



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL CASE NO. 1244 OF 2001**

**GUPTA SEA TOURS LTD ..... PLAINTIFF**

**VERSUS**

**HIGH ROLLER LTD ..... DEFENDANT**

**R U L I N G**

The Applicant in this case is seeking one order that the defence filed herein be struck out and judgment entered for the Plaintiff as prayed on the only ground that the Memorandum of Appearance and defence though filed in time were served upon the Plaintiff out of time. It is not in dispute that the same were indeed served out of time. There is no prejudice being alleged by the Plaintiff. There is an application before me to allow the extension of time so as to have the same documents deemed as having been served in time.

I have seen the case of Salome Namukasa vs. Yozefu Bukya Uganda HCCC No. 78 of 1961 reported in (1966) EA 433. Clearly that was a situation where the Uganda's Chief Justice wanted to put right a practice which had developed in Uganda whereby counsels were instituting proceedings without due regard to procedure. The decision was punitive in nature (see last paragraph of page 435). In any case it is not binding on me as the same Chief Justice decided the case in his capacity as High Court Judge. The case of Dow Hager Lawrence vs. Lord Norreys & Others (189) H.L. (E) 210 is dealing with cases where courts inherent jurisdiction needs to be invoked to stop an abuse of the court process. I do not think failure to serve a document in time amounts strictly to an abuse of the court process. In the case of Wilfred Odhiambo Musingo vs. Habo Agencies Ltd HCCC 2047 of 2000, Hon. Justice Ringera makes a very important remark which cannot be ignored. He says:

“On consideration of the submissions made I have taken the following view of the matter. There is a clear and noncontroverted breach of Order VIII rule 1(2) by the Defendant.

The explanation for the breach, namely, reliance on another advocate, though reasonable is irrelevant in this application. It would have been relevant in an application by the Defendant for extension of time within which to serve the defence had the Defendant made such an application which is allowed by order XLIX rule 5 of the Civil Procedure Rules. The Defendant has not made any such application despite being put on notice by the present application that the defence on record was not served and it risked being struck out”.

In the case before me the Defence and Memorandum were served although they were served late. Further in the application before me the Defendant has on being put on notice applied for extension of time.

It has been said over and over again that power to strike out a pleading is such a draconian power that the courts must sparingly and cautiously exercise it. In this case the Defendant has accepted its mistake. It had in fact served the documents though late. It has sought leave to have the period extended. Order 49 Rule 5 allows the application to be made even after the period to be extended had expired. I will not strike out the Defence. I will not enter judgment. I will extend the time to serve the Memorandum of Appearance and Defence to such time such that they are deemed to have been properly served in time. The application dated 11th October 2001 is dismissed but the Applicant/Plaintiff will have the cost of the application and the cost of the application by Defendant for extension of time in any event. Orders

accordingly.

Dated at Nairobi this 7th Day of December 2001.

**ONYANGO OTIENO**

**JUDGE**