



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
CIVIL CASE NO. 5028 OF 1991

DEL MONTE KENYA LTD.....PLAINTIFF

VERSUS

TOURING CARS (KENYA) LTD

& ANOTHER.....DEFENDANT

RULING

This is an application by way of Chamber Summons under Order 9B of the Civil Procedure Rules seeking to set aside the judgment in default entered against the 2nd defendant on 31st January, 1996.

The said application is supported by two affidavits sworn by the 2nd defendant Giorgio Vittone and his then advocate Roger No. Shako respectively.

The application is opposed and grounds of opposition have been filed by counsel for the plaintiff. I also have the submissions of both counsel on record.

The record before me shows that the plaintiff filed an application for summary judgment against both defendants. The two defendants were each represented by different advocates. When the application came up for hearing on 31st January, 1996 it was put off by consent to be heard on 7th February, 1996 to enable the parties to file replying affidavits. The learned counsel for the 2nd defendant was not there but this being a joint application, one would be right to assume that the consent to have the application heard on 7th February, 1996 bound the 2nd defendant also.

That notwithstanding, the learned counsel for the plaintiff addressed the court and asked for judgment against the 2nd defendant as prayed against him because he had been served but did not appear. The learned counsel for the 1st defendant is recorded as saying he had no objection whereupon the court entered default judgment aforesaid.

There are several observations here, among them, that such an application called for a hearing even if counsel was absent. This was not done. The learned counsel for the 1st defendant had no instructions to appear for the 2nd defendant or hold brief for his counsel. He has no locus therefore, to say that he had no objection to the entry of such judgment. Further, going by the nature of the application before the court, the judgment entered cannot be said to be default judgment. A default judgment is one that is entered for the failure of a party either to enter appearance or file a defence within the specified time. With respect

therefore, the alleged default judgment was misplaced and irregular.

Several averments have been made in the affidavits in support of the application to set aside the said judgment. This is a trial by affidavit evidence. There is no affidavit in reply and so the facts must be taken as uncontroverted.

Further, it has been shown that the 2nd defendant has a good defence. To shut him out using unprocedural means leads to miscarriage of justice. Above all the plaintiff has not shown what prejudice if any shall befall it if the said judgment is set aside.

On my part I hereby exercise my discretion in favour of the 2nd defendant, for reasons that I have given, and set aside the judgment of 31st January, 1996. The 2nd defendant shall also have the costs of this application.

Orders accordingly.

Dated and delivered at Nairobi this 10th day of February, 2000

A. MBOGHOLI MSAGHA

JUDGE

**Mr Nyamu for plaintiff**

**Mr Machandia for Ngatia for 2nd defendant**