



DAVID G. KATIBA.....APPLICANT

-VERSUS-

DISTRICT LAND REGISTRAR, MURANG'A.....RESPONDENT

**Summary:**

- 1) Under **Section 12(1) and Section 13** of the **Government Proceedings Act, Chapter 40, Laws of Kenya, Order 5 Rule 9(1)** of the **Civil Procedure Rules** Civil Proceedings against the Government can only be instituted and served against the Attorney General;
- 2) Generally, as a matter of practice, counsel should as much as possible avoid swearing affidavits on matters in dispute in which he is engaged as an advocate of any of the parties. In view of **Order 5 Rule 16** of the **Civil Procedure Rules**, counsel may also not swear affidavits of service in circumstances that may expose him to examination on, inter alia, validity, sufficiency or failure thereof of service of process;
- 3) Failure to enter appearance is not of itself a guarantee for entry of judgment in default of appearance and the court will hesitate to enter judgment or grant leave for entry of such judgment if, for example:
  - i. There are manifest fundamental or material irregularities on the face of the suit, for instance failure to disclose a cause of action or failure to join the proper party;
  - ii. If the reliefs sought are neither clear nor are, liquidated claim, pecuniary damages and detention of goods;
- 4) While the court is called upon to administer justice without undue regard to formal or procedural technicalities, it will certainly have **due** regard to such technicalities if to disregard them will prejudice any of the parties before it.

Application dismissed

**Cases referred to:**

1. Nairobi High Court Civil Case No. 1077 of 2002 (2002) 1KLR 443  
*East African Foundry Works (K) Ltd versus Commercial Bank Ltd*
2. Machakos High Court Civil No. 1 of 2006  
*Mwanzia Makau versus Special District Commissioner, Kitui & 2 Others*
3. Nairobi High Court Land & Environment Case No. 662 of 2011

**Statutes referred to:**

1. ***The Government Proceedings Act, Chapter 40, Laws of Kenya,***

*Section 12(1) and Section 13*

2. ***The Civil Procedure Act Chapter 21, Laws of Kenya, Section 81(1)***

*Order 2 Rule 1(1), Order 5 Rule 5(1) (b), Order 5 Rules 6,7, and 9, Order 5 Rule 9(1), Order 5 Rules 15, 16, Order 10 Rule 4 and 5, Order 10 Rule 8*

**RULING**

On 7<sup>th</sup> November, 2012, the Applicant filed in this court an application by way of Chamber Summons dated 6<sup>th</sup> October, 2012 primarily seeking for an order for leave to apply for judgment against the Respondent. The application was brought under **Order 10 Rule 8** of the **Civil Procedure Rules** and was supported by an affidavit sworn by the Applicant himself on 5<sup>th</sup> November, 2012.

When the application came up for hearing on 4<sup>th</sup> December, 2012 only counsel for the Applicant appeared. There was neither response nor appearance on the part of the Respondent either by herself or by her representative despite the fact that she had been served with the hearing notice. The application was, inevitably, heard *ex parte*. I have duly considered in this ruling the pleadings on record and the Applicant's counsel's submissions.

**Order 10 Rule 8** of the **Civil Procedure Rules** states that:

***“8. No judgment in default of appearance or pleading may be entered against the Government without the leave of the court and any application for leave shall be served not less than seven days before the return day.”***

The presumption is that for a party to invoke this provision, he must have sued the Government. It therefore follows that the provisions of the **Government Proceedings Act (Chapter 40, Laws of Kenya)** which, *inter alia*, govern civil proceedings by or against government come into play. Of particular interest, in so far as the Applicant's application is concerned, are **Section 12(1)** and **Section 13** of that Act. **Section 12(1)** provides as follows:

***“12. (1) Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney-General, as the case may be.”***

Once such proceedings have been instituted as contemplated by **Section 12(1)** of the Act their service upon the Government is regulated by **Section 13** of the same Act which provides:

***“13. All documents required to be served on the Government for the purpose or in connexion with any civil proceedings by or against the Government in accordance with the provisions of this Act shall be served on the Attorney-General.”***

My understanding of the foregoing provisions is that, it is beyond doubt that unless any other written law provides the contrary, any grievance against the Government which a party chooses to address through civil proceedings must be instituted against the Attorney-General and secondly, in all cases, service of process of such proceedings must, as a matter of law, be effected upon the Attorney-General. These provisions of law bring to the fore one other important issue which is that, other than the Civil Procedure Rules, the institution and service of process of civil proceedings against the Government is also governed

by substantive law. This position is augmented by **Order 5 Rule 9(1)** of the **Civil Procedure Rules** which is categorical that the “... *provisions of this Order* (that is on issue and service of summons) *shall have effect subject to Section 13 of the Government Proceedings Act, which provides for service of documents on the Government for the purpose of or in connection with civil proceedings by or against the Government.*”

It is against the foregoing background that the Applicant's Chamber Summons needs to be addressed.

The foundation of the Applicant's application is an Originating Summons dated 12<sup>th</sup> October, 2012 drawn and filed by the Applicant in person and as far as it is pertinent to the Applicant's present Chamber Summons it is reproduced herein as thus:

**"IN THE HIGH COURT OF KENYA AT MURANG'A**

**MISCELLANEOUS CIVIL APPLICATION NO. 1 OF 2012**

**IN THE MATTER OF AN APPLICATION TO REMOVE ENCUMBERANCES**

**BETWEEN**

**DAVID G. KATIBA RUTHI.....APPLICANT**

**VERSUS**

**DISTRICT LAND REGISTRAR, MURANG'A.....RESPONDENT**

**ORIGINATING(sic) SUMMONS**

Let the District Land registrar Murang'a within 10 days after service of this summons on him enter appearance to this summons which is issued on the application of David G. Katiba Ruthi who claims to be entitled to discharge of charges his properties namely Block 3/368 Murang'a Municipality loc. 10/ Wanjengi 1193 and loc. 11/Maragi 4771-41276 and issuance(sic) of new title deeds in respect of the said properties for the reasons that-

- a) such obligations are statute barred.
- b) such obligations have been written off
- c) such obligations were paid.
- d) such obligations no longer exist the proprietor's applications having been dismissed.

This summons was taken out by David G. Katiba Ruthi

**Dated at Murang'a this 12th Day of October 2012**

**DAVID G. KATIBA RUTHI**  
**APPLICANT**

**DRAWN & FILE(sic) BY**  
**DAVID G. KATIBA RUTHI**  
**P.O. BOX 919**  
**MURANG'A**

**TO BE SERVED UPON**

**THE DISTRICT LAND REGISTRAR  
MURANG'A**

(SERVICE THROUGH PRIVATE (sic) PROCESS SERVER)"

Having brought in court his application under **Order 10 Rule 8** of the **Civil Procedure Rules**, there is no doubt that the Applicant's target in the civil proceedings is the Government; however, it is clear on the face of the Applicant's Originating Summons that the Attorney-General was not joined to his suit. The Applicant's action in this respect therefore, defies **Section 12(1)** of the **Government Proceedings Act** quoted above.

The Originating Summons itself was filed in Court on 12<sup>th</sup> October, 2012 and was allegedly served on the Land Registrar, Murang'a District. The Affidavit of Service is sworn by the Applicant's counsel who apparently took it upon himself to serve the Summons. The Affidavit is made up of four paragraphs only and due to their importance to the Applicant's application it is necessary to quote them verbatim:

***"I, MACHARIA WAIGURU an advocate of P.o. Box 919 Murang'a a resident of the same town do make oath and state as follows:-***

- (1) That I received summons to enter appearance on 15<sup>th</sup> October, 2012 for service on the Respondent herein.***
- (2) That I proceeded to the land's office to serve the same.***
- (3) That I served the application upon Mrs. Njenga the District land Registrar who signed and stamped the same.***
- (4) That what is sworn herein is true.***

***Sworn by the said..."***

This affidavit was obviously filed pursuant to **Order 5 Rule 15(1)** of the **Civil Procedure Rules** which requires a serving officer in all cases in which summons have been served to swear an affidavit of service ***"...stating the time when and the manner in which summons was served..."***

Although **Order 5 Rule 5(1) (b)** of the **Civil Procedure Rules** provides that an advocate is one of those people to whom summons may be delivered for service, it would not be appropriate, as in the present case, for counsel to serve process in a matter in which he is involved in his capacity as an advocate for one of the parties. This is because **Order 5 Rule 16** of those Rules opens a window for cross-examination of the advocate on any allegation that a summons has not been properly served. If this happens counsel will be compelled to step out of his privileged position of an advocate and take the unenviable position in the witness box where he will most likely be embroiled in the parties' dispute. Decisions abound where courts have consistently deprecated this practice but for purposes of this application the words of Ringera J (as he then was) in the case of **East African Foundry Works(K) Ltd versus Commercial Bank Ltd (2002) 1KLR 443** will suffice. The learned judge said at page 446 that ***"...that I have always deprecated depositions by advocates on contentious matters of fact in suits or applications which they canvas before the courts and I have never had any hesitation in striking out such affidavits as a matter of good practice..."*** I would adopt the learned judge's reasoning in dealing with an affidavit of service whose depositions are likely to be contentious.

Even if counsel was to be deemed the appropriate process server, the affidavit of service is not clear of *when* the summons to enter appearance was served but more importantly, it is noted that the Attorney-General who ought to have been served was not served. He was not only omitted from the Applicant's suit but it is apparent from the affidavit of service that he was also not served with the Originating Summons which omission is contrary to the provisions of **Section 13** of the **Government Proceedings Act**. In the **Machakos High Court Civil Case No. 1 of 2006, Mwanzia Makau versus Special District**

**Commissioner Kitui & 2 Others** the court (Dulu, J) struck out as being incompetent an application under **Order 10 Rule 8** of the **Civil Procedure Rules** because the Attorney General who is supposed to be the proper party in civil proceedings against government was not joined in the suit.

With all these deficiencies I find that that even if for whatever reasons the omission of the Attorney-General from the proceedings was to be explained or excused service of Summons upon the Respondent fell short of the standards required under **Order 5 of the Civil Procedure Rules** more particularly **Rules 6,7,8,9** and **15** thereof. The Applicant's application would fail on that account.

Although the Applicant's Application would fail for want of proper service one further question that is worthwhile to consider is, assuming the Respondent had properly been served would the Applicant be entitled to leave to enter judgment against the Respondent? Can a court of law grant leave to enter judgment for want of appearance if, for example, it would not have jurisdiction to determine a case before it even if the Respondent were to enter appearance? Where there are glaring material irregularities manifest on the face of the Applicant's Originating Summons would the court ignore them and grant leave to enter judgment merely because the purported Summons was properly and effectively served?

There is no question that the primary task of a court of law is to do justice to the parties before it and a party's right to be heard is a fundamental component of this task. Where for one reason or another circumstances demand, as in the present application, a party to be condemned unheard, it is incumbent upon the court to satisfy itself that, among other things, the suit before it is in law a proper suit; this can be tested against several benchmarks but for purposes of this application I must satisfy myself that the applicant's suit discloses a cause of action against the Respondent; if the suit discloses a cause of action what are the reliefs sought and if judgment is entered whether it is enforceable in terms of the reliefs sought and whether that judgment will affect or is likely to affect any other party not party to the suit. It is from this perspective that I have to consider the Originating Summons whose service of process has already been noted to have fallen below the required standards.

The Originating Summons is apparently supported by the affidavit sworn by the Applicant on 12<sup>th</sup> October, 2012. It is clear from that affidavit that the Applicant's parcels of land which he has described as parcel numbers **Loc. 11/Maragi/4271-4276, Loc. 10/Wanjengi/1193** and **Block 3/368 Murang'a Municipality** are charged to Barclays Bank of Kenya whose rights under those charges are reserved under **Sections 83** and **84** of the Repealed **Registered Land Act, Chapter 300 Laws of Kenya**. Although the copies of search certificates attached to the affidavit of the Applicant are clear that the charges remain undischarged, he deposes in paragraph 3 of his affidavit that:

*"...the above obligations (that is, the charges), were paid or written off over a decade ago and are statute-barred anyway".* The Applicant therefore proceeds in paragraph 4 of his affidavit to state that, *"... that I pray the charges be removed and new-title deeds issued..."*

The Applicant's claim that his obligations to Barclays Bank have either been paid or written off is not supported by any evidence; his own affidavit betrays this assertion and shows that his properties remain charged to the bank. If indeed the Applicant's liabilities to the bank had been settled either by the bank writing them off or by way of repayments as the Applicant seems to suggest nothing would have been easier than obtaining a discharge of charge and registering it against the charged properties in which event the Applicant's suit against the Respondent would have been rendered unnecessary.

It is clear on the face of the Originating Summons that Barclays Bank whose rights under charge in issue will, no doubt, be affected by the judgment sought if leave is granted is not a party to the applicant's suit. The Applicant has not raised any grievances against it yet what he is seeking will certainly adversely affect the bank's rights in a material way; neither has the Applicant raised any complaint against the sole party he has sued, the Land Registrar Murang'a District. The Applicant's Originating Summons therefore does not only fail to disclose a cause of action against the Land Registrar who has been sued but it has also failed to disclose such an action against Barclays Bank which has not been sued but which will definitely be affected by the judgment sought if it is granted. The Applicant's action no doubt offends the provisions of **Order 2 Rule 1(1)** of the **Civil Procedure Rules** which is to the effect that:

**“1.(1) Every pleading in civil pleadings including proceedings against the Government shall contain information as to the circumstances in which it is alleged that the liability has arisen and, in the case of the Government, the departments and the officers concerned.”**

Contrary to the provisions of this Rule, the Applicant’s Originating Summons does not disclose any liability on the part of the sued Land Registrar and is deficient on information as to circumstances under which any such liability would have arisen.

One other question that the Applicant’s Originating Summons begs is that assuming that judgment in default of appearance is eventually entered against the Respondent, what relief or reliefs would the Applicant have been granted? The Originating Summons is not clear on its face on what the Applicant is seeking; the Applicant’s Originating Summons is simply a brief narrative of what appears to me to be grounds upon which he is making the application but which, regrettably, falls short of seeking any declaration or prayer for any specific relief. I have noted that paragraph 4 of his affidavit expresses his intention that “...**the charges be removed and new title deeds issued...**”but no similar prayer is found in the Originating Summons which for all intents and purposes must bear the prayers or reliefs he is seeking for.

It is appreciated that the Applicant drew and filed this Summons himself and as a layman the procedural, formalities and technical aspects of his pleadings should be judged leniently; however, I also note that he subsequently secured the services of a professional even before the Originating Summons was allegedly served. It was early enough at that stage for his advocate to take appropriate steps and put the Originating Summons in its proper perspective not least before the hearing of the present Application. Much as the court is called upon to administer justice without undue regard to procedural technicalities it will certainly have *due* regard to such technicalities if to disregard them will prejudice any of the parties.

In any event, it must be appreciated that judgment in default of appearance under **Order 10** of the **Civil Procedure Rules** is not available in all case where the defendant or defendants fail to appear but it can only be entered when certain reliefs are sought. These reliefs are liquidated claims, pecuniary damages and detention of goods and they are specifically provided for in **Order 10 Rules 4** and **6** of the **Rules**. The Applicant has not demonstrated that he is seeking any of these reliefs. In **Nairobi High Court Land & Environment Case No. 662 of 2011, Githinji Karuri versus the Attorney General** the court (Lady Justice Pauline Nyamweya) rejected an application under **Order 10 Rule 8** of the Rules because the prayers sought in the plaint were outside the category of reliefs that judgment in default of appearance can be entered for.

In the absence of a cause of action in the Applicant’s substantive suit; where the relief sought is at best blurred; where the proper party is not joined to the suit and; where the judgment sought will affect the rights of a third party who is not joined to the suit, would the court allow the Applicant’s Application and grant leave to enter judgment in default of appearance? I reckon not. Failure to enter appearance is not a carte blanche for judgments in favour plaintiffs or applicants whose suits fall short of the very minimum thresholds of what in law is a proper suit. The inevitable conclusion is that even if the Applicant had properly served the Respondent with the Summons his application under **Order 10 Rule 8** of the **Civil Procedure Rules** would still fail because his Originating Summons cannot go very far in its present state. For reasons I have given and in the light of the decisions in the cases cited in this ruling the only alternative left for me is to dismiss the Applicant’s Application with no orders as to costs. I so order.

**Dated and delivered** in open court at Murang’a on the 14<sup>th</sup> day of December 2012

**Ngaah Jairus**

**JUDGE**