



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL NO. 89 OF 1998**

**ALBERT NYARAMBA .....PLAINTIFF**

**VERSUS**

**NEW AKIKA TRADERS CO. LTD .....1ST DEFENDANT**

**JOSEPH D. K. KIMANI**

**T/A BEKAGO AUCTIONEERS..... 2<sup>ND</sup> DEFENDANT**

Coram: Mwera J

Miano for plaintiff

Kibe for 1<sup>st</sup> defendant

Shimenge N/A for 2<sup>nd</sup> defendant

Njoroge court clerk

**RULING**

The 1<sup>st</sup> defendant company filed a chamber summons dated 18/7/07 under the now repealed Order XXI Rule 22 (1) of the Civil Procedure Rules and sections 3A, 91 of the Civil Procedure Rules for orders:

- i) that the order of 30/01/04 striking out the joint defence herein be set aside;
- ii) that the judgement dated 18/11/05 be set aside;
- iii) that there be a stay of execution of the decree dated 18/11/05; and
- iv) the 1<sup>st</sup> defendant/applicant be granted leave to defend the suit

In some 21 grounds, repetitive in many respects, the applicant contended that the entire proceedings herein were tainted with fraud, illegality and irregularities. Its ostensible advocates *M/s Moses N Siagi & Co.* compromised the applicant's right to a fair hearing. It became aware of the suit herein on 27.6.2005. The suit was not served with any summons and it did not instruct Mr. Siagi to represent it in any manner including filing a joint defence dated 16.7.98. The 1<sup>st</sup> defendant/applicant was stranger to the 2<sup>nd</sup> defendant on whose behalf Mr. Siagi purported to file a joint defence. Assuming that that defence was filed with instructions, no application to strike it out was ever served and the court should not have

acted on an oral application to strike out the defence on 30/10.05. By that time the purported defence lawyer Mrs Siagi had been disqualified to act for the defendant way back on 16.9.02 - a thing the plaintiff ought to have known and therefore ceased to correspond with Mr. Siagi. The applicant was not aware of the striking out of the defence until 29.6.05. In a turn of events the court did not quickly understand, it was a further ground by the 1<sup>st</sup> defendant/applicant that Mr. Siagi introduced M/s Mogusu Miencha & Co. Advocate to it, but that did no good to it at all. Then the judgement of 18/11/05 followed, all to the prejudice of the applicant. So to allow execution of a decree thereof would increase the prejudice.

A supporting affidavit sworn by Lazaro Mbubi Nzau a director of the applicant company reiterated but elaborated on the grounds above. When he appeared with Mr. Siagi on 29.6.05 in court a hitch arose whether Mr. Siagi would represent the 1<sup>st</sup> defendant when he had been ordered earlier by court not to do so. Then Mr. Siagi introduced the deponent to Miss Mogusu, Advocate who would represent the 1<sup>st</sup> defendant from there on. Later in the day, trial started with the plaintiff testifying before Kubo J in the presence of the deponent. M/s Mogusu came late and presented an application which the Judge refused and the plaintiff closed his case. Judgement followed on 18/11/05 with sh. 1,604,250/= award in general damages to the plaintiff. The 1<sup>st</sup> defendant's directors had sat in court but not participated in the trial. The dispute had been over rent before the Rent Restriction Tribunal (RRT), followed by levying distress against the plaintiff who had been defaulting. Mr. Siagi had in his custody all the relevant papers before the Rent Restriction Tribunal (RRT) but the 1<sup>st</sup> defendant did not instruct him to file the defence joining it with the 2<sup>nd</sup> defendant. Perhaps the plaintiff served him with the process because of the Rent Restriction Tribunal (RRT) times. And by the time the defence was struck out Mr. Siagi had long been disqualified from acting for it on account of the plaintiff's intention to call him as a witness. So prayers laid warrant to be granted.

In the replying affidavit the plaintiff's advocate, Mr. Kabuya Miano, deponed that the proceedings herein had gone on procedurally. The 2 defendants appointed Mr. Siagi to act for them and the deponent instructed one David Irungu a process server and:

**“6. The first defendant was served on 22.6.1998 at his Kamukunji Police Station where he refused to acknowledge and sign the summons.....”**

The evidence of the service was exh. KMI. On observation this affidavit is in respect of service on the 2<sup>nd</sup> defendant and not the 1<sup>st</sup> defendant – a corporation. Obviously David Irungu did not serve the 1<sup>st</sup> defendant in a manner prescribed by law and a corporation could not be:

**“..... at his Kamukunji Police Station.....”**

And later it was deponed:

**“8. .... and did not serve the summons on Mr. Moses Siagi, Advocate as alleged.....”**

The plaintiff then maintained that on 29.6.05 the 1<sup>st</sup> defendants' directors (including Lazaro Nzau) attended court with Mr. Siagi as their counsel, addressing the court. The hearing was adjourned to the afternoon to enable the 1<sup>st</sup> defendant to engage another lawyer Ms Mogusu. When the hearing resumed the plaintiff proceeded with his evidence without the defendants' directors seeking an adjournment to await the arrival of their advocate. And if this court is permitted to observe, the trial judge on 29.6.05 should have asked where the defence lawyer was when hearing resumed in the afternoon, before hearing the plaintiff to the end. But be that as it may. It was added that even after Mr. Siagi was disqualified from representing the defendants, he defied/ignored, especially Waki J's directive of 29.9.02 and so the plaintiff continued to serve all processes on him. Then on 13.10.04 Ransley J struck out the defence as being a mere denial and ordered that the suit proceed to trial. This replying affidavit was as long as the grounds and the supporting affidavit of the 1<sup>st</sup> defendant, if not longer covering all manner of things. It ended by pleading with the court to let matter which has taken more than ten years to come to an end by granting the execution of the decree.

When this application came before court and Mr Siagi's name featured as it has above, the court desired him to file an affidavit to assist it especially in the denial that he had been instructed by the 1<sup>st</sup> defendant or that he had been disqualified from acting for it. Served duly Mr. Siagi did not respond even after he had appeared in court once and the importance of his affidavit was stressed. Then the parties were directed to submit in writing. They did so. But again all appeared to constitute what had been set out in the affidavits except for filing authorities.

In this court's view, it shall serve the ends of justice if the judgment of 30.10.04 is set aside, and the defendants have their day in court when this suit is tried on merits. The main reason for this decision is that the 1<sup>st</sup> defendant does not appear to have been properly or validly served. It is a corporate body and to serve it under the old Order V rule 2 Civil Procedure Rules it was mandated that:

**“2. Subject to any other written law, where the suit is against a corporation the summons may be served –**

**(a) on the secretary, director or other principal officer of the corporation; or**

**(b) If the process server is unable to find any of the officers of the corporation mentioned in rule 2 (a), by leaving it at the registered office of the corporation or sending it by prepaid registered post to the registered postal address of the corporation, and if there is no registered office and no registered postal address of the corporation, by leaving it at the place where the corporation carries on business or by sending it by registered post to the last known postal address of the corporation.”**

It was said above that the plaintiff's lawyer instructed David Irungu, a process server, to serve the defendant. Irungu did serve the 1<sup>st</sup> defendant at his Kamukunji Police Station. It was not said which officer of the 1<sup>st</sup> defendant was served at Kamukunji Police Station and who refused to acknowledge. Further it was not stated in the replying affidavit that Kamukunji Police Station was the registered office of the 1<sup>st</sup> defendant. That service was therefore invalid and because in the same affidavit it was deponed that Mr. Siagi Advocate for the 1<sup>st</sup> defendant was not served either. The conclusion therefore is that no valid service was ever effected on the 1<sup>st</sup> defendant.

The issue of Mr. Siagi having or not having instructions was not resolved because he did not favour this court with an affidavit on that account. This court may venture to observe that the ex parte hearing or formal proof that went on 29.6.07, should be seen to have been prejudicial to the 1<sup>st</sup> defendant. Both sides have agreed that M/s Mogusu did not show up in the afternoon session when the plaintiff finished his case. The plaintiff claims that it was the defendants' directors who were present who did not seek an adjournment on this account. And quiet probably the plaintiff's lawyer or indeed the court itself did not pay attention to that state of affairs at all. But be that as it may.

As regards striking out of the defence it also appears that it was on the court's own motion or on an oral application from the plaintiff. The plaintiff does not clearly come out on this. And this court does not to say more on that.

All in all the prayers in this application are granted. Parties to conclude discovery, file witness statements, issues, and as it were, comply with Civil Procedure Rules 2010 so that the suit herein is as soon as possible heard on its merits.

Costs to the applicant.

Ruling delivered on 11.5.11.

**J. W. MWERA**  
**JUDGE**