



**REPUBLIC OF KENYA**

**INT EH INDUSTRIAL COURT OF KENYA**

**AT MOMBASA**

**CAUSE NO. 311 OF 2013**

**HUMPHREY RIUNGU MUKIRA .....CLAIMANT**

**VERSUS**

**SPEEDSTEAM WORLD LTD .....RESPONDENT**

**R U L I N G**

The Motion before the court is dated 17/2/2014 and is by the Respondent in the main claim. It seeks for setting aside of the exparte judgment delivered by this court on 6/12/2013 and for an order that the suit be heard interpartes.

The Motion is supported by the affidavits of Hanif Somji sworn on 17/2/2014 and 24/4/2014. the Motion is opposed by the claimant vide his own replying affidavit sworn on 14/4/2014 and 19/5/2014. The Motion was disposed of by filing of written submission.

Upon perusal of the court record, the Motion and the affidavits filed and upon considering the submissions, the only issue for determination is whether the application has merits to warrant the exercise of the courts discretion to set aside the exparte judgment. The main contention by the applicant is that the reason for a failure to attend hearing on 25/11/2013 is because she was not aware of the hearing because her advocate was never served with a hearing notice.

In response, the claimant contends that he was never served with any pleadings by the respondent and as a result he served the hearing notice on the respondent personally. There is an affidavit of service on record to support that allegation. In all fairness, the court is satisfied that this is a good case where the unfettered jurisdiction of the court to set aside the judgment should be exercised. The reason is that the respondent had filed a Memorandum of Appearance and defence through counsel. Even if service of the same was not done for whatever reason, the matter should not have proceeded without notice to the defence counsel.

The question that arises is whether the Memorandum of Appearance and the response were on record when the suit was heard and also when the court wrote the judgment. The answer is obviously no, because in all those circumstances the Court satisfied itself that the respondent had filed nothing. However, after seeing the said documents and the receipt for court fees, it is clear that the documents were never placed in the court file by the registry clerks after filing. In those circumstances, the defence was not to blame for the exparte judgment. Interestingly enough, the original Memorandum of Appearance and the response and the court receipts were put in the court file by the registry staff after judgment. Had that been done before the hearing date, the suit would not have proceeded even with the affidavit of service having been filed to prove that the respondent had been served personally.

Consequently, and in view of the above background, the exparte judgment delivered on 6/12/2013 is hereby set aside. Neither the claimant nor the applicant was to blame for the exparte judgment. However, the law and the principle of justice require that such judgment should be set aside upon terms. Consequently, the respondent will pay to the claimant throw away cost of ksh.10,000/ within 14 days hereof.

Orders accordingly

**Dated, Signed and delivered this 11<sup>th</sup> July 2014**

**O. N. Makau**

**Judge**