



**HGB REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL CASE NO. 352 OF 1996**

JUBILEE HARDWARES LIMITED ..... PLAINTIFF

VERSUS

HANS KOSCHANY ..... DEFENDANT

**RULING**

The plaint in this suit was filed on 28.6.1996. Summons to enter appearance was served on 10.7.96 and signed for by the defendant at 9.45 a.m. on that day. An affidavit of service was filed on 28.8.96. On the same day the plaintiff applied for judgment in default for the sum of Shs.577,126/= and this being a liquidated sum it was final judgment for failure to enter appearance. Decree was formalized and sealed by the court. By the 1999 the decree had been reduced by part payment in the sum of Shs.200,000/=. The first application for execution dated 9.2.1998 was returned unexecuted for reason given that the applicant had closed business. The second application for execution shows an outstanding amount in the sum of Shs.346,431/75. On issue of this second execution Notice of Appointment of advocate was filed by Tindika & Company Advocates who on 6.10.2000 filed this application seeking to set aside default judgment obtained as stated above and alternatively refund of Shs.65,017/75 excess payment to the plaintiff and that unconditional leave to defend be granted on the amount denied in the draft defence. The first ground in support of affidavit is that the principal sum should be Shs.477,126/= and not Shs.577,126/= a difference of Shs.100,000/=. Of this ground I find there is correspondence before action which indicates the sum to be Shs.577,126/= and at no time did the defendant raise the issue of correct figure. Instead he was moving on the footing that the plaintiff's claim was Shs.577,126/=. See his own letter exhibit HK6.

Secondly that the said defence has triable issues. I have perused the statement of draft defence. There is an admission of shs.477,126/= in respect of goods sold and delivered but not Shs.577,126/= as prayed in the plaint. This is the only substantial item in that document which is dated 24th September 1999. It is not clear why the counter claim was not filed at that time.

Of ground numbered 3 the applicant failed to enter appearance and to file defence because he said he honestly believed the amount in dispute would be agreed upon which was obvious from the statement. My observation is that the applicant did nothing to pursue such a dispute for a very long time and he had no reason to think the matter would be agreed upon. He should have obeyed the court summons to enter appearance.

Regarding ground 4 it is said that if orders granted no prejudice will be suffered by the plaintiff but the applicant shall suffer irreparable loss. This application is opposed by the plaintiff who submitted that the applicants are guilty of delay in seeking orders. And that by now balance outstanding is Shs.201,954/= as at 20.6.2002 as laid out under para. 13 of Replied Affidavit. Also that the applicant has not raised as counter claim in his defence proposed.

Also that it is now 6 years since the suit was filed and it is only now the dispute is brought up. Since November 1998 no payment has been made towards liquidation of balance of decree.

I have considered the arguments of both parties I find that the summons to enter appearance having been properly served and accepted by defendant, there has been inordinate delay in making this application. The issue of the correct amount has never been raised by applicant until now after 6 years. I find this ground to be without merit. No counter claim has been raised in the proposed defence. Of course the applicant can always file a fresh suit on the counter claim. I also find that the defendant does not show bona fides. He stopped payments in April 1999 when the balance was Shs.123,963.05 as shown in the replying affidavit. The applicant did not take any action from April 1999 to October 2000 when he filed this application. By now the balance has risen to Shs.201,954/60. I also find that by the applicant paying his debts he cannot be said to suffer irreparable loss.

The upshot is that this application has no merit and the same is dismissed with costs.

Dated this 27th day of June 2002.

**J. KHAMINWA**

**COMMISSIONER OF ASSIZE**

Mr. Kagame present

Mr. Tindika present

Mr. Tindika: -

I apply for certified copy of Ruling and proceedings and leave to appeal.

Court: -

Appeal against order is as of right. No leave required. Proceedings may be supplied on payment.

**J. KHAMINWA**

**COMMISSIONER OF ASSIZE**

Mr. Tindika: -

I apply for stay of execution under Order 41 rule 4.

Court: -

In the circumstances this case I decline to grant stay.

**J. KHAMINWA**

**COMMISSIONER OF ASSIZE**

