



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**

**CIVIL CASE NO. 519 OF 2001**

**GESTETNER (K) LIMITED ..... PLAINTIFF**

**VERSUS**

**KERIO VALLEY DEVELOPMENT AUTHORITY ..... DEFENDANT**

**RULING**

This application has been brought under O. IXA Rule 10 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for the following orders:-

- (1) That the ex parte judgment entered in this matter on 29.5.2001 be set aside;***
- (2) That the defendant be granted unconditional leave to defend the suit.***

The application is supported by an affidavit sworn by David K. Suge, an advocate of this court having the conduct of the suit on behalf of the defendant. As stated in the body of the chamber summons, the application is based on the following grounds:-

- 1. That it is not the fault of the defendant that the memorandum of appearance was not filed on time.***
- 2. That the delay if any and the inconvenience caused is to be blamed on the courier service engaged by the defendant's advocates who have always been prompt in making delivery of documents in any part of the country and whom they had previously relied on in the past, to deliver the documents to their counterpart in Nairobi in order to effect filing.***
- 3. That the delay can be explained and the defendant should not be made to suffer for no fault on their part.***

Although as appears above the claim that the defendant has a good defence is not one of the grounds upon which the application is stated to be based, it is nonetheless one of the matters deponed to in the affidavit in support of the application and is therefore a live issue in the application. Indeed it constitutes the major ground upon which this application was contested. Regarding that issued, Mr. Suge in his affidavit states:-

***“The defendant has a good defence to the claim and will be prejudiced if (the default) judgment is allowed to stay.”***

A copy of the draft defence is annexed to the affidavit. Mr. Kipkorir, learned counsel for the plaintiff/respondent (Mr. Kipkorir) did not however think that there was much merit in the draft defence. He described it a sham consisting only of mere denials which raised no triable issues. However before I proceed to consider the issue of the merit of the defence, I think I should make some brief observations regarding the service of summons in this matter because that is the other ground upon which the application is based.

Mr. Suge in his affidavit claims that the relevant memorandum of appearance was drawn by his Eldoret office immediately on receiving instructions from the defendant. Thereafter the document is said to have been despatched through Securicor Omega Express to the Advocates Nairobi office for filing at this court but unfortunately, the document got misplaced somewhere along the way and was never received at Mr. Suge's Nairobi office. That is the basis upon which Mr. Suge avers that the failure to file the memorandum of appearance was not the fault of the defendant.

On his part, Mr. Kipkorir did not wish to fight the application on that point and for the purposes of this application the issue of service can be taken as having been resolved in favour of the defendant/applicant.

What Mr. Kipkorir however contested was that the defendant had a viable defence. His contention was that even if the failure to file a memorandum of appearance could be explained, the defendant had still to prove that it had a reasonable defence to the action. In that respect he submitted that the plaintiff was very explicit in that it showed that the defendant was supplied with a photocopy machine and an invoice subsequently raised. Since no payment was forthcoming, the defendant was liable to the plaintiff as claimed and consequently the defence was a sham.

Mr. Kipkorir relied on the cases of *Patel v. East African Cargo Handling Services* (1974) E.A. 75 and *Magunga General Stores v. Pepco Distributors Limited* (1987) 2 KAR 89 as authorities for his submissions. In the case of *Patel v. East African Cargo Handling Services* it was decided that although:-

***“no judge could, in exercising the discretion conferred on him by the rule, (to set aside a default judgment) fail to consider both (a) whether any useful purpose could be served by setting aside the judgment and obviously no useful purpose would be served if there was no possible defence to the action and (b) how it came about that the applicant found himself bound by a judgment, regularly obtained, to which he could have set up some serious defence, the proof of those matters was not a condition precedent to the existence of the discretionary power to set aside a judgment signed in default of appearance.” (emphasis is mine)***

Accordingly, the court found that the jurisdiction of the court was not limited.

The case of *Magunga General Stores* involved a summary judgment application under O. XXXV of the Civil Procedure Rules in which different considerations apply and where the defendant is required to show that he should have leave to defend the suit. In that case it was held that:-

***“A mere denial is not a sufficient defence and a defendant has to show either by affidavit, oral evidence, or otherwise, that there is a good defence.”***

The defendant is only required to show that there is a good defence in a summary judgment application because the plaintiff has in the first place **sworn positively as to the facts verifying the cause of action and the amount claimed** (See O. XXXV Rule 1(1) (a) and (2) of the Civil Procedure Rules). (emphasis mine). Quite obviously if such facts are not in place, it would be unfair and unjust to require the defendant to show that he has a good defence.

The plaintiff in the instant case has sworn no affidavit at all in reply to the defendant's affidavit filed in support of the application and clearly the submissions by Mr. Kipkorir have no evidential basis. Indeed what the defendant/applicant says in the supporting affidavit with respect to there being a good defence has not been controverted.

Given the above circumstances, my views of the matter are as follows:-

- (1) The discretion of the court is not limited and there is therefore no requirement for the defendant/applicant to prove that it has some serious defence to the action before the court or a judge can exercise the power conferred by O. IXA Rule 10 of the Civil Procedure Rules to set aside a default judgment;
- (2) This is not a summary judgment application and therefore the defendant does not have to show that there is a good defence; and
- (3) What the defendant/applicant says in his affidavit has not been controverted.

By reason of what I have stated above and particularly in view of the fact that the delay in filing the memorandum of appearance has been satisfactorily explained, I am satisfied that the defendant/applicant has established a case for the exercise of its favour of this discretion under O. IXA Rule 10 of the Civil Procedure Rules. Accordingly, the application is allowed and the default judgment set aside. The defendant/applicant will bear the plaintiff's thrown away costs which said costs will include the costs of this application.

Dated at Nairobi this 29th day of June, 2001.

**T. MBALUTO**

**JUDGE**