



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL DIVISION & ADMIRALTY DIVISION**  
**CIVIL SUIT NO 1217 OF 2002**

**GEORGE W. OMONDI .....APPELLANT**

**Versus**

**GUILDERS INTERNATIONAL BANK LTD .....RESPONDENT**

**JUDGMENT**

**(On an Appeal under Order 49 Rule 7 (2) (3) of the Civil Procedure Rules)**

**Appeal on orders made on Notice to Show Cause**

[1] The proceeding I am confronted with is an Appeal under Order 49 Rule 7 (2) (3) of the Civil Procedure Rules (hereafter CPR). The Memorandum of Appeal dated 20<sup>th</sup> March, 2014 was deemed to be duly filed by the order of this court made on 7<sup>th</sup> April, 2014. The Appeal is, therefore, competent and I will determine it in the manner below.

**The Appeal**

[2] The Appellant proposed 9 grounds of appeal as hereunder:

1. *The Deputy Registrar erred in not considering sufficiently or at all the merits of the Appellant's application for adjournment to enable him file an affidavit showing cause why execution should not issue as sought by the Respondent.*
2. *The Deputy Registrar erred in holding that the Appellant would have filed his affidavit by 28-2-2014 ignoring the submission that he had been continually away from Nairobi from before the date of the purported service to the date of hearing of the Notice to Show Cause.*
3. *The Deputy Registrar erred in holding that service had been effected on the Appellant when that fact was hotly disputed without making a finding on who between the Appellant and the process-server was telling the truth.*
4. *The Deputy Registrar misdirected herself and erred in law and procedure when she failed to dispose of the application for adjournment first and then asking Counsel for the Appellant to*

- show on behalf of the Appellant cause why execution should not be granted.*
5. *The Deputy Registrar misdirected herself and erred in law in disposing of the application for adjournment and then proceeding to grant execution when the Notice before her permitted the Appellant to inter alia show cause through an advocate instructed for that purpose.*
  6. *The Deputy Registrar in the premises granted orders adverse to the*

*Appellant in Judicial proceedings but denied him the right to be heard thus violating the cardinal principle of natural justice.*

7. *The Deputy Registrar erred in not appreciating that the colossal amount of money in dispute was in itself a compelling reason for the Appellant to be given adequate chance to show by affidavit evidence cause why execution should not issue.*
8. *The Deputy Registrar erred in denying the Appellant the right to file affidavit evidence which could afford the Appellant the opportunity to adduce evidence of fraud by the Respondent's officers that has attended the relationship between the parties from inception which can only be done by way of an affidavit*
9. *The Deputy Registrar's decision has occasioned a grave miscarriage of justice.*

[3] On 29.4.14, Mr Odhiambo argued the Appeal which he termed to be on the Order of Deputy Registrar made on 28.2.2014 which inter alia allowed a Notice to Show Cause why the suit property should not be sold. He urged that an adjournment was refused and the Notice to show cause was allowed. The Appellant has never been afforded an opportunity to be heard. On 22.1.2014 the Deputy Registrar ordered personal service of the Notice to Show Cause why execution should not issue on the plaintiff. On 28.2.2014, the Plaintiff advocate notified the court that the Notice to Show Cause had not been served on the person of the Plaintiff as had been directed. Order of personal service was made after the court was told that a court process server had forced papers on the Plaintiff's residence at Lovington. An affidavit of service was filed claiming personal service on Plaintiff even though there was no acknowledgement or signature by the Plaintiff. The Deputy Registrar then held that she had no reason to dispute the affidavit of service. She refused an adjournment for Mr. Wasuna to file a rejoinder. Mr. Wasuna was also refused audience to submit orally on why the Notice to Show Cause should not issue.

[4] Counsel further argued that the Plaintiff contests the decision on service by the Deputy Registrar. He invited the court to look at Order 5 Rule 16 of Civil Procedure Rules on examination of serving officer. Adjournment was refused despite the complexity of the matter. It was only reasonable to have allowed ventilation of these issues. See case of **PETER M. KARIUKI V ATTORNEY GENERAL [2014] eKLR** on elements to be taken into account is granting or refusing an adjournment. The court exercised discretion unreasonably. See also Order 9 Rule 1 of Civil Procedure Rules. Advocate is a recognized agent but was denied opportunity to address court. The Order was prejudicial and the Appeal should be allowed.

### **Appeal was opposed**

[5] Mr Murugara opposed the Appeal and relied on the grounds of opposition filed in court. he submitted that the court is being called upon to interfere with the discretion of the Deputy Registrar which she exercised it judicially. The contrary has not been shown. The court is also being called upon to aid a party who was bent at delaying the matter herein at all costs. Proceedings of 22.1.2014 show the same advocate appeared before Deputy Registrar and stated that he could not show cause; and that the Notice to Show Cause served on him was for his attention only. He did not mention that he had informed his client of the Notice to show cause. He only asked for personal service. The Deputy Registrar adjourned the matter and allowed personal service.

[6] On 28.2.2014, the same advocate applied for an adjournment because he alleged that his client had not been served personally. It matters not how he came into knowledge of the court process. See paragraph 2 of Affidavit filed on 21.3.2014 – He says that at some day he was in his

rural home at Siaya when he was told that some papers had been thrown into his compound. He ascertained they were court papers and asked them to be taken to his advocate. He did not say where he was on 28.2.2014. All these are machinations to delay justice. Such parties should not be aided by the court. He cannot say he was not heard because the adjournment was refused, and I doubt what "Cause" he would have shown. They were aware of the Notice to show cause. No affidavit to show cause that has been filed to date.

[6] Counsel pressed further. There is no complexity in this matter. He confessed that he had stretched his mind and found no complexity in a Notice to Show Cause. The amount involved does not matter as long as the decree is there and no complexity can be read from the amount being colossal. The Plaintiff is simply delaying the matter. The Decree-holder has a right to his judgment. For those reasons, the court should not interfere with discretion of Deputy Registrar.

[7] Mr **Odhiambo** took exception to the allegations of delay on their and said they were unfounded. No prove that the Plaintiff has delayed the case. He insisted that a Notice to Show Cause must be served personally. They only served the Plaintiff's advocates. The Plaintiff has not been served in person. They only needed to challenge the affidavit of service.

### **COURT'S RENDITION**

#### **Point of objection: adjournment was refused un-judicially**

[8] This is a challenge on the exercise of discretion by the Deputy Registrar. According to the Appellant, the Deputy Registrar exercised her discretion wrongly and un-judicially in refusing the adjournment; she ***denied the Appellant the right to be heard thus violating the cardinal principle of natural justice*** and occasioning a grave miscarriage of justice. The legal parameters for the exercise of judicial discretion has never been in doubt from the time of **SHAH V MBOGO [1968] EA 93**, that;

***...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice:***

[9] Therefore, exercise of discretion by a judicial officer will only be disturbed by the Appellate court if it is shown to have been exercised in total disregard of the legal principles that govern the issue at hand or that the judicial officer failed to take into account a relevant factor which he ought to have taken into account, or took into account an irrelevant or extraneous factor which he ought not to have considered, or that it is plain eye-sight of the court that the judicial officer was clearly wrong.

[10] The alleged wrong or injudicious exercise of discretion is what I should determine, therefore, whether the Deputy Registrar acted contrary to the law and denied the Appellant the right to be heard.

[11] Applying the test above stated, let me analyze the question of service. The Deputy Registrar had ordered personal service of the Notice to Show Cause on the Plaintiff. The person serving, one Francis Kiongo Chabari filed a detailed affidavit of service sworn on 24<sup>th</sup> February, 2014. The affidavit discloses the admirable efforts the process server engaged in order to locate the whereabouts of the judgment-debtor. He even carried out searches on the locations he had information he may find the judgment-debtor including L.R. Number 3734/311 where he finally located the judgment-debtor. That service was not easy yet as he had to go to the residential premises of the judgment-debtor two times; the luck time being when he went there very early in the morning on 21<sup>st</sup> February, 2014 and found the judgment-debtor. The process server introduced himself and the purpose of his visit to the judgment-debtor who also introduced

himself and confirmed he was the judgment-debtor in this suit. He then tendered a copy of the Notice to Show Cause to the judgment-debtor and required him to acknowledge receipt by signing on the reverse side of the original copy thereof. The judgment-debtor accepted service but declined to sign as requested and instead he stated he needed time to consult his lawyers on the matter first. The process server returned the original copy of the Notice to Show Cause duly served.

[12] It is on this affidavit of service that the Deputy Registrar (DR) allowed the Notice to Show Cause, in effect allowed execution to issue against the judgment-debtor. The DR also considered the history of the matter and found as a fact that there had been delay on the matter which had been caused by the judgment-debtor.

[13] Doubtless, the court has unfettered discretion to grant or refuse an adjournment, except the court should always consider the reasons being advanced for the adjournment to see whether they are valid. The court should also consider the adequacy of those reasons, what prejudice the grant or refusal of the adjournment will occasion on the parties and whether the other party could be compensated by way of costs. See the case of **PETER M. KARIUKI V ATTORNEY GENERAL (supra)** and other cited in the same decision on this point.

[14] From the record, there is not a doubt that the Notice to Show Cause was properly served on the Plaintiff. Even if we should go by the record, from what counsel submitted, there was a general acknowledgement that the plaintiff was aware of the Notice to Show Cause and the appointed dates for its hearing. That knowledge is sufficient in law. In any event, I am convinced service was proper. What is strange is that the plaintiff and his counsel had taken on a path that contradicts their obligations under the overriding objective of the law; i.e. that parties should assist the court to attain an expeditious, proportionate, affordable and just disposal of cases, which came with the advent of the O2 Rule into our law. The legal counsel also bears a statutory obligation to assist the court to attain the overriding objective of the law, and could also be held responsible for delaying a case if he acts in a manner contrary to that obligation. Without passing judgment, I think the counsel for the plaintiff did not discharge that obligation in these proceedings. For all those reasons, I concur with the concurrent finding by the DR that the Appellant was properly served and that he was only bent at delaying execution.

[15] But even where service is proper, the question that begs is: Did the DR consider the reasons that were advanced for the adjournment to have been valid and adequate, or the prejudice the grant or refusal of the adjournment will be occasioned on the parties, and whether the other party could be compensated by way of costs? The DR considered the reasons advanced and in her ruling she clearly observed that there was absolutely no reason why the judgment-debtor was not before court to provide reason why execution should not issue. Indeed, the DR was frantic in her finding that the judgment-debtor was engaging delaying tactics by insisting he was not served. The law frowns upon such mala fides and considers such conduct to be a direct pierce into the heart of justice; a negation of the overriding objective of the law and the constitutional principle of justice in Article 159 of the Constitution; that justice shall be delivered without delay. Invariably, any delay in a judicial proceeding especially when it is deliberate, irrespective of the person perpetuating it, is an affront to justice and breeds grave injustice to the other party. The prejudice which the Respondent and the course of justice were going to suffer is great in the circumstance; such dent will have been inflicted by the Appellant. The Respondent is a holder of a decree of this court and is entitled to the fruits of the said decree without unnecessary restrictions from unwilling suitor. That is a valid reason on which a court of law should refuse an adjournment. Other than mere submission by counsel, there is absolutely nothing or any evidence which would create any doubt that the affidavit of service herein may have deposed to false depositions as to make the DR to invoke the provisions of Order 5 rule 16 and call upon examination of the person serving. Accordingly, the DR properly directed herself on all the aspects of the law and fact, and rightly denied the adjournment. To the contrary, the reasons which were advanced by the Appellant are the ones which were not valid or adequate to warrant an adjournment. In sum, compensation by way of costs would not have been the appropriate remedy.

[16] One more thing. The claim by the Appellant that his counsel being an authorized agent was also denied an opportunity to show cause on behalf of the Appellant, I say this; that claim is feeble in the sense that counsel for the Appellant pre-occupied himself with the question of service and adjournment even after the DR had ruled that service was proper and the Appellant was merely delaying the case. Nothing prevented the legal counsel from showing 'cause' why execution should not issue, if at all he was in a position to do so especially noting that the advocate had claimed the Appellant had not been served and nothing had been filed to show any cause.

[17] I have effectively dealt with all the grounds of the Appeal which fail completely. Consequently, I make the following finding and holding in each of the grounds of appeal:

1. ***The Deputy Registrar did not err as she sufficiently considered all the merits of the Appellant's application for adjournment, and once the adjournment had been denied, there was no reason to have allowed the Appellant to file an affidavit.***
2. ***The Deputy Registrar did not err or ignore any submission that the Appellant had been continually away from Nairobi before the date of the purported service to the date of hearing of the Notice to Show Cause. No evidence was adduced towards that end whatsoever.***
3. ***The Deputy Registrar correctly held that service had been effected on the Appellant and there was in fact no dispute or any hotly disputed issue on service. There was every indication that the Appellant had been served and had knowledge of the entire process except he was engaging in delaying tactics. Counsel for the judgment-debtor only treated the court with generalized denials on without specific attack on the depositions in the affidavit of service. Therefore, there was no necessity of enquiring as to whom between the Appellant and the process-server was telling the truth.***
4. ***The Deputy Registrar properly directed herself in law and procedure in disposing of the application for adjournment. There was nothing which prevented Counsel for the Appellant, and who never bothered to show on behalf of the Appellant cause why execution should not be granted. Counsel was pre-occupied by denial of service through and through the proceedings.***
5. ***The Deputy Registrar properly directed herself in law in disposing of the application for adjournment and then proceeding to grant execution when the Notice.***
6. ***The Deputy Registrar in the premises did neither denied the Appellant he right to be heard nor violated the cardinal principle of natural justice.***
7. ***The Appellant should avoid the utter misconception that an adjournment in such a proceeding for execution should almost be granted on the basis that the amount involved is colossal as that fact in itself alone is not a compelling reason for an adjournment.***
8. ***The reasons given by the Appellant were not valid or adequate to allow an adjournment. There was no filing or affidavit evidence by the Appellant to show fraud by the Respondent's officers regarding the relationship between the parties from inception that was placed by the Appellant's counsel on the material day, which the DR or this court can consider.***
9. ***The Deputy Registrar's decision did not occasion any or grave miscarriage of justice, instead it served justice in the case.***

[18] The upshot is that the Appeal fails and is dismissed with costs to the Respondent.

**Dated, signed and delivered in open court at Nairobi this 22<sup>nd</sup> day of May, 2014**

**F. GIKONYO**

**JUDGE**