



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NUMBER 131 OF 2002**

**NATIONAL HOUSING CORPORATION.....PLAINTIFF/APPLICANT**  
**VERSUS**  
**LAWI KIPLAGAT.....DEFENDANT/RESPONDENT**

**RULING**

Coram: Mwera J

Onyancha for Plaintiff/Respondent  
Makumi for Defendant/Applicant  
Njoroge Court Clerk

In his notice of motion dated 5.10.11 brought under Order 10 rule 11 Civil Procedure Rules and Sections 3A, 63 (e) of Civil Procedure Act the defendant prayed:

- i) that there be a stay of execution herein;
- ii) that the ex-parte judgement entered against him be set aside; and
- iii) that further proceedings herein be stayed pending final determination of an appeal before the State Corporations Appeal Tribunal.

In the grounds it was contended that the defendant was never served with summons to enter appearance. So he was not aware of this suit until the execution of decree. He got a lawyer to apply to set aside the *ex parte* judgement and then the court file disappeared. Then his goods were sold. The court file resurfaced; the defendant had committed an act of bankruptcy; an official receiver took charge of his estate together with this suit. The official receiver never applied to have the judgement set aside. The receiving order was secretly lifted; he has a good defence and has moved with promptitude for the orders stated.

The applicant deponed in the supporting affidavit that mid this year auctioneers visited his son's residence and carted away goods purportedly in execution of the judgement against him. That son instituted objection proceedings and his goods were returned in July 2011. The applicants' own property had been attached in 2002. He instructed M/s Kipkenda, Lilan & Co. Advocates to act for him who did not pursue the case believing that the official receiver was handling the case. It is only on 25.06.02 that the applicant became aware of this case when auctioneers went to attach his goods. At no time did a process server called George Omollo Ngasi serve him with summons to enter appearance as claimed in the affidavit of service sworn on 2.04.02. After attachment of goods in July 2002, the applicant visited the offices of his lawyers, M/s Kipkenda, Lilan but they informed him that the court file could not be traced. His goods were sold.

In October 2003 the applicant got advice from M/s Chemitei & Co. Advocates that to protect his assets,

he could obtain a receiving order. He got one in KSM HCBC 33/03 and attended meetings with the official receiver. Then in November 2004 M/s Kipkenda, Lilan Advocates informed the applicant that the court file had been reconstructed and they had filed a notice of appointment. All the time the applicant was of the view that his assets and cases were being handled by the official receiver to whom M/s Kipkenda Lilan would hand the brief. That that was done and that firm of lawyers told the applicant that the official receiver would handle the proceedings to set aside the judgement on 23.9.11. The applicant perused KSM HCBC 33/03, in which he got a receiving order and found that, unknown to him or the official receiver, the receiving order was lifted on 19.05.08. In giving the official receiver the list of assets the applicant inadvertently omitted property no. LR 99/119 NRI. The official receiver advised the applicant to sell that property and hand proceeds to him but the court could not allow that for want of capacity. All the time the applicant was under the impression that M/s Kipkenda & Lilan Advocates and the official receiver were protecting his rights. He has a good defence, hence this application.

At this point the court remarks that the applicant has charged that the original file in this matter went missing at some stage. Later his lawyers informed him that a reconstructed file had been traced (paras. 11, 15 of supporting affidavit).

A reconstructed file ought to contain as much, if not, all the documents and papers from both sides as was in the original (missing) file. Perusing this reconstructed file reveals that it begins at the time of execution, objection proceedings etc which means that judgement had been entered against the applicant already. Then on 06.10.11 M/s Masore Nyang'au & Co. Advocates who filed the present motion filed a notice of change of advocate. It is not clear that leave to replace M/s Kipkenda Lilan & Co Advocate was obtained from the court and when, judgment have been entered earlier (Order 9 rule 9 Civil Procedure Rules). The applicant's current lawyers first appear in the proceedings on 6.10.11.

In the grounds of opposition filed on 21.10.11 it was contended that the present motion was frivolous and an abuse of the process of court. That the defendant was guilty of laches and the application had been brought in bad faith. And further that the application had been filed by an advocate who previously conducted this matter on behalf of the applicant. That could prejudice the plaintiff (Note: or did this mean that the advocate who had NOT previously acted for the defendant?)

The corporation secretary of the plaintiff company swore a replying affidavit asserting that summons to appear in this suit was properly served on the defendant on 5.3.02 as per the affidavit (ann. EWM 1). Then judgement was entered against him and for 9 years the defendant has not denied knowledge of it. That there was even partial execution of the decree when on 3.7.02 M/s Warleen Traders (K) Ltd attached and sold his goods fetching only sh. 16 463/= (ann. EWM 3). This was followed by a sale of the defendants' property LR NRI?BLOCK 99/113 for sh. 7 m on 24.10.08 (ann. EWM 4). That it was a 3<sup>rd</sup> attachment on 31.5.11 which elicited objection proceedings so the applicant cannot claim that he did not know of the judgment. His bankruptcy case at KSM High Court was only meant to deny the plaintiff the course of execution of the decree. The intended defence raised no triable issue and the defendant had at no time appealed to the State Corporations Appeal Tribunal against certain surcharge certificates so as to have these proceedings stayed.

It was not clear when the applicant got the court's leave to file a further supporting affidavit, but he did so on 03.11.11.

In submission, the applicant repeated that he was never served with the summons to enter appearance. So he was not aware of the suit until the first execution of 25.06.02. Then in July 2011 there was another execution but against his son. The applicant does not deny/rebut the deposition by a process server that he served the processes on him at KCB Building Jogoo Rd at Ravine Chemists and that the applicant accepted the papers but declined to acknowledge by signing, promising to hand them to his lawyers. He claims in submission however, that the process server did not establish that the defendant owned that pharmacy. But he does not deny being there. He does not speak of the sale of his property LR No. 99/113 NRI except to claim that he omitted it from the inventory of his assets by mistake.

The defendant went on to deny that he was ever served with surcharge certificates by the Inspector of

State Corporations before this suit was commenced. Yet he had filed 3 appeals against them. He urges the court to exercise its discretion here and do justice by granting the prayers. Some cases were cited in regard to setting aside, *ex parte* judgements or other. There was also some supplementary submission in response to that of the plaintiff.

The plaintiff submitted that the defendant was duly served with summons to enter appearance, a judgement was entered against him in the sum claimed and execution started. He could not be heard to say that he did not know of the judgment. The applicant took too long to bring these proceedings and with no explanation. So he did not deserve the orders. It was not said exactly when the original court file went missing or when it was reconstructed. There were no letters in that regard. Due surcharge certificates were served and this suit followed.

In this court's view, the orders sought will not issue. The applicant has not demonstrated that the process server did not serve him at KCB Building and he declined to acknowledge by signature. If that did not occur then the applicant should have opted to have the process server examined here on oath. There were 3 attachments and sale of the applicant's properties on 3.7.02, 24.10.08 and 31.5.11. He claimed that he knew of the judgment when the first attachment was levied and he instructed M/s Kipkenda Lilan Co. Advocates. He does not refer to the one of 24.10.08 when his house was sold for sh. 7m. Then he moves to the one of May 2011 when his son's property was attached. Can it be said that all this time the defendant was unaware of the decree against him? This court is unable to believe him on this. It rather believes that the applicant has all along been aware of the decree against him. Indeed when he filed a bankruptcy petition in KSM BC 33/03 he stated in the affidavit:

**“ That I have been sued by several creditors namely:-  
(a) National Housing Corporation vide Nairobi HCCC 131/02  
(b) ..... (c) .....”**

And the plaintiff was a creditor indeed because as early as 3.7.02, it had obtained judgement against the defendant and commenced execution. Accordingly, the court is inclined to hold as the plaintiff does, that the bankruptcy cause was filed with a view to hold it and other creditors at bay. Then the receiving order was secretly lifted. By who? And did the applicant seek to have it reinstated? Not at all.

As to the appeals to the State Corporations Appeal Tribunal, only the case numbers were given. No copies of pleadings/proceedings. Do those appeals exist and/or is the defendant serious about them? Only he can tell. Or does the law say that with such appeals pending, no execution can go on? We are not told. However, if such legal regime existed and this court was inclined to grant the stay, the applicant would be directed to render security for due performance of decree e.g. depositing the decretal sum. But we need not go there for no such appeals have been shown to exist.

In the event the above reasons to refuse the prayers sought are not sufficient, the court was unable to find that the applicants' present lawyers, M/s Masore Nyang'au & Co. are properly on record.

The applicant's lawyers on record are M/s Kipkenda, Lilan & Co. Judgement was entered against the defendant when they were acting as such. Then later on 6.10.11 the present lawyers filed a notice of change of advocates - from M/s Kipkenda Lilan to themselves. In such circumstances Order 9 rule 9 Civil Procedure Rules must come into play:

**“9. Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgement has been passed, such change or intention, to act in person shall not be effected without an order of the court –  
(a) upon an application with notice to all the parties; or  
(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”**

On perusal of the file there did not appear such an application or that it was served on all parties or was based on a consent as provided for above. And finally there is nothing that this court gave leave and

recorded an order that M/s Masore Nyangau & Co. Advocates now act for the defendant instead of M/s Kipkenda Lilan & Co. If that finding be correct, and this court thinks so, then these proceedings have been irregularly put in place by M/s Masore Nyangau & Co and therefore they are a nullity. They ought to be struck out.

In sum this application is dismissed with costs.

Delivered on 21.11.11.

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