



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 80 OF 1999**

**NELSON MUGUKU NJOROGE.....PLAINTIFF**

**VERSUS**

**FURNCON LIMITED..... DEFENDANT**

**RULING**

1. This ruling is the outcome of two summons taken out by Furncon Ltd, the Defendant herein. In the chamber summonses dated 28<sup>th</sup> August 2007, the Defendant sought for the following orders interalia:
  - i. ***THAT the exparte judgement entered herein be set aside.***
  - ii. ***THAT there be a stay of execution of the decree herein and all consequential orders relating thereto pending the hearing and determination of this application.***
  - iii. ***THAT the costs of this application be provided for.***
2. In the chamber summons dated 1<sup>st</sup> December 2010, the Defendant sought for
  - a. ***THAT the Defendant be granted leave to amend chamber summons and supporting affidavit dated 28<sup>th</sup> August 2007 as per draft amended chamber summons.***
  - b. ***THAT the Defendant to be granted a further leave to expunge from record the whole of the further affidavit dated 23<sup>rd</sup> July 2010 which is malicious and misleading.***
  - c. ***THAT the draft amended chamber summons be deemed duly filed***
  - d. ***THAT the costs of this application be the costs in the cause.***
3. The Plaintiff contested both applications. Both applications were heard together. When the summonses came up for interpartes hearing this court gave directions to have the same disposed of by written submissions.
4. Before determining the substance of the aforesaid summons, let me set out in brief the background of this dispute. By the plaint dated 12.1.1998 and filed on 15.1.1999, Nelson Muguku Njoroge, the Plaintiff herein sued the Defendant seeking for judgment in the sum of kshs.610,843/60 in lieu of unpaid rent arrears, electricity and water bills. The Defendant filed an appearance and a defence in person. The suit proceeded to hearing exparte on 23<sup>rd</sup> September 2002 when the Defendant failed to turn up in court despite having been served with a hearing notice. Eventually judgement was entered in favour of the Plaintiff as prayed in the plaint on 23<sup>rd</sup> September 2002. The Plaintiff's bill of costs was also taxed exparte when the Defendant is alleged to have refused to attend court despite service having been effected upon it.

5. Having stated the brief background of this dispute, I now turn my attention to the merits or otherwise of the applications .
6. I have considered the material placed before this court plus the rival written submissions. In the summons dated 28<sup>th</sup> July 2007, the Defendant's urged this court to set aside the *ex parte* judgment because the Defendant was never served with a hearing notice. It was contended that the affidavit of service which this court relied in concluding that the Defendant was served with a hearing notice was false. In the supporting affidavit of the Defendant's managing director, it is specifically deponed that the Defendant was never served with hearing notice. It is also argued that the process server filed a false affidavit of service. This complaint was noted by Justice Hatari Waweru, who directed the police to carry out an in depth investigation. The Defendant on its own wrote to the Director of Criminal Investigations. Through the Defendant stated that it has knowledge of the outcome of the investigations carried out by the C.I.D, none was annexed to the affidavits filed in support of the summons. The Plaintiff contested the Defendant's assertion that the affidavit of service contained false averments. It is argued that the Defendant only took issue with the signature indicating receipt of the hearing notice 6 years after judgement had been entered against it and yet it was represented by counsel who has failed to summon cross-examination to ascertain the veracity of his averments. I have already stated that the Defendant has lodged its complaint to the C.I.D over the issue. What I have noted is that the Defendant has merely attached to its affidavits copies of the complaint and the exhibit memo. The actual findings or report has not been filed in court by the C.I.D.
7. In the circumstances, the question to be answered is whether the *ex parte* judgment should be set aside?

The principles to be considered in answering the aforesaid question were restated by the Eastern African court of Appeal in **Shah = vs= Mbogo (1967) E.A 116** inter alia as follows:

***“The court’s discretion to set aside and ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice.”***

8. After a careful consideration of the grounds stated on the face of the summons and the facts deponed in the affidavits filed in support and against the application plus the rival written submissions, I am convinced that the Defendant was properly served with a hearing notice for September 2002. The Defendant denied service but it failed to tender any credible evidence to establish the allegation. I expected the Defendant's advocate to summon the process server to attend court for cross-examination but it failed to take advantage of the opportunity offered by law. It also failed to present to this court the outcome of the C.I.D's report though it alleged it had the report with it. In the end I see no merit in the summons dated 28<sup>th</sup> July 2007. In the circumstances, the prayer for an order of stay of execution cannot be granted.
9. In the second application dated 1<sup>st</sup> December 2010, the Defendant is basically seeking to amend the summons dated 28.7.2007. In my view, this application depended on the outcome of the decision on the summons dated 28.7.2007 since the summons dated 28.7.2007 had been dismissed, I find no merit in the summons dated 1<sup>st</sup> December 2010.
10. In the end I find no merit in both summonses. They are dismissed with costs to the Plaintiff.

Dated, Signed and Delivered in open court this 11<sup>th</sup> day of December, 2015.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

.....for the Defendant