

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

**AT NAIROBI
MILIMANI LAW COURTS**

CIVIL CASE NO. 1707 OF 2000

MUTHAIGA ROAD TRUST COMPANY LTD.....PLAINTIFF

V E R S U S

FIVE CONTINENTS STATIONERS LTD.....1ST DEFENDANT

DEEPAN SHAH.....2ND DEFENDANT

PANKAJ THAKER.....3RD DEFENDANT

R U L I N G

This Chamber Summons application dated 22nd June, 2001 is brought under Order IXA Rules 5, 6 and 10; Order XXI of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Defendants/Applicants pray for an order setting aside the interlocutory judgment entered on 22nd December, 2000 in default of appearance; that there be a stay of execution and the annexed defence be deemed as filed. That application is based mainly on the grounds that there was improper service of summons (if at all) on the Defendants and the interlocutory judgment should not have been executed without going for formal proof. The Plaintiff/Respondent filed its Replying Affidavit on 4th July, 2001 and the parties were heard on 10th July, 2001. Mr. Mussilli, Counsel for the Applicants/Defendants, contended that there was no service of summons upon the Defendants and that the process server, Jackstone Oya Owidhi did not tell this court how he came to know one Mr. Sharaj as a director of the first defendant, or who introduced him as such. He further argued that service was on the wrong Company, that is, Five Continents Travels instead of Stationers Limited, and that there was no admission for the amount claimed. He therefore concludes that there are triable issues requiring the interlocutory judgment to be set aside.

Mr. Ohaga, on the other hand, argued that the suit related to a liquidated claim and not "pecuniary damages." There was therefore no need for formal proof. He also submitted that there is no defence to the Plaintiff's claim and no purpose will be served by setting aside the interlocutory judgment. He referred to the case of **Patel v. E.A. Cargo Handling Services Ltd [1974] E.A.C.A.75** on this point. It is clear from the court records that Jackstone Oya Owidhi effected service on the first and second defendants per his affidavits of service dated 14th November, 2000. There is no evidence of service on the third defendant. Although service on the first defendant is contested as having being on a non-officer (Mr. Sharaj), I do not think it has a serious effect as the summons were left in the Company's premises which is proper service under Order V Rule 2. Mr. Ohaga's argument that the matter did not require formal proof as the claim is liquidated and not pecuniary cannot, with respect, stand. The word "pecuniary" denotes a monetary relationship. A liquidated sum is pecuniary and cannot be otherwise. The matter should have gone for formal proof under Order IXA Rule 5. I am satisfied that there is a defence on the merits of the case raising triable issues and hereby set aside the ex parte judgment of 22nd December, 2000 under Order IXA Rule 10. The Applicants' application is therefore granted as prayed. The costs shall be in the cause.

DATED and DELIVERED at NAIROBI this 31st day of July, 2001.

ALNASHIR VISRAM

JUDGE