



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**Civil Suit 276 of 2004**

**OMAR SAID MWATAYARI.....APPLICANT**

**VERSUS**

**BHARATKUMAR.....1<sup>ST</sup> DEFENDANT**

**VIPINKUMAR .....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

By a Chamber Summons dated 3<sup>rd</sup> May 2005, the 2<sup>nd</sup> defendant herein, Vipinkumar Nathalal Shah applied for an order setting aside judgment and for leave to defend the suit. He alleged that he was not personally served with the summons to enter appearance hence he did not enter appearance nor filed a defence. He claimed that the summons to enter appearance were advertised in Kenya Times Daily Newspaper which is not widely read. It is also argued that the suit against the 1<sup>st</sup> Defendant is null and void in that the 1<sup>st</sup> defendant was dead at the time of filing the suit.

On its part, the plaintiff urged this court to dismiss the summons on the ground that it has no merit. It is argued that the summons to enter appearance were served through a publication in the Kenya times Newspapers which is widely read.

I have considered the submissions tendered by both the applicant and the 2<sup>nd</sup> defendant. I have also perused the material laid before this court. It is not denied that this court permitted the plaintiff to serve summons by substituted service by way of advertisement. It is also not denied that the plaintiff complied with that order by advertising the same through the Kenya Times Newspaper. It is the contention of the 2<sup>nd</sup> defendant that the Kenya Times Newspaper is not widely read. As a result, the defendants did not read the advertisement hence they did not file an appearance nor a defence and in the end interlocutory judgment was entered against them in default of appearance. The case came up for hearing before the honourable Mr. Justice Mwera as a formal proof. Finally judgment was given in favour of the plaintiff on 16<sup>th</sup> September 2005. I have read the affidavit of Vipinkumar Nathalal Shah sworn on 27<sup>th</sup> April 2006 in support of the summons dated 3<sup>rd</sup> May 2006. The 2<sup>nd</sup> defendant does not disclose how he came to know the existence of this suit. I have perused at the copy of the advertisement annexed to the affidavit of service of Stephen Oddiaga sworn on 16<sup>th</sup> May 2005 and it is clear that the size of the advertisement was big enough which cannot be categorized as obscure. It is a matter of common notoriety that Kenya Times Newspaper is a Newspaper of National circulation within the Republic of Kenya. I reject the defendants' submission that it is a paper of limited circulation. In the absence of any other explanation as to how the 2<sup>nd</sup> defendant learnt of the existence of this suit, I can only infer that he got the information by reading the same of the advertisement placed in the Kenya Times Newspapers of 8<sup>th</sup> April 2005. I find therefore that the defendants were properly served by substituted service by way of advertisement and that the duo neglected to enter appearance. Consequently the exparte judgment was properly entered hence I see no reason to set aside the same. It has been argued that the suit against the 1<sup>st</sup> defendant is a nullity in view of the fact that at the time of giving suit the 1<sup>st</sup> defendant was dead. That may be so but the provision of order IXA rule 10 of the Civil Procedure Rules cannot be invoked to make such a finding.

Since the court's jurisdiction was not properly invoked I decline to make a decision on it. In any case the 1<sup>st</sup> defendant's legal representatives have not moved this court to consider the matter. The 2<sup>nd</sup>

defendant does not expressly nor indirectly aver that he is challenging the exparte judgment as a legal representative of the late Bharatkumar Nathalal Shah. It therefore means that the judgment as against the 1<sup>st</sup> defendant remains unchallenged.

For the above reasons the summons dated 3<sup>rd</sup> May 2006 is dismissed for lacking in merit with costs to the plaintiff.

**Dated and delivered at Mombasa this 30<sup>th</sup> day of March 2007.**

J.K. SERGON

J U D G E

Wameyo h/b Shah for the defendant/applicant and Mr. Oddiaga for plaintiff respondent and Mr. Mkan for the necess