



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 1048 OF 1994**

**TIMBER MANUFACTURERS AND DEALERS LTD ..... PLAINTIFF**

**VERSUS**

**JOSEPH KIARIE MBUGUA AND ANOTHER ..... DEFENDANT**

**RULING**

This is an application to set aside the ruling made on 6th December 1999. The consequence of that ruling was that the defence of Ist defendant was struck out. It is important to find out why the order of 6th December 1999, was made. It was made because Ist defendant did not comply with Order X r.11 of the Civil Procedure Rules as his advocate was unable to reach him for further instructions. The Ist defendant's advocate was unable to reach him for further instructions. The Ist defendant's advocate now tells us that she has been instructed and hence in a position to comply with Order X r.11 of the Civil Procedure Rules. Miss Ongwenyi for the Plaintiff opposed this application on the ground that it was brought in bad faith and that the supporting affidavit was defective for not stating where it was sworn. She complained that the matter had taken too long and it would appear that the Ist defendant was not interested in pursuing this matter.

Miss Malik for 2nd defendant pointed out that there was no evidence counsel for the Ist defendant has been trying to get in touch with her client.

Setting aside of a ruling, order or judgment is a discretion to be exercised by the court that made the order. This discretion must be exercised so as to avoid injustice or hardship where sufficient reason is shown that such discretion ought to be exercised in favour of the applicant. In the case of Gibbins v. Strong [1884] Ch.D.66 the Court of Appeal in England held that on a motion for judgment for want of defence if a defence has been put in though irregularly, the court will not disregard it but will see whether it sets up grounds of defence which if proved will be material and if so will deal with the case in such manner that justice can be done. And in Gupta v. Continental Builders Ltd [1978] Kenya L.R. 83 a

***"If a prima facie issue is put forward to the claim of the plaintiff, it is the duty of the court forthwith to enter summary judgment for it is as much against natural justice to shut out without proper cause a litigant from defending himself as it is to keep a plaintiff out of his dues in a proper case. Prima facie triable issue issues ought to be allowed to go for trial just as a sham or bogus defence ought to be rejected peremptorily."***

Since the advocate for Ist defendant/applicant has given sufficient explanation in this application and in view of what I have already stated so far I find this to be a proper case in which I should exercise my discretion in favour of the applicant. It follows that this application is allowed and the ruling of the court made on 6th December 1999 set aside. The applicant will however pay the costs of the application to the plaintiff and 2nd defendant. Order accordingly.

**Dated and delivered at Nairobi this 9th day of March, 2001.**

**E.O. O'KUBASU**

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**JUDGE**