



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GICHERU, TUNOI & SHAH JJ.A

CIVIL APPEAL NO. 100 OF 1998

BETWEEN

MULTI-OPTIONS LIMITED.....APPELLANT

AND

KENYA CO-OPERATIVE CREAMERIES LIMITED.....RESPONDENT

**(Appeal from the Ruling/Order of the High Court of Kenya Nairobi (Mr. Justice R. Kuloba) on
22nd April 1998)**

in

H.C.C.S. NO. 14 OF 1998

JUDGMENT OF THE COURT

The summons in the suit in the superior court, was served on the respondent on 13th February, 1998. The service thereof was accepted by the company secretary of the respondent. The respondent entered an appearance to the summons on 26th February, 1998 through its advocates Ms Ogetto & Company, who also filed a statement of defence on 27th February, 1998.

By a letter dated 24th February, 1998 the appellant applied for entry of judgment in default of appearance by the defendant (respondent here). It is not clear if the judgment was entered on the same day but an entry made by the Deputy Registrar, Milimani Commercial Courts, Nairobi shows that judgment was actually entered on 27th February, 1998 although the date shown at the end of the said entry shows the date as the 24th February, 1998.

It stands to reason that the judgment could probably have been entered on 27/2/98 as once a letter is filed, requesting judgment, the letter is acted upon by registry clerk, who makes a note and passes it on the Deputy Registrar. There is clearly a mix-up somewhere.

Under O. IX rule 1 of the Civil Procedure Rules appearance may be entered at any time before judgment is actually entered. The entry of judgment, therefore, on 27th February, 1998 was incorrect. There was already filed, a memorandum of appearance, on 26/2/98.

In the circumstances we find no fault on the part of the learned judge in setting aside the ex-parte

judgment. The learned judge relied on the uncertainty of the date of entry of judgment, and in our view rightly so, when he set aside the said judgment.

The appellant relies on several grounds of appeal but by these grounds, put simply, the appellant complains that it was not granted an audience and that the learned judge did not consider the merits of the defence (as to impose conditions for setting aside of ex-parte judgment). The learned judge was not bound to consider merits of the defence. He had the power to set aside the judgment ex-debito-justitiae, if the same was entered after filing of appearance. The final ground of appeal is out of place simply as the issue of merits of the defence or the strength of the plaintiff's claim was not in issue.

The learned judge, in our view, exercised this discretion to set aside the judgment, quite properly, and we see no basis to interfere with the exercise of such discretion.

This appeal is dismissed with costs.

Dated and delivered at Nairobi this 12th day of November, 1998.

J. E. GICHERU

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.