



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 530 OF 1999

MARIE A. LUSENO PLAINTIFF

VERSUS

HON. KIJANA WAMALWA

T/A INTERMARK AGENCIES DEFENDANT

RULING

This application has been brought under O. IXA Rule 10 and 11 and O. XXI Rule 22 of the Civil Procedure Rules, Sections 3A and 63 of the Civil Procedure Act for orders:-

“(a) That there be a stay of execution of the judgement entered herein and orders made against the Defendant herein on 29.1.2001.

“(b) That the said judgement and all consequent orders made herein be set aside and the Applicant be granted leave to defend.”

The application is supported by an affidavit sworn on 9.2.2001 by Michael C. Wamalwa, the applicant and is based upon the grounds that:-

“(a) The Defendant/Applicant failure to enter appearance was occasioned by circumstances beyond the Applicant’s control.

“(b) The Defendant is desirous of defending this suit and has a good defence which raises triable issues and should be granted leave to defend.

“(c) The Defendant should not be condemned unheard and made to suffer for mistakes that are not of his making.

“(d) The Defendant/Applicant has invested heavily in the disputed premises of which if evicted, he will suffer irreparably.”

As will be apparent from submissions by the applicant’s learned counsel, the applicant’s main grounds is that summons to enter appearance in respect of this suit were not served upon him. The

applicant asserts that he was instead served with summons in respect of a different suit altogether, namely H.C.C.C. No. 430 of 1999.

While conceding the fact that initially an error was made when the wrong case number was given, Mr. Oduol for the respondent explained that the error was subsequently corrected and fresh summons re-issued in which the correct case number was quoted. Mr. Oduol added that the new summons were served personally upon the applicant as shown on the affidavit of service filed in this matter on 23.10.1999. That affidavit of service not having been challenged, I find it represents the true position in this matter and accordingly the applicant's complaint of irregular service not only lacks substance but it is also unsustainable and must be rejected. Given that finding, the applicant's failure to enter appearance remains unexplained. That in turn means that the substratum for the application to set aside the ex parte judgment no longer exists.

As regards the application for stay of execution, I am unable to see how, O. XXI Rule 22 which applies to decrees which have been sent to another court, can apply to a matter such as this in which stay is being sought in the same court in which the matter originated. The order does not therefore apply. In my view the appropriate order under which the application should have been made is O. XLI Rule 4(3) and (5) of the Civil Procedure Rules. The requirements of the latter Order were not however satisfied and my view is that the application would not in any event have succeeded even if it had been made under the correct Order.

For the above reasons, the application is hopelessly incompetent and must be dismissed with costs. It is so ordered.

Dated at Nairobi this 27th day of April, 2001.

T. MBALUTO

JUDGE