rules) and Section 3 A of the Civil Procedure Act, (the Act) and is supported by the annexed affidavit of Shabir Vaya, a director of the defendant company. The reasons for the application are that the defendant was not served with summons to enter appearance and the defendant has a good defence to the Plaintiff's claim. The defendant's goods have been proclaimed by M/s Patros Agencies Limited who are about to attach the said goods. The application is opposed and grounds of opposition and a replying affidavit were filed.

According to the affidavit of service which was filed by the Plaintiff's counsel, one Edith Wanjiku Muriu, on 28th November, 2002, she handed over a copy of a Plaint, verifying affidavit and summons to enter appearance to one, Kennedy Mutua together with a cover letter dated 28th November, 2002 to send by registered post to the defendant. Annexure "EWM 1" is a bundle containing copies of what was handed over to the said Kennedy Mutua for service by way of registered post. Page number ten (10) of that bundle is a copy of the postal receipt for posting a registered article. It is not in dispute that service of summons was by registered post. The defendant however denies receiving the summons and has urged the court to find that, as the defendant is a limited liability company, service of summons upon it must be in strict compliance with the provisions of Order V Rule 2 which reads thus:-

"Order V Rule 2. Subject to any other written law, where the suit is against a corporation, the summons may be served ---

(a) On the secretary, director or other principal officer of the corporation, or

(b) If the process server is unable to find any of the officers of the corporation mentioned in Rule 2 (a) , by leaving it at the registered office of the corporation or sending by prepaid registered post to the registered postal address of the corporation, or if there is no registered office and no registered postal address of the corporation by leaving it at the place where the corporation carries on business or by sending it by registered post to the last known postal address of the corporation."

Counsel for the Plaintiff submitted that although the affidavit of service of summons does not show that the process server looked for and was unable to find any of the officers of the corporation mentioned in Rule 2 (a) above, before opting for service by registered post, the process server had for a period of five months, not been able to find any of the authorized officers of the defendant, for purposes of service of summons. If there is no proper or no service at all, of summons to enter appearance to the suit, then there cannot be a regular default judgment, but if the judgment is a regular one, then the court has a discretion to set aside such judgment and any consequential decree or order, upon such terms as are just (See Order

IX A Rule 10) so that it can do justice between the parties. The law, on the exercise of the court's discretion is well set out in the case of **Shah vs Mbogo 1967 EA 116** . The discretion is intended to avoid injustice or hardship resulting from evident, inadvertence or excusable mistake or error. However, the discretion is not to assist a person who had deliberately sought to obstruct or delay the course of justice.

Bearing the above principles in mind, I shall consider if the defendant/applicant has shown that there was no service of summons upon it or that if there was, such service, then the same was not proper. The defendant is a limited liability company and the mode of service of summons upon it is prescribed in Order V Rule 2 which I have set out elsewhere in this ruling. A case for service of summons upon a corporation, by way of registered post only arises after a process server has tried in vain to find any of the corporation's principal officers for purposes of service. Those principal officers as is set out in Order V Rule 2 are, the corporation secretary, director or any other principal officers of the corporation. How is the court to know that attempts were made in vain by the process server, to effect service of summons upon the principal officers of a corporation? It must be deponed in the affidavit of service to justify the mode of service opted for. Although counsel for the Plaintiff told the court from the bar, that the process server, for a period of five months, was unable to serve the principal officers of the defendant with summons, there is no affidavit to that effect and so, the mode of service which the Plaintiff's counsel opted for was not open to the Plaintiff and I find that even if I were to assume that the registered parcel reached the defendant, that mode of service was not proper in the absence of evidence that the process server had made futile attempts to serve the defendant's principal officers. That being so the judgment obtained ought to be set aside as a matter of right (**ex debito justitiae**), and not as a matter of discretion.

Having found that there was no proper service of summons to enter appearance upon the defendant, the court is entitled to set aside the default judgment **ex debito justitiae** and I do not find it necessary to go into the matter of discretion to find out if the defendant has otherwise made out a case for setting aside the default judgment. This could have been necessary had I found that the default judgment was a regular one.

I allow the application by the defendant, dated 27th March, 2003 and set aside the default judgment entered against it on 27th January, 2003 together with all the consequential orders. I direct that the defendant do enter appearance and file defence within fifteen days (15) from the date hereof. The Plaintiff shall pay to the defendant, the costs of this application. In the event that M/s Patros Agencies Limited have incurred any expenses as a result of the proclamation upon the defendant's goods, such expenses shall be paid by the Plaintiff.

Dated and delivered at Nairobi this 5th day of May, 2003.

S. C. ONDEYO

JUDGE

5.5.2003