**Ceneast Airlines Ltd v Kenya Shell Ltd**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of judgment:** 26 May 2000

**Case Number:** 174/99

**Before:** Omolo, Akiwumi and Owuor JJA

**Sourced by:** LawAfrica

**Summarised by:** H K Mutai

*[1] Judgment – Judgment in default of appearance – Application to set aside – Factors to be considered*

*– Existence of* prima facie *defence – Exercise of judicial discretion – Whether the trial court’s discretion*

*should have been exercised in favour of the Appellant – Order IXA – Civil Procedure Rules.*

*[2] Practice – Summons to enter appearance – Time within which to enter appearance – Summons must*

*provide at least ten days – Order IV, Rule 3(4) – Civil Procedure Rules.*

**Editor’s Summary**

Judgment in default of appearance against the Appellant was entered on 4 January 1999. On 15 January the Appellant applied under Order IXA, Rule 3(1), Civil Procedure Rules for the judgment to be set aside on the grounds that it had not been served with summons to enter appearance and that the amount claimed in the plaint was disputed. The application was dismissed on 20 July 1999. On appeal.

**Held** – The Court had a wide discretion to set aside a judgment on terms that were just but it would not usually set aside a regular judgment unless it was satisfied that there was a *prima facie* defence which should go to trial for adjudication; *Patel v EA Cargo Handling* [1974] EA 75 applied. In this instance, the fact that the KShs 21 438 007-95 claimed by the Respondent included value added tax whereas it appeared that the products supplied were exempted from value added tax at the material time, raised a triable issue that should have moved the court to exercise its discretion in the Appellant’s favour.

*Per curiam*: It was a mandatory requirement of the Civil Procedure Rules Order IV, Rule 3(4) that the time given for entering appearance had to be at least ten days. A summons that required a defendant to enter appearance within ten days of service was invalid and of no effect.

**Case referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

*Patel v EA Cargo Handling Service* [1974] EA 75 – **AP**