

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMERCIAL BANK
CIVIL CASE NO. 1689 OF 1999

EAST AFRICAN INDUSTRIES LTD. PLAINTIFF

VERSUS

MUTINDA MBOKE DEFENDANT

R U L I N G

Chamber summons before me is dated 2nd April 2001 but was filed into the court on 23rd August 2001, over four months later. It is brought under Order 25 Rule 10 which rule does not exist in the Civil Procedure Rules. It is also brought under Section 3 and 3A of the Civil Procedure Act which can only be invoked where there is a vacuum in our laws and not in a case such as this where rules for staying execution and rules for setting aside exparte judgments are well spelt out. It is seeking stay of execution, pending the hearing of this application and setting aside the exparte judgment entered on 24th January 2001. The grounds for the same application are that the application dated 29th November 2000 was not properly served upon counsel for the Applicant, that the Applicant was entitled to a hearing however hopeless the defence appeared to be and that the Respondent will not be prejudiced.

I have perused the application, the Supporting Affidavit, the Replying Affidavit, the annexures, and the able submissions by the learned counsel. The application was served through the Applicant's advocates given address which was M/S Samba & Co., Advocates, Nzoia County Council Building, P.O. Box 1304, Kitale as given by the same counsel in its Memorandum of appearance as is required by Order 9 Rule 3 and service was effected under Order 9 rule 7. This was proper. There was no need for substituted service. As to the ground for application that the Applicant was entitled to a hearing however hopeless the Defence was, the Applicant was indeed given a chance to be heard when his counsel was properly served and received the application seeking for summary judgment. He and his counsel never availed themselves to convince the court that the defence was not hopeless. They have only themselves to blame. As to the submission that even if Defence is hopeless summary judgment cannot be entered, that cannot be sustained as Order 35 rule 1 and Order 6 rule 13(1)(b)(c) and (d) under which the application for summary judgment was made makes it clear that if Defence is hopeless to certain extents, summary judgment can be entered. In any case, I cannot set aside exparte judgment on that score as to do so would amount to my sitting on an Appeal upon judgment of a fellow judge.

Lastly on the ground that the Respondent will not be prejudiced by setting aside a judgment obtained in January 2001, the Applicant/Defendant cannot be serious as clearly he knows that since judgment was entered several steps to execute have been taken and to wipe out all these and go back to square one is a clear prejudice to the Respondent.

Before I dismiss this matter as I must do, I feel this is a clear situation where there is an abuse of the court process. Under paragraph 6 of the Supporting Affidavit the Applicant says

“That I only knew of the exparte judgement on 16th March 2001 when I went to Kitale”.

If that were the position, then why was this application prepared on 2nd April, 2001 some 17 days later? And even worse why was this application filed on 23rd August 2001 over 5 months from the date the Applicant knew of the exparte judgment? I do not think the Applicant has been fair to the court. His advocates contacted him and he did nothing about the matter. His advocates also did nothing on the matter, nay! not even to inform the court that their client was not yet available.

Lastly I also observe that a part of the Supporting Affidavit is on a different page on its own. This is not proper as is shown by the Supreme Court practice rules. Not only that but it was sworn on 6th April whereas the application was dated 2nd April 2001. It seems to me that almost everything is wrong with this application.

The upshot of all the above is that this application cannot succeed. It is dismissed with costs to the Respondent. Orders accordingly.

Dated at Nairobi this 17th day of September 2001.

ONYANGO OTIENO

JUDGE