



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 51 OF 2014**

**SHAFFIQUE ALLIBHAI ..... PLAINTIFF**

**Versus**

**WILLIAM OCHANDA ONGURU T/A**

**OCHANDA ONGURU &**

**COMPANY ADVOCATES .....1<sup>ST</sup> DEFENDANT**

**JOHNSTONE KIPLIMO**

**ARAP CHEMOS.....2<sup>ND</sup> DEFENDANT**

**FINAL RULING**

**Setting Aside and Stay of Execution**

[1] I am faced with the Motion dated 23<sup>rd</sup> May, 2014 which is expressed to be brought under Order 10 Rule 11 and Order 22 Rule 22, of the Civil Procedure Rules, Section 3 and 3A and Section 1A and 1B of the Civil Procedure Act 2010. Apart from provision of costs, the Motion sought two significant orders. These orders are: - 1) *A stay of execution of the warrants of attachment and sale issued herein;* and 2) *Setting aside of the default judgment entered herein on the 25<sup>th</sup> April, 2014 and to allow the Defendant to defend the suit unconditionally.* But, on 9<sup>th</sup> day of October, 2014, the court delivered a partial ruling wherein it; *stayed execution of and set aside the warrants herein; and ordered the Deputy Registrar to subject the receipts in question to forensic investigations, i.e. Receipts No 5957935 and 5899630.* Prayer 1 in the application was, therefore, determined. The only outstanding issue and which was to be determined on receipt of the report by the DR on the receipts in question is: the setting aside of the default judgment entered into on the 25<sup>th</sup> April, 2014 and the request that the court allows the Defendant to defend the suit unconditionally. The Report by Deputy Registrar on the receipts in question is inextricable to the decision of the court in respect of the request to set aside the judgment in default of appearance and defence. The Deputy Registrar carried out the investigations and returned a report on 6<sup>th</sup> November, 2014 to the effect that Receipts No 5957935 and 5899630 are genuine and were issued on the dates indicated on the receipts. The report resolves all the concerns which had been raised in the submissions by counsel for the plaintiff in that respect. The Report makes my work

easier.

[2] The Applicant argued that the default judgment herein was erroneous because a memorandum of appearance and defence had already been filed at the time of entry of the judgment. There was, therefore, a valid defence in the file which raises triable issues. He averred that he read mischief in removing the defence from the court file. Immediately upon service, the 1<sup>st</sup> defendant filed a memorandum of appearance on 12<sup>th</sup> day of March, 2014 which was within 15 days provided by law. And, on the 27<sup>th</sup> day of March, 2014 the 1<sup>st</sup> defendant filed a statement of defence vide official receipt No.5957935 which was within the period provided by law. The request for judgment was made in a letter dated the 1<sup>st</sup> day of April, 2014 after the memorandum of appearance and the defence had been filed. I confirm the sequence of events as narrated by the Defendant to be correct. The judgment in default of appearance and or defence which was obtained is, therefore, irregular and should be set aside *ex debito justitiae*. It is accordingly set aside.

[3] But counsel for the Plaintiff raised yet another important issue on service of the memo of appearance and defence filed. The learned counsel stated that appearance and defence was not served. Also there is no evidence to show the following were filed and/or served upon him by the applicant

- a. List of defendant's witnesses
- b. Defendant's witness statements
- c. Defendant's bundle of documents

[4] I admit that under Order 6 rule 2(3) and Order 7 rule 1 of the Civil Procedure Rules, the defendant should serve memorandum of appearance and defence within 14 days from the date of filing of the respective pleadings. The word used is shall and connotes some mandatoriness thereof. The failure to so serve the said pleadings may lead to those pleadings being struck out. Courts have so held in the past. It should be understood that, the requirement of service is not a technicality which can be diminished as it serves a noble objective of justice to bring to the attention of the plaintiff the fact of appearance, the address of service for the defendant and the defence put forth against his claim. Service of those pleadings also puts in motion the filing of other subsequent pleadings especially on the defence, and prevents a scenario like the one we are faced with here. The importance of serving appearance and defence becomes pronounced when it is understood to be an integral part in the preparation of the case for trial. except, Article 159 of the Constitution which emphasizes on substantive justice confers discretion on the court to excuse such lapses especially where there is not real prejudice that the other party suffers. The appearance and defence were filed on time. And, the plaintiff moved with speed as it should be, to obtain judgment and executed thereafter. It seems there was some lapse somewhere and the plaintiff was not able to discern the appearance and defence had been filed. I am sure if they had seen the documents, they will not have applied for judgment. But, the registry may bear the blame since it has the duty to place all pleadings in the court file. That being the case, I am inclined to give the defendant the benefit of the doubt and spare the defence. I see it raises triable issues worthy trial. Accordingly, I direct the defendant to serve all the pleadings it has filed together with the documents and witness statements it intends to rely upon in evidence in this case within 14 days of today. The plaintiff should also comply with pre-trial requirements and have the matter set down for hearing as soon as possible. It is so ordered.

**Dated, signed and delivered in court at Nairobi this 28<sup>th</sup> day of November, 2014**

-----

**F. GIKONYO**

**JUDGE**

