

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 288 OF 2001

GENERAL TYRES SALES LIMITED PLAINTIFF

VERSUS

1. FIRESTONE EAST AFRICA (1969) LTD.

2. GIRO COMMERCIAL BANK LTD. DEFENDANTS

R U L I N G

The application by the 1st Defendant seeks to set aside an Interlocutory Judgement entered on 4th June, 2002 against them in default of entering appearance and filing a defence to the plaintiff's suit.

The application by Chamber Summons is brought under the Provisions of order 9A rules 10 and 11 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It is made on the grounds that the purported Interlocutory judgement entered is irregular as the Summons to enter appearance were defective and that the 1st defendant has a meritorious defence which it wishes to prosecute.

The plaintiff filed suit herein on 6th June, 2001 but for unexplained reasons the summons the summons to enter appearance were not served upon the 1st defendant's Advocates until the 24th May, 2002. Then on 31st May 2002 the 1st defendant's Advocate forwarded an appearance and defence to the Firm of Aboo & Co. Advocates to file the same on their behalf. However on the 4th June, 2002 when the Firm of Aboo & Company went to file the said appearance and defence they found out that Interlocutory judgement had been requested for and entered on the same date in default of an appearance and defence. They informed the 1st defendant's Advocates by letter dated 1st July, 2002 after which this application was filed.

In their submissions for the 1st Defendant, Counsel said that the Provisions of order 4 rule 3 (4) are very clear and any summons contravening the same were null and void. Order 4 rule 3 (4) provides:

“The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear provided the time for appearance shall not be less than ten days:

He relied on the decision in ABRAHAM K. KIPTANUI –vs- DELPHIS BANK LTD. & ANOTHER C.A. 1864 of 1999 (UR). Also annexed to the application is a proposed defence and it refers to a pending suit in HCC 1657 OF 2001, Milliman and raises the issue of alleged enforcement of a material guarantee as against postdated cheques which is denied.

On their part, the plaintiff say that although the summons clearly indicated summons to enter appearance be within 10 days, the interlocutory judgement was properly entered as they had no intention of challenging the same until they found they were late on presenting the same for filing. And as for the defence, Counsel for the plaintiffs submitted it was nothing but a general denial.

The summons to enter appearance in this case required the Defendant to enter appearance “within 10 days from the date of Service”. Interpretation and computation of days is not a problem even to a lay person. The Defendant was clearly required to enter appearance not later than the 10 days which gives the

Defendant less than 10 days Contrary to the Provisions of order 4 rule 3 (4). In the circumstances, the Summons were defective and it does not matter that the Defendant did indeed enter appearance but outside the 10 days and the Interlocutory Judgement was not requested until after the 10 days' and having found so, I need not even consider the proposed defence herein to establish whether it raises any meaningful defence. But I having read the same and there is no doubt it does raise some triable issues. These are issues such as whether the enforcement of a material guarantee was legitimate and also whether another suit does exist as between the parties herein touching on the same issues. It is for the said reasons that the application is hereby allowed with costs.

Dated at Mombasa this 22nd day of November, 2002.

P.M. TUTUI

COMMISSIONER OF ASSIZE