



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 324 OF 2012**

**FREDRICK KIRITU T/A SAATCHI KABIRO & ASSOCIATES.....PLAINTIFF**

**VERSUS -**

**TURN-O.METAL ENGINEERING LIMITED.....DEFENDANT**

**RULING**

1. On 18<sup>th</sup> July 2014 Ogola J. delivered a Ruling in respect to the defendant's application dated 25<sup>th</sup> April 2013. By his Ruling, the learned Judge dismissed the suit.
2. The plaintiff has now moved the court by an application dated 23<sup>rd</sup> November 2015, seeking the reinstatement of the suit.
3. As far as the plaintiff was concerned, the reason why the court dismissed the suit was because he failed to attend court when the defendant's application was listed for hearing. The plaintiff told this court that he did not attend court because he had never been served with the application or with the Hearing Notice.
4. By his supporting affidavit, the plaintiff said that although he had originally appointed an advocate to represent him, the said advocate had ceased to represent him. Therefore, in his opinion, the defendant should have served the plaintiff personally.
5. The plaintiff indicated that he would ask the court to summon the process server who had purportedly served him with the application, so that he could cross-examine the process server.
6. However, when the application came up for hearing, the plaintiff did not pursue his said desire to have the court summon the process server.
7. According to the plaintiff, his previous advocate had ceased to represent him from 16<sup>th</sup> November 2012. Therefore, after that date, the plaintiff says that the defendant should have served him personally. As no personal service was effected on him, the plaintiff deponed that he was condemned unheard.
8. Mr. Mwaniki, the learned advocate for the plaintiff, conceded that the defendant used to effect service upon the advocates who had ceased to act for the plaintiff. However, such service was said to be irregular.
9. But Mr. Wanjohi, the learned advocate for the defendant pointed out that the advocates who had allegedly ceased acting for the plaintiff, had continued accepting service of the pleadings which the

defendant served on him.

10. Therefore, because the said advocates actually attended court on behalf of the plaintiff, the defendant was convinced that the advocates had not ceased to represent the plaintiff.

11. As far as the defendant was concerned, it was clear that the advocates in question were still acting for the plaintiff because on 6<sup>th</sup> July 2015, the advocates filed an application to cease acting for the plaintiff.

12. On 30<sup>th</sup> July 2015 Ogola J. granted leave to the law firm of **MWANGI MWAURA & PARTNERS** to cease acting for the plaintiff.

13. In the light of that order dated 30<sup>th</sup> July 2015, the question that arises is as regards the validity of the previous court order which had, (*on 16<sup>th</sup> November 2012*), granted leave to the same law firm to cease acting for the plaintiff.

14. Obviously, if the orders made on 16<sup>th</sup> November 2012 were valid and effective, it would mean tht the orders made on 30<sup>th</sup> July 2015 were superfluous.

15. The record of proceedings shows that on 16<sup>th</sup> November 2012 both parties were in court, when the application dated 25<sup>th</sup> October 2012 came up for hearing. The plaintiff was represented by Mr. Nyagilo advocate, who held brief for Mr. Mwangi advocate.

16. Meanwhile, Mr. Mabeya appeared for the defendant.

17. As the application was not opposed, the court allowed **M/s MWANGI MWAURA & PARTNERS** to cease acting for the plaintiff.

18. Thereafter, Mr. Mabeya is recorded as having told the Judge that the plaintiff, who was present in court, had told him that he would be representing himself.

19. In the circumstances, the defendant was well aware that it should have been serving pleadings on the plaintiff personally. Therefore, any service upon the law firm which had ceased to act for the plaintiff was not good or effectual service.

20. On 23<sup>rd</sup> November 2012, the plaintiff acted in person when he and Mr. Mabeya advocate recorded a consent order, by which the interlocutory injunction was vacated against the defendant. That further reinforces my finding that the defendant knew that the plaintiff's previous advocates were no longer acting for him.

21. Therefore, when the defendant served the advocates who were no longer acting for the plaintiff, they had not served the plaintiff. Thereafter, when the application proceeded to hearing, before the plaintiff was served, he was condemned un-heard.

That is reason enough to warrant the setting aside of the court orders made on 18<sup>th</sup> July 2014.

23. I am alive to the fact that the said orders were not made simply because the plaintiff was absent. The learned Judge gave a reasoned Ruling, based on the merits of the case.

24. But without having accorded the plaintiff an opportunity to be heard, the court cannot be sure about what he may have told the court, and what impact the plaintiff's submissions may have had on the application.

25. In the final analysis, the application dated 23<sup>rd</sup> November 2015 is allowed. The orders made on 18<sup>th</sup> July 2014 are set aside, and the suit is reinstated.

26. The plaintiff is awarded the costs of the application.

27. And I now direct that the application dated 25<sup>th</sup> April 2013 will proceed to hearing.

**DATED, SIGNED and DELIVERED at NAIROBI this 8<sup>th</sup> day of June 2016.**

**FRED A. OCHIENG**

**JUDGE**

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

*Mwaniki for the Plaintiff*

*Miss Waititu for Wanjohi for the Defendant*

*Collins Odhiambo – Court clerk.*