



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 401 of 2007**

**SERRACO LIMITED.....PLAINTIFF**

**VERSUS**

**THE ATTORNEY GENERAL.....DEFENDANT**

**RULING**

The plaintiff herein moved to this court vide a plaint dated 7<sup>th</sup> day of May 2007 and filed on the 7<sup>th</sup> May 2007. The cause of action is stated in paragraphs 3,4,5,6,7,8,9 and 10 thereof. The summary of the same is that the plaintiff imported 700 bales of gunny bags with each bale containing 300 pieces giving a total of 210,000, pieces of gunny bags, which were stolen immediately upon clearance. The perpetrators of the theft were apprehended on 23<sup>rd</sup> April 1999 by officers of the criminal investigation department, and 582 bales comprising 174,600 pieces of gunny bags were recovered. These were taken possession of by the said criminal investigation department to be used as exhibits, in cases to be filed against the perpetrators of the said theft, but unfortunately the defendants negligently kept the said gunny bags, in consequence thereof, the plaintiff suffered loss and damage amounting to Kshs. 20,079,000/= which is claimed from the defendants. In the alternative to the delivery of the 582 bales of gunny bags, plus.

Summons to enter appearance were taken out and vide a R/S of one Jacktone Oyia Owidhi, sworn on the 12<sup>th</sup> day of June 2007, it is deponed that the summons were served on the legal department of the defendants office on the 21<sup>st</sup> day of May 2007.

The said R/S gave rise to the filing of the application dated 12<sup>th</sup> day of June 2007 and filed the same date. The application is by way of chamber summons and it is brought under order IXA rule 7 CPR. It sought 2 prayers namely:

1. *That leave be granted for the judgement to be entered against the defendant in default of appearance.*
2. *That the defendants do pay the costs of this application.*

A summary of the grounds in the body of the application is that the suit was filed, summons to enter appearance taken out, and served, on the 24<sup>th</sup> day of May 2007, but no entry of appearance and defence were filed. This prompted the plaintiff to present to court, an application by way of chamber summons dated 12<sup>th</sup> day of June 2007 seeking leave of court, to be granted for judgement to be entered against, the defendant in default of appearance and that the defendant be ordered to pay costs of the application.

This is the application which came up before this court, for disposal on 4/7/2007 and this court, being

satisfied on the basis of the documentation before it that, the defendant had due notice of both the suit and the application, allowed that application as prayed.

The allowing of the application for the entry of the judgement paved the way for the decree on 9<sup>th</sup> day of July 2007, and issued on the 17<sup>th</sup> day, a certificate of costs dated 24<sup>th</sup> day of July 2007, paving the way for execution process to be set in motion. It is this execution process that prompted the Defendant/Applicant to present an application by way of chamber summons dated 1st August 2007, and filed on 2<sup>nd</sup> August 2007. It seeks 6 prayers namely:

1. *Spent*
2. *Spent*
3. *That there be a stay of execution of the decree dated 17<sup>th</sup> July 2007, In this suit pending the hearing of this application inter partes.*
4. *That the Honourable court be pleased to set aside the interlocutory judgement entered against the defendant on 9<sup>th</sup> July 2007 and all other consequential orders*
5. *That the memorandum of appearance and defence annexed to the affidavit herein be deemed properly filed and served*
6. *That the costs of this application be in the cause.*

The application is anchored on the grounds in the body of the application, supporting affidavit, written skeleton arguments, case law and oral high lights in court.

Upon presentation of the said application, counsel for the defendants filed notice under order 18 CPR dated 4<sup>th</sup> day of October 2007 of intention to cross-examine the deponent of the R/S one Jacktone Oya Owidhi. On 8/7/2008 when the matter came for hearing inter partes, counsel for the plaintiff applied orally to cross-examine a Mr. Chege then a clerk in the Attorney General's chambers who had been mentioned in paragraph 9 of the supporting affidavit. Leave to cross-examine was granted to both sides, which cross-examination was carried out on 18/9/2008, on both process server who allegedly served the process on to the Attorney General's office and the then clerk in the Attorney General office who is alleged to have been served.

At the end of the cross-examination counsel for the plaintiff informed the court, that since the Attorney Generals' office had denied service, of the processes upon them, the signature of the person who allegedly received the processes and the stamp appended on the said processes should be submitted to the CID for investigation and verification as regards their authenticity. This move was opposed by the defendants for the reasons given, but the court, in its ruling given on 23/10/2008 ordered the investigation to be done before receiving of submissions of both counsels on the application. The director of CID addressed its report to the Registrar high court, but was directed to the Attorney General's Chambers and received there on the same date of 23<sup>rd</sup> February 2009, and thereafter re-directed to the Registrar high court where it was received on the 24<sup>th</sup> February 2009. The report was annexed to the said letter. The sum total of the report is that the purported signature of one Chege on processes allegedly served was different from the spaceman signature obtained from the said Chege and the stamp on the process allegedly emanating from the Attorney General Chambers was also different from the spacemen obtained from that office.

There after the content of the report was passed on to the counsels and then the court received submissions of the counsels. The counsel for the applicant reiterated the grounds in the body of the application, supporting documents and then stressed the following points:-

- (i). Concede that they were served with the plaint and summons to enter appearance.

(ii). The file was then handed over to counsel on record for the defendant who set about, preparing the memorandum of appearance and defence for filing. These were brought to him for verification and he discovered that the memorandum of appearance had an error and sent it back for re typing. Thereafter he sent a clerk one Mbuvi to file the same.

(iii). These were presented to the Registry on 5/7/2007 and when 2 documents were stamped the Registry clerks stopped midway and referred to the incharge of the Registry who told Mbuvi that they could not receive them because of a request for entry of judgement being present on the court, file but no entry of judgement had been entered as at that time.

(iv). They dispute service of the application for leave to enter judgement because the process server has not named the person served, the time of service and lastly it is not in the prescribed format. This in itself casts doubt as regards the genuineness of the said service which is in doubt confirmed by the findings of the investigation report from the CID.

(v). The court, is invited to make findings that despite the long experience of the process server, he failed to find out the name of the person he was effecting service on.

(vi). Further proof that the service was false, is confirmed by the fact that he contradicted himself as regards the place of service. In the cross examination he said he effected service on the 7<sup>th</sup> floor whereas in the return of service he said that he served on the 8<sup>th</sup> floor.

(vii). The court, is further urged to reject the return of service because he dated it himself contrary to the requirements of the oaths and statutory declarations Act cap 15 laws of Kenya.

(viii). The court, is urged to believe the denial of Mr. Chege that he was never served.

(ix). The court, is invited to hold that the Deputy Registrar was wrong to reject the filing of the defence papers and step in to rectify the error.

(x). The court, is invited to note that an interlocutory judgement should not have been entered in the manner it was done as the claim needed formal proof.

(xi). In view of the fact that the money to meet the claim will come from tax payers' money, and for this reason public policy demands that the claim be defended in order to protect the tax payers money.

(xii). The government has expressed willingness to defend the claim and this court, should not shut it out as it is not proper to deny the defendants a chance to defend the suit.

(xiii). The court is invited also to find that the format used to request for interlocutory judgement is irregular and that request is therefore faulty.

The Plaintiff/Respondent opposed the application but their opposition documents are not on the record save for the written skeleton arguments, a matter in advertently not noticed by the court, earlier on and as such the points to be considered from the oral high lights and written skeleton arguments will be the legal points raised in them. These are:-

(i). He takes great exception of the document examination report which tends to suggest that the defendants were never served at all contrary to the deponement from the defendants that they were served which confirm service of the suit and summons to enter appearance.

(ii). The said document examination report is valueless as the document examiner did not call for the known signatures of the questioned people. He relied on the spacemen signatures which could be altered.

(iii). The court, is further urged not to give credit to the report as it has turned out that in fact it is the same CID department which is a defendant herein. Naturally they cannot be expected to do anything

against themselves.

- (iv). The court, is invited to invoke the provisions of sections 48 and 49 of the Evidence Act, and compare the questioned signatures on its own and confirm that indeed the R/S was correct that the defendants were served.
- (v). The judgement entered herein was not interlocutory but final and as such the Defendant/Applicants' application is improper as they should have applied to set aside the order granting leave to enter judgement.
- (vi). The Defendants/Applicants have shown bad faith in their move in that they have denied service of the notice of intention to sue and yet the same was served and acknowledged.
- (vii). The court is urged to hold that the respondent complied with all the requirements of the rules in the first instance. In the second instance that these same rules are not superfluous. They are not cosmetic. They are meant to be complied with. It means that the Defendant/Applicant ought to have applied to set aside the order granting leave to apply for judgement.
- (viii). The court, is urged to hold that the amount claimed is liquidated as the same was computed and court fees paid for.
- (ix). There is no doubt that the Defendant/Applicants never filed their papers in time and their papers were rightly rejected.
- (x). They pleaded the value of the subject matter in the plaint which has not been denied.
- (xi). There is no need for formal proof because judgement was not given on both limbs but on the alternative limb.
- (xii). The court is invited to hold that the ingredients in SHAH VERSUS MBOGO are absent in the first instance and in the second instance the defence is a mere denial.

In response to that submission, the counsel for the Defendant/Applicant reiterated the earlier submissions and then added the following:-

- The judgement has been attacked because it grants double benefits to the beneficiary.
- Maintain that the plaintiff should not lose sight of the discrepancies noted during the cross-examination of the process server which when considered in the light of the C.I.D report, it goes to cast doubt to the existence of an effective service.
- They have a genuine complaint to raise in their defence, namely failure to issue a proper notice in accordance with the provisions of section 13A of the government proceedings Act.
- Reiterate that the court, should not lose sight of the need for it to protect the tax payers' money.
- Maintain no proper service was effected.

On case law the court, was referred to the case of MAE PROPERTIES LIMITED VERSUS DAVUSON NGINI NAIROBI MILIMANI COMMERCIAL COURT HCCC NO. 313 OF 2004 decided by Mary Kasango J on the 3<sup>rd</sup> day of November 2006, whose gist of the holding is that *"the order of the court sought to be upset did not determine any of the parties rights in the action and the ruling there could not have given rise to a decree but to an order."*

The case of ISHMAEL KAGUNYI THANDE VERSUS HOUSING FINANCE COMPANY OF KENYA LIMITED NAIROBI MILIMANI HCCC NO. 896 OF 2000 decided by Onyango Otieno J as he

then was (now JA) on the 21<sup>st</sup> day of November 2000 on an application to set aside *ex parte* judgement. At page 4 of the ruling line 6 from the bottom the learned judge set out the ingredients for setting aside an *ex parte* order established by the decisions in the case of SHAH VERSUS MBOGO AND ANOTHER (1967) EA 116 thus:-

*“..... the courts iscretion to set aside an ex parte judgement is intended to be exercised to avoid injustice or hardship resulting from accident, in advertence, or excusable mistake or error but not to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.....”*

At page 6 line 6 from the bottom the court, made the following observation: *“I do think that as a court of law I cannot turn my eyes away from what is in law not proper. Indeed I do not need to be moved by counsels or by affidavits to see irregularity The court, is supposed to be the custodian of law, and that being so I do humbly that it is the duty of the court, never to entertain an irregularity in the administration of law. Thus even if the affidavit did not exist, still once the court detects what is clearly legally untenable the court, should be keen to correct it....”*

The case of PITHON WAWERU MAINA VERSUS THUKU MUGIRIA NAIROBI CA NO. 27 OF 1982. At page 3 of the judgement Potter JA as he then was, set out case law on the exercise of discretion on setting aside. At line 9 from the top there is quoted with approval the decision in the case of PATEL VERSUS EA CARGO HANDLING SERVICES LIMITED (1974) E.A 75 where Dufus P. stated thus:-

*“ There are no limits or restrictions on the judges’ discretion, except that if he does vary the judgement, he does so on such terms as may be just.....The main concern of the court is to do justice to the partes , and the court, will not impose conditions on itself to fetter the wide discretion given it by the rules.”*

At line 28 from the bottom on the same page, quoted the principle in SHAH VERSUS MBOGO (SUPRA) already set out herein. At line 19 from the bottom there is quoted the decision in the case of SHABIR DIN VERSUS RAM PARKASH ANARD 22 EACA 48 by Briggs JA thus: - *“I consider that under order IX, rule 20 the discretion of the court, is perfectly free, and the only question is whether upon the facts of any particular case it should be exercised. In particular, mistake or misunderstanding of the appellants legal advise even though negligent may be accepted as a proper ground for granting relief, but whether it will be so accepted must depend on the facts of the particular case. It is neither possible nor desirable to indicate in detail the manner in which the discretion should be exercised.”*

At page 9 of the judgement line 5 from the bottom there is quoted the case of KANJI NARAN VERSUS VEIJI RAMJI (1954) 21EACA 20 (C.A.K ) where it was held *inter alia* that: *“The court, has no discretion where it appears there has been no proper service and the power to set aside the judgement does not cease to apply because a decree has been extracted”*

At page 10 there is a quotation with approval from the decision of JESSE KIMANI VERSUS MC CONNEL (1966) E.A. 547 where the holding is that:- The matter which should be considered when an application is made among others are: *“The facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any material factor which appear to have entered into the passing of the judgement, which would not or might not have been present had the judgement not been ex parte and whether or not it would be just and reasonable to set aside or vary the judgement upon term to be imposed”*

At line 24 from the bottom there is quoted the case of JAMNADAS VERSUS SUDHA VERSUS GORDANDAS HAMRAJ (1952) ULR 11(u) where the principle set reads thus:-

*“ The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether, the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think it should always be remembered that to deny the subject a hearing should be the last resort of a court”*

There is the case of NATIONAL BANK OF KENYA LIMITED VERSUS ALFAYO ONYANGO RIAKO NAIROBI MILIMANI COMMERCIAL COURT HCCC NO. 726 OF 2002 decided by MK Ibrahim J on 23<sup>rd</sup> day of July 2004. In an application for setting aside, the same was allowed because “*the R/S showed that the defendant was served on 31/8/2002 and yet the R/S had been sworn on 4<sup>th</sup> August 2002, a matter the court, could not ignore despite the fact that the concerned process server had not been availed for cross-examinations.*”

The case of STEPHEN MUGERA GAKENGE VERSUS KENYA COMMERCIAL BANK LIMITED AND ANOTHER NAIROBI MILIMANI HCCC NO. 1558 OF 2001 decided by Nyamu J as he then was (now JA) on the 8<sup>th</sup> day of May 2003. On an application for setting aside the Defendant/Applicant denied that the purported signature on the summons purporting that she was served, was not hers. At page 3 of the Ruling line 2 from the bottom that:- “*Except for the saving grace of the failure to serve the summons as indicated above, the failure to annex a draft defence or to explain what defence is available and lack of diligence in prosecuting the application would have been sufficient grounds for the court, to refuse the application. However ..... since the plaint dated 1/10/2001 sought a permanent injunction, and a declaration, the Deputy Registrar did not have jurisdiction to enter an interlocutory judgement, but should have directed the Respondent to proceed to set down the suit for hearing pursuant to the provision of order IXA rule 8.....under rule 8 the Deputy Registrar ought to have given direction that the claim be set down for hearing and had no mandate what so ever to enter interlocutory judgement he entered on 2/11/2001. This claims is neither liquidated, nor is it a claim for pecuniary damages only, or for detention of goods, with or without a claim for pecuniary damages. It is only these categorized cases where the Deputy Registrar is authorized to enter interlocutory judgement”*

The case of MANJIT SINGH SETH AND PERMINDER SIGH SETH VERSUS SIMSON KARIUKI NJEGI AND SUSAN WAITHERERU NJENGI NAIROBI MILIMANI HCCC NO. 188 OF 2003 Decided by Kasango J on the 3<sup>rd</sup> day of November 2006. On an application for setting aside, it was urged that the plaintiff had obtained prayers which were in the alternative in an ex parte judgement and was therefore irregular and should be set aside. In the annexed draft defence the defendant applicant had denied entering into a contract with the plaintiff and that the claim was statute barred. The court set aside the ex parte judgement because there were triable issues raised in the defence.

The case of ALICE MUTHONI KINYANJUI VERSUS BENSON MULI AND THREE OTHERS decided by Nyamu J as he then was (Now JA) on the 25<sup>th</sup> day of June 2004. On an application to enlarge time for filing and serving a statement of defence at page 5 of the ruling the learned judge as he then was, (now JA) made observation at line 4 from the top that:-

*“It is not in dispute that this court, has a wide discretion under section 95 to extend time prescribed by the Act and under order 49 rule 5 the court, has a wide discretion to enlarge the time prescribed, under the rules”*

At the same page 5 of the ruling, the learned judge quoted with approval Apollo JA (as he then was) in the case of WACHIRA VERSUS NDANJERU (1982-88) IKAR 1062 at page 1065 thus:-

*“At all events, it seems to me that the appellant is merely standing on bare technicalities. Nobody has a vested right in procedure and a court, must at least at the present day, strive to do substantial justice to the parties’ undeterred by technical, procedure rules.”*

At page 6 of the ruling the same learned judge quoted with approval Shah JA as he then was in the case of LX COLONEL IGWETA VERSUS MUKERA M. ETHARE AND THE ATTORNEY GENERAL CA NAIROBI 2700/2001 UR at page 11 thus:-

*“While I accept that the first respondent does not know where he stands, he would not suffer further prejudice if the applicant is allowed his final pay”*

On the basis of that reasoning the learned judge went on to rule thus:- “ since it is clear to the court, that the defence is not frivolous, and that the respondent can be compensated by way of costs for the delay which might be occasioned by the filing of the defence at that late hour.....”

On the part of the Plaintiff /Respondent the following case law was cited namely:-

The case of MUTHAIGA ROAD TRUST COMPANY LIMITED VERSUS FIVE CONTINENTS STATIONARY LIMITED DEEPARSHA AND PANKAJ THAKAR NAIROBI CA 298 OF 2001. This was an appeal from an order of the superior court, setting aside an ex parte judgement which had been entered on 22<sup>nd</sup> December 2002. At page 3 of the judgement the CA made observation that the superior court, judge was satisfied that service had been effected, but he was of the view that since the defence raised triable issues he set aside the ex parte judgement.

On appeal at page 5 of the judgement, line 7 from the bottom the law lords of the CA made observations thus:-

*“In our view this was a regular judgement which could however be set aside pursuant to order IXA rule 10 of the CPR. The defendants were therefore entitled to go to the superior court, and apply for the setting aside of that judgement, the superior court, was exercising its very wide discretion granted under order IXA rule 10 of the CPR. The principles to be followed in an application to set aside judgement were set out in PATEL VERSUS EA CARGO HANDLING SERVICES LIMITED (1974) EA 75 at page 76. Where Duffus P said:- “ (Supra)(already set out herein”)*

At page 8 line 8 from the bottom the court, went on to observe:-

*“In view of what was stated in the two letters from the 1<sup>st</sup> defendant ` and our comments therein, it cannot be said that there was a bonafide defence to the appellants claim. It therefore follows that as the judgement entered on 22<sup>nd</sup> December 2000 having been a regular and final judgement, the only way to set it aside was pursuant to order IXA rule 10 of the CPR. Since we found that the defendants had no bonafide defence to the applicants’ claim, the learned judge proceeded to hold that the matter ought to have proceeded to formal proof. He fell into error when he set aside the judgement entered on 22<sup>nd</sup> December 2000”*

Reference was also made to JOWITT’S Dictionary of English law, second Edition volume 2, L-Z. At page 1105 there is found definition for a liquidated demand which is defined as:-

*“Liquidated demand where an action is brought for a debt or liquidated demand only, the writ must be endorsed with a statement of the amount claimed and for costs and also with a statement that further proceedings will be stayed if within time limited for appearing, the defendants pays the amount claimed to the plaintiff, his solicitor or agent or into court”*

Liquidated on the other hand is defined as: “a sum is said to be liquidated when it is fixed or ascertained. The term is usually employed with reference to damages.” Where as liquidated damages is defined as:- “ The amount agreed upon by a party to a contract to be paid as compensation for the breach of it and intended to be recovered whether the actual damages sustained by the breach are more or less in contrary distinction to a penalty.

The case of G.L BAKER LIMITED VERUS BARKLAYS BANK LIMITED (1956) IWL R 1409. The brief facts are that the plaintiff issued a writ endorsed with claims for specified sums of money alleged to have been fraudulently converted by the defendants, or alternatively that each sum, being the plaintiff property traceable in equity should be repaid by the defendants to them. Two of the five defendants failed to enter an appearance and the plaintiff obtained judgement in default of appearance and proceeded to lay execution against them. The defendants applied successfully to up John J to have the judgements against them set aside. He ordered the plaintiff to pay the defendants costs. The plaintiff appealed.

It was held inter alia that:-

*“The claims endorsed on the writ were liquidated demands within the meaning of R.S.C. order 13 rule 3 but did not come within order 3 rule 7 not being for a liquidated demand only. Accordingly the judgement obtained against the two defendants were regular and the order as to costs should be varied to the extent of providing that the costs of the motion to set aside the judgements should be costs in the cause.”*

The case of RAPANDO VERSUS OUMA AND 6 OTHERS (2004) IKLR 115, on an application to set aside an *ex parte* judgement Warsame J held inter alia that:-

(i). *“There should be no limits or restriction on the judges’ discretion to set aside *ex parte* judgement, except that if he does vary the judgement, he does so on such term as may be just. The main concern of the court is to do justice to the parties and the court, will not impose conditions on itself to fetter the wide discretion given by the rules save that discretionary power must be exercised judicially and not arbitrarily in order to safeguard the interests of both parties.*

(ii). *The power to set aside *ex parte* judgement does not cease and or extinguish because of the director and or age of the decree.”*

In addition to the case law, cited, there are provisions of law relied upon and it is only proper that their content too be reflected on the record order IXA rule 10,11 provides:-

*“IXA rule 10 where judgement has been entered under this order, the court, may set a side or vary such judgement and any consequential decree or order upon such term as are just.*

*Rule 11 applications under this order shall be made by summons. Section 3. in the absence of any specific provision to the contrary nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred or any special form of procedure prescribed, by or under any other law for the time being in force 3A nothing in this Act shall limit or otherwise effect the inherent power of the court, to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”*

The yard stick to be applied by the court when exercising its jurisdiction under order IXA rule 10 CPR are already set out in the case law cited. Section 3 on the other hand protects powers or jurisdiction donated by any other written law, to the effect that those powers cannot be clipped by any provision contained in the CPA and CPR. Where section 3A CPA on the other hand enshrines what is popularly known as the courts inherent power to do justice to litigants and prevent injustice to litigants and to prevent abuse of the due process of the court. The yard stick on how this power is to be exercised is not embedded in the section. It is how ever now crystalized by case law emanating both from the superior court, and the CA. There is now a wealth of such case law. There is no harm in setting out a few. There is the case of WANJAU VERSUS MURAYA (1983) KLR 276 where Kneller JA as he then was held inter alia that:-

*“ Section 3A of the CPA cap 21 although saving the inherent powers of the court, to make such orders as may be necessary for the ends of justice to prevent abuse of the power of court, should not be cited where there is an appropriate section or order and or rule to cover the relief sought.”*

The case of MEDITERENIAN SHIPPING COMPANY S.A VERSUS INTERNATIONAL AGRICULTURE ENTERPRISES LIMITED (1990) KLR 183 it was held inter alia that:-

*“ it is now trite law that the inherent jurisdiction of the court, should not be invoked where there is specific statutory provision which would meet the necessities of the case.*

(2) *Section 3A of the CPA ought to be called in to the aid of a litigant in all situations not specifically legislated for. It all depends on the circumstances of each case.”*

The case of TANGUS VERSUS ROITEL (1968) CA 618 where it was held inter alia that “the courts’ inherent jurisdiction should not be invoked where there was a specific statutory provision to meet the case”

Issue was also raised by the applicants counsel that the claim herein was not a proper candidate for entry of interlocutory judgement as provided for in order IXA rules 3 and 5. These reads:-

“Order IXA rule 3 (1); where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or the defendants fail to so appear the court, shall, on request in form No. 26 of Appendix C. enter judgement against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court, thinks reasonable, to the date of judgement, and costs.

(2) Where the plaintiff makes a liquidated demand together with some other claim and the defendant fails, or all the defendants fail to appear as a fore said, the court, shall, on request in form NO. 26 of Appendix C, enter judgement for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgement upon such other claim.

Order IXA rule 5 where the plaintiff is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages and any defendant fails to appear, the court, shall, on request in form No. 26 of Appendix C enter interlocutory judgement against such defendant and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be”

On the courts assessment of the facts herein, the following facts do not appear to be in dispute:-

1. That the plaintiff herein presented a claim whereby he sought the main prayer to be delivery and or return of the 582 bales of gunny bags to the plaintiff. In the alternative Kshs. 20,079,000.00 ( c) interest.
2. There is no dispute that there is an R/S on record sworn by one Jackton Oyia Owidhi sworn on 12<sup>th</sup> day of June and filed the same date. The R/S is brief. The sum total of the same is that the process server proceeded to the state law offices, proceeded to the 7<sup>th</sup> floor where he has knowledge that such processes are received and effected services on one of the legal clerks. It is deponed, the copies were stamped and returned. These are the copies which were later taken to the CID for examination of the stamp and signature.
3. There is no dispute that the same was alleged to have been effected on 24<sup>th</sup> May 2007. On the 12<sup>th</sup> June 2007, the plaintiffs counsel applied under order IXA rule 7 for leave to enter judgement against the state. The only requirement to be complied with is that the application should be served not less than 7 days to the return date. There is also an R/S by the same process server sworn on 29<sup>th</sup> June 2007 to the effect that the application for leave to enter judgement was served on 21<sup>st</sup> day of June 2007. The application was served with a hearing date for 4<sup>th</sup> day of July 2007, on which day as mentioned earlier on leave was granted.
4. Following the grant of the leave by this court, on 4/7/2007 counsel for the plaintiffs wrote a letter to the Deputy Registrar of this court, on the same 4/7/2007. The content reads:-

“Our Ref: soo/05/94

4<sup>th</sup> May 2007

Deputy Registrar

High Court

Dear Sir,

RE: HCCC NO. 401 OF 2007

SERACO COMPANY LIMITED VERSUS THE ATTORNEY GENERAL

Pursuant to the court, order by the Honourable Lady Justice Nambuye on the 4<sup>th</sup> July 2007.

Kindly enter judgement herein against the defendant in default of Appearance.

Yours faithfully

S.O Owino and Associates”

There are remarks on the said letter showing that the letter was received on 6<sup>th</sup> July 2007 and minuted to the Senior Principal Registrar for his advice as there was no appearance entered and the Senior Principal Deputy Registrar gave instructions to enter judgement as per the leave granted. It is to be noted that the said letter made a blanket request. It did not specify the nature of the judgement either interlocutory or final. Neither did it specify the applicable rule.

The record of the proceedings reveals that the judgement was entered on the 7/6/2007. The content reads:-

“ Judgement. The defendant herein the Attorney General having been duly served with summons to enter appearance, and having failed to enter appearance within the prescribed period and on the application by the plaintiffs advocates dated 4<sup>th</sup> March I enter judgement against the said defendant as prayed. Save as to costs which shall be party and party without interest thereon.

Dated this 9<sup>th</sup> day of July 2007.

Signed

Deputy Registrar”

A further perusal of the record reveals that there is an entry made on 23/7/2007 on a certificate of costs it reads:-

“The plaintiffs costs herein certified in the sum of Kenya shillings three hundred and ninety two thousand three hundred and forty five (Kshs. 392,345/=) only pursuant to rule 68A of the Advocates remuneration order and is allowed in this sum as against the defendant.

Dated this 24<sup>th</sup> day of July 2007.

Signed

Deputy Registrar”

There are a number of observations made by this court, regarding the sequence of events set out above. These are:-

(a). The main claim in the plaint is the delivery or return of the 582 bales (174,600) pieces of gunny bags to the plaintiff.

Alternatively

- (b). Kshs. 20,079,000/=
- (c). Interests
- (d). There is no prayer for costs of the suit and yet the same were awarded.
- (e). The letter requesting for judgement whose content has already been set out herein did not specify under which limbs of the prayers was the entry of judgement being made: that is whether the main limb or the alternative limb.
- (f). The entry of the judgement made by the Deputy Registrar reads plainly clear that judgement was entered “ as prayed” meaning that the plaintiff got judgement as prayed on both limbs.

The question for determination by this court, is whether on the facts presented by both sides, considered in the light of the provisions of law as well as case law cited, the said judgement is to be upset or not. In determining this question, the court, has to bear in mind the observations it has made above regarding the entries made by officers of the court, leading to the entry of the judgement sought to be upset, and the same considered in the light of principles applicable to the subject. These are:-

1. There are two types of judgements, namely the regular ones and the irregular ones. The position in law is that an irregular judgement is a proper candidate for setting aside *ex-debito justitiae* (as of right) whereas the setting aside of a regular judgement on the other hand is a matter within the discretion of the court, which discretion has to be exercised judiciously, within the accepted principles and with a reason.
2. The remedy of setting aside is meant to aid a litigant who through inadvertence, accident or mistake failed to take a procedural step leading to the entry of judgement against them. It is not available to a litigant who has deliberately chosen to delay and or obstruct the cause of justice.
3. When considering to allow or not to allow a party to be heard, the court, should bear in mind the fact that the last thing that a court, of justice ought to do is to shut a litigant from the seat of justice. At all times the court, should strive to hear parties and render justice on their merits as opposed to disposing justice on technicalities.
4. Indeed rules of procedure were not made for cosmetic value. They are meant to be obeyed and should in fact be obeyed by litigants. However in the event of any breach occurring, the court, has to ensure that the said rules which are meant to be handmaid of justice do not turn into bad masters or strange and or bad bed fellows with the justice dispensation system.
5. At all times the court, should always strive to do justice to both litigants.
6. When considering setting aside a judgement, the court, has to bear in mind the reasons given by the defaulting party as to why procedural steps were not taken in time.
7. Where the judgement is sought to be set aside with a view to creating an avenue for the defendant to be heard, the court, is duly bound to have a look at the issues raised in defence to the claim, however irregularly obtained, to determine whether these are triable or not.
8. Even if only one triable issue is raised in the defence, the court, should allow the defence to go to trial.
9. Prejudice and inconvenience likely to be caused to the non defaulting party, is also of paramount consideration. Where no serious prejudice is to be suffered by the non defaulting party, and where the injury suffered can be compensated for by way of costs, the judgement should be set aside and the defaulting party allowed to be heard.

These principles have been applied to the facts herein and the court, makes the following findings:

1. The judgement entered herein, complained of in the opinion of this court, qualifies to be an irregular judgement for the following reasons:

(a) The relief sought in the plaint as mentioned herein has two limbs. The first limb seeks the delivery and or return of the 582 bales 174,600 pieces) of gunny bags to the plaintiff. Entry of judgement in favour of the plaintiff on this limb would not have given rise to an immediate decree as it falls under the provision of order IXA rule 5, whereby the beneficiary plaintiff should have been required to set down the suit for formal proof.

In this courts opinion the alternative prayer though in a liquidated form, and contained in the averments in the body of the plaint, and the origin of the said figure, being the value of the items in limb one, the claim herein falls into the category of a claim known in law as a special claim. It is trite law now that such a claim requires to be specifically pleaded which the plaintiff has done, particularized which the plaintiff has also done. The 3<sup>rd</sup> requirement is that the same has to be proved. This requirement removes the claim from the ambit of order IXA rule 3(1) CPR and places it into the ambit of order IXA rule 5 where by a formal proof would have been required before any decree could be obtained.

(b) Counsel knowing that the relief sought in the plaint was in the alternative, he should have specified for which limb he was seeking judgement. Failure to specify so makes the request for entry of judgement ambiguous.

(c) The Deputy Registrar also should have specified under which limb he was entering judgement for the plaintiff. By entering judgement "as prayed" entered an irregular judgement as he failed to take note of the alternative nature of the relief. This made the judgement entered ambiguous and unenforceable as there is no way a litigant seeking alternative prayer can have both limbs. The general practice and trend is that where a litigant seeks an alternative prayer, he either gets the main prayer or the alternative but not both.

(d) A further irregularity is that the plaintiff had no prayer for an award of costs and yet the Deputy Registrar went ahead to award the same. That cannot stand.

2. As for the reasons for the delay in filing the papers, it is on record that the defendants disputed services. It is on record that the stamps of the office of the defendant and the signatures on the served documents were taken to the CID for examination. It is also on record that the results were negative. However as submitted by the plaintiffs' counsel the results were negated because the CID failed to examine the known signatures. They used specimen signatures which could be simulated. It was also discovered that they are in fact the defendants herein, and as such, it is understandable that human ingenuity could not allow the CID officers to guillotine themselves. The findings should in fact be received with reservations. An independent document examiner should have been ideal had it been brought to the courts' attention that the CID were in fact the defendants. The court, doubts if they could be brave enough to skin themselves while alive.

It is on record that further doubt which is to be cast on the said report is that it tends to imply that the state law office was never served at all, contrary to the deponement in the supporting affidavits that they were served, moved diligently to file their papers on 5/7/2007 and after stamping one process namely the defence, the clerk declined to stamp and receive the rest. Efforts to get the Deputy Registrar assist was fruitless leading to the filing of the application subject of this ruling which application is dated 1/8/2007 and filed on 2/8/2007 a period of 27 days from the stamping. Counsel explained that the delay was due to papers being typed wrongly and therefore necessitating a repeat typing.

In this courts' opinion, a delay of 27 days is not inordinate if an allowance is to be given for the preparation and correction of paper work. In this courts opinion the delay is excusable as it cannot be said that the defendant has deliberately sought to obstruct or delay the cause of justice.

3. Turning to the defence, whether it raises triable issues, a reading of the copy annexed to the supporting affidavit reveals that the defendant has denied the plaintiffs averments and then called for

strict proof. When considered in the light of the principles of law governing pleading, presentation, and proof of such claims which fall into the category of special damages, which requires proof, a pleading that the plaintiff is put to strict proof cannot be declared asham.

There is also issue about the serving of the requisites statutory notice in compliance with section 13A of the government proceedings Act cap 40 laws of Kenya. In his submissions, counsel for the plaintiff submitted that the notice of intention to sue was served, acknowledged by a response and as such there is no triable issue on this aspect. Due consideration has been made of this argument and the court, rules that issue of service of the notice of intention to sue if discounted leaves the other issues mentioned above standing for trial. In addition there is room for striking out should the plaintiff dislodge the same through its reply to defence.

4. Issue was raised about failure to pray for setting aside of the leave granted. Indeed there is no prayer for the same. That notwithstanding if the judgement is set aside, the practice is usually to set aside the attending orders of judgement along side all other consequential orders emanating there from. Should there be any impediment that is likely to render meaningless the order setting aside the judgement entered herein, the court, will not hesitate to use its ready handy tool to give effect to its order and ensure that justice is rendered to both parties. This is non other than the courts inherent powers enshrined in section 3A of the CPA. For it would be imprudent for the court, to give a relief halfway and then necessitate the making of other applications in order to fructify the relief accessed by setting a side the judgement complained of.

5. As for the issue of compensation of the offended party with costs. Such an order will be perfectly in order unless if there are good reasons for withholding the same.

For the reasons given in the assessment, the court, is inclined to allow the defendant/applicants' application dated 1/8/2007 and filed on 2/8/2007 and proceeds to make the following orders:-

1. An order be and is hereby made on the courts on motion in the exercise of its inherent jurisdiction enshrined in section 3A of the CPA, necessary for meeting out justice to both parties for purposes of striving to make the orders to be made in respect of the said application effective, the leave to enter judgement granted herein by this court on 4/7/2007 be and is hereby set aside.

2. The exparte judgement entered by the Deputy Registrar on 7/6/2007 and endorsed on 9/7/2007 be and is hereby set aside for the reasons given in the assessment.

3. The defendant/applicant has 14 days within which to file and serve his defence from the date of delivery of this ruling.

4. The plaintiff/Respondent has leave to file a reply to the defence within the time prescribed in the rules for the date of service.

5. Thereafter parties to proceed according to law.

6. Since the entry of judgement has been faulted for the reasons given in the assessment costs of the application will be in the cause.

**DATED, READ AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF MAY 2009.**

**R.N NAMBUYE**

**JUDGE**