REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS APPLICATION NO. 516 OF 2014

(ORIGINATING FROM COOPERATIVE TRIBUNAL CASE NO. 115 OF 2014)

CHARLES OSIEMO.....APPLICANT/JUDGMENT DEBTOR

VERSUS

1. STANLEY NGURE MWANGI

2. NICHOLAS MUSYOKA NZIOKA

3. FRANCIS WAEMA MALONZA

4. JAMES ORINA ABUYA

5. BERNARD WAMBUA MUASYA

6. CHRISTINE ATIENO ODUOR

7. DAMARIS A.W. KIONGO

8. IRENE O. MWANGI

9. TAHIYA NASSOR SAID

10. DAVID N. WERE.....DECREE HOLDERS/ CLAIMANTS

RULING

1. This is an Application of the judgment debtor(‘***the applicant’***) seeking to set aside the ex parte judgment delivered on **6th May, 2014** together with the consequential orders thereto. The Application is supported by the affidavits of the applicant sworn on 26th June, 2014 and 4th August, 2014 respectively. The Application is opposed. The 1st decree holder swore an affidavit on his behalf and on behalf of the decree holders on 8th July, 2014.

2. The grounds in support of the Application as contained in the application and the supporting affidavit are that the applicant knew of the existence of a judgment against him by the Cooperative Tribunal when he received proclamation letter at his home on 20th June, 2014.

He particularly denied having been served with any court papers by **Kenneth K. Dindi** and stated that her daughter who is alleged to have been served was in fact away from school. He urged this court to allow the application to set aside the said ex parte judgment.

3. In his replying affidavit, Stanley Ngure Mwangi deponed that the applicant had been properly served. That the applicant has no defence since he had written a letter admitting indebtedness to the decree holders ('**Respondents'**).

4. I have read the affidavits and considered the submissions of the parties. The issue for determination is whether the applicant has established a case to warrant the setting aside of the ex parte judgment entered by the Tribunal.

5. The Court in ***Chemwolo and Another v. Kubende (1986) KLR 496*** set out the principles to be considered in deciding whether or not set aside an ex parte judgment. The court held that:

> ***"Order IXA rule 10 of the rules confers upon the court an unlimited discretion to set aside or vary a judgment in default of appearance upon such terms as are just…in light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside and vary the judgment, if necessary upon terms to be imposed. But the court went ahead to explain that the main concern was to do justice to the parties and would not impose conditions itself to fetter the wide discretion given to it by the rules. On the other hand, where a regular judgment has been entered, the court would usually set aside, unless it is satisfied that there were no triable issues which raised a prima facie defence which would go to trial."***

6. Despite the fact that the Applicant contradicted himself, the question which remains to be answered is whether or not there was proper service. There is no dispute that the Applicant's daughter was served with processes. That service cannot be equated to service upon the Applicant. In any case there is no evidence that the Applicant's daughter was authorised to receive process on behalf of the Applicant.

7. In short, there was no proper service. Consequently the exparte judgment entered on 6th May, 2014 is set aside. The Applicant is given unconditional leave to defend the suit.

Costs of the Application shall abide the outcome of suit.

Dated, **Signed** and **delivered** in open court this 17th day of **October 2014.**

J.K.SERGON

JUDGE

In the presence of:

M/s Chege h/b for the Applicant

N/A for the Respondent