



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

Civil Case 58 of 2006

PLANTATION FERTILIZERS LTD.PLAINTIFF

VERSUS

RIOKI COFFEE (1971) CO. LTD.....DEFENDANT

RULING

The Defendant in this suit has filed this Chamber Summons brought under **Order XXI Rule 22, Civil Procedure Rules, Section 3A Civil Procedure Act**, dated 12th November, 2007 in which it seeks four prayers as follows:

1. THAT execution of the decree dated 23rd July 2007 be stayed until the hearing and determination of this application.
2. THAT the exparte decree dated 23rd July 2007 be set aside.
3. THAT the defendant/applicant be granted leave to reply to the application by the plaintiff dated 26th April 2007.
4. THAT the costs of this application be provided for.

The grounds for the application are cited on the face of the application as follows:

1. The decree was obtained in flagrant disregard and abuse of court procedures.
2. The defendant was not served with the application.
3. The defendant has a strong defence to the plaintiff claim.

4. The conduct of the plaintiff prior to the decree and subsequently, is blatantly calculated to deprive the defendant its right to be heard.

5. The defendant will suffer substantial prejudice unless the decree is stayed and set aside.

There is also a supporting affidavit sworn by the Defendant's Advocate dated 12th November, 2007.

The application is opposed. The Plaintiff/Respondent has filed a replying affidavit sworn by its **Managing Director Stephen Ngaruiya** dated 14th January, 2008. When the application came up for hearing, the Defendant's Advocate sought to cross-examine the process server who is alleged to have served a notice of hearing and the application dated 26th April, 2007 that was to be heard on 23rd, July 2007, upon a clerk in the firm of **Njoroge Baiya & Co. Advocates**.

I have considered the submissions by both Counsel, the affidavits by both parties and the application itself. There is only one issue which arises, whether the process server **David Manyonge Sala** served the application dated 26th April, 2007 and a notice of hearing for 23rd July, 2007 upon the Defendant's Advocates. The process server filed an affidavit of service which is on record, dated 20th July 2007. When the process server was cross-examined by the Defendant's Advocate, it transpired that the name of the building where the process is alleged to have been served was wrongly described in the affidavit of service. The affidavit of service reflects the name of the building as **Kamindu House** situated in Kiambu Town. In cross-examination, **Manyonge** admitted that the correct name of the building was in fact **KAMINDI House**, Kiambu Town.

Mr. Manyonge told the court that when he visited the Defendant's Advocate's office, he found a lady and a man. That the man, whom he had never seen before or after the said date of service, described himself as **James. Manyonge** could not describe how he looks nor explain how come he gave only one name.

I noted further that the affidavit of service indicated that the said **James** declined to stamp or sign the copy of the application on the grounds that only the Advocate could sign for service.

None of the Advocates cited any case in support of their arguments. However, the legal position on such a matter is very clear. Where there has been no service or no proper service, any judgment entered against the Defendant in such circumstances should be set aside *ex debito justitiae* on application by the Defendant. Such judgment is not set aside in exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself. In that case, it does not matter whether or not the Defendant has any defence on the merits. See **Remco Limited vs. Mistry Jadva Parbat & Co. & 2 others, Milimani HCCC No. 171 of 2001; 2001 eKLR.**

Where the default judgment is a regular one, the court has unfettered discretion to set aside such judgment and any consequential decree or order upon such terms as are just as ordained by **Order IXA Rule 10** of the **Civil Procedure Rules**. See **Patel Vs. EA Cargo Handling Services Limited [1974] EA 75** and **Shah vs. Mbogo [1967] EA 116** and **Pillion Waweru Maina vs. Thuku Mugina [1982-88] 1 KAR 171.**

On the issue of service, the Plaintiff maintains that service was effected upon a clerk in the Defendant's Advocate's firm. **Manyonge**, the process server who is said to have effected the said service was cross-examined at length. The officer admitted that he had served service in the same office several times before and that he had not met the person he served on the day in question. **Manyonge** could not describe the person at all.

I observed **Manyonge's** demeanour and he did not impress me at all. First of all he came drunk and reeking of alcohol. That was misconduct which spoke volumes concerning his attitude to the issue that was at stake before the Court. The second observation was his casualty and evasiveness in answering the questions put to him, and at several points, the Court had to intervene to ensure he responded to the

questions.

Having scrutinized the demeanour of **Manyonge** in court, and taking into consideration all the circumstances of the matter, I am not satisfied that the said process server effected service upon the Defendant's Advocates as he alleged.

Having come to the conclusion I have, the law is very clear that if there is no evidence of service or of proper service, the judgment and all consequential orders should be set aside on application by the Defendant, whether or not the Defendant has a defence on the merits. That is the fate of this application. The same is allowed to the extent that the judgment entered against the Defendant herein and all consequential orders be and are hereby set aside with costs to the Defendant/Applicant.

Dated at Nairobi, this 12th day of March, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

No appearance for the Applicant

Mr. Mungla - Advocate for the Respondent

LESIIT, J.

JUDGE