



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**CIVIL SUIT NO. 349 OF 2011**

**I & M BANK LIMITED.....PLAINTIFF**

**- VERSUS -**

**SLOPE PARK LIMITED.....DEFENDANT**

**RULING**

1. The defendant's application dated 9<sup>th</sup> February 2017 seeks the setting aside of the default judgement entered on 19<sup>th</sup> September 2012.
2. The basis of the application is the defendant's contention that it was never served with summons to Enter Appearance.
3. The application is supported by the affidavit of **GEORGE WAINAINA NJOGU**, a director of the defendant, **SLOPE PARK LIMITED**. He deposes that he was never served with summons.
4. It is curious that the Affidavit of Service which was sworn by the process server, **JULIUS KARIUKI MUNDIA** on 18<sup>th</sup> July 2012 indicated that the Complaint and Summons had been served upon **GEORGE WAINAINA NJOGU**.
5. The plaintiff responded to the application with an affidavit sworn by **SYMION K. LARIAK**, a Legal Assistant at **G A INSURANCE**. The said Lariak explained that the plaintiff, **I & M BANK LIMITED** had brought these proceedings in the exercise of their subrogation rights.
6. If, as the defendant says, the plaintiff had been duly compensated by its Insurer, there would be nothing wrong in having the plaintiff sue the defendant, so as to give effect to the subrogation rights of the insurer.
7. Accordingly, on a *prima facie* basis, I find that Symon K. Lariak was not a stranger to the proceedings herein.
8. On the other hand, the fact that the defendant did not cross-examine the process server, does not, of itself weaken the deposition by the applicant's director. I say so because the appropriate person who could have challenged the deposition of George Wainaina Njogu, could have been the process server. It is the process server who could have confronted George with an affidavit detailing how he served him.
9. If that had happened, the result would have been 2 affidavits which were inconsistent and contradictory

on the same set of alleged facts. Such an impasse on the matters of fact could then only be best resolved through cross-examination of either the process server or of the person who had allegedly been served, or both persons.

**10.** In this case, the plaintiff did not challenge the deposition contained in the affidavit which was filed in support of the application. An affidavit which was filed at the outset of the suit cannot be deemed to be an answer to an affidavit filed 5 years later.

**11.** I am thus satisfied that the defendant was not duly served with the Plaint and Summons to Enter Appearance. Therefore, the default judgement was entered irregularly. It therefore, must be set aside.

**12.** Accordingly the judgement entered on 19<sup>th</sup> September 2012 is set aside. The defendant is allowed 7 days from today to file and serve its Defence.

**13.** As regards the costs of the application dated 9<sup>th</sup> February 2017, I order that the same shall be in the cause. Whichever of the 2 parties ultimately succeeds in the suit, shall also be awarded the costs of this application.

**DATED, SIGNED and DELIVERED at NAIROBI this 31<sup>st</sup> day of July 2017.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

*No appearance for the Plaintiff*

*Dulu for Kithi for the Defendant*

*Collins Odhiambo – Court clerk.*