



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

**Civil Suit 35 of 2008**

**WILTER ENTERPRISES LIMITED.....1<sup>ST</sup> PLAINTIFF**

**TOM OTIENO KEKE**

**KEVINCE OYUGI KEKE T/A**

**ROMBOTECH ENTERPRISES.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**ORANGE DEMOCRATIC MOVEMENT.....1<sup>ST</sup> DEFENDANT**

**HENRY KOSGEL.....2<sup>ND</sup> DEFENDANT**

**PROF. ANYANG NYONG'O.....3<sup>RD</sup> DEFENDANT**

**OMINGO MAGARA.....4<sup>TH</sup> DEFENDANT**

**SAID S. KEITONY.....5<sup>TH</sup> DEFENDANT**

**TONY NJENGA CEGE.....6<sup>TH</sup> DEFENDANT**

**JOSEPH KIPWAMBOK BUNEL.....7<sup>TH</sup> DEFENDANT**

**MILTON MUGAMBI IMANYARA.....8<sup>TH</sup> DEFENDANT**

**ABEL VULIMU.....9<sup>TH</sup> DEFENDANT**

***(Being sued as the officials of Orange Democratic Movement)***

**R U L I N G**

The application is a Chamber Summons dated 19<sup>th</sup> March, 2008. It has been filed by the Defendants under **Order XXI, rule 22(1) Order IXA rules 10 and 11 of the Civil Procedure Rules Section 3A and 63(e) of the Civil Procedure Act**. There are three prayers in this application.

The Defendants seek a stay of execution pending the hearing and determination of this application; an

order setting aside the ex parte judgment entered in default of defence, on the 11<sup>th</sup> March 2008, and that the Defendant be at liberty to file a defence against the Plaintiff's claim. There are five grounds for the application, which are as follows:

- (a) That the plaint and summons herein were not properly served upon the Defendants
- (b) That as a consequence of the irregular service, the Defendants were not aware of the suit.
- (c) That the Defendants were thus unable as a consequence of the foregoing to enter appearance and file defence within the time stipulated by law.
- (d) That it is only fair and just that this application be allowed and the Defendants be granted leave to defend this suit.
- (e) That the Defendants have a strong defence to this suit.

The application is supported by an affidavit of **Cynthia Chemiryo** who is a receptionist with the 1<sup>st</sup> Defendant party. The gist of the affidavit is that on the 1<sup>st</sup> of February 2008, she was visited by a person who did not divulge his name and given a bundle of documents and informed to give them to a principal officer of the 1<sup>st</sup> Defendant. She deposes further that due to some inadvertent mistake and error on her part, which was neither willful nor deliberate, she failed to forward the said documents to any officer of the 1<sup>st</sup> Defendant.

The 2<sup>nd</sup> supporting affidavit is sworn by one **Joshua Kawino**, the Finance Director of the 1<sup>st</sup> Defendant who deposes that he became aware of this case on the 17<sup>th</sup> of March 2008, when their receptionist, i.e. Cynthia, informed him that auctioneers had visited their premises. He proceeded to speak to the auctioneers who advised him that they had been retained by the Plaintiffs to proclaim against the 1<sup>st</sup> to the 9<sup>th</sup> Defendants pursuant to a decree of the court. **Mr. Kawino** deposes further that it is afterwards that Cynthia informed him that she had been served with a bundle of documents relating to this case and that she had inadvertently omitted to bring them to the attention of any officer including himself.

There is a third supporting affidavit sworn by **Prof. Peter Nyong'o**, the 3<sup>rd</sup> Defendant in the suit, dated 19<sup>th</sup> of March 2008. In the affidavit he deposes that he is the Secretary General of the 1<sup>st</sup> Defendant and the 3<sup>rd</sup> Defendant in the suit. He deposes that he came to learn of the present suit on the 17<sup>th</sup> of March 2008 when the Finance Director of the 1<sup>st</sup> Defendant, **Mr. Kawino**, informed him that auctioneers had visited the premises to carry out proclamation of their goods. In the same affidavit **Prof. Nyong'o** confirmed that the other Defendants were equally not served with any summons to enter appearance and the plaint in this case. The affidavit also annexes a draft Statement of Defence for all the Defendants. **Prof. Nyong'o** deposes that the said defence is a good defence and that the Defendant should be given unconditional leave to defend the suit.

The application is opposed. There is a replying affidavit sworn by **Mr. Wilfred Mwethera**, a Director of the 1<sup>st</sup> Plaintiff. In this affidavit he deposes that the Defendants were duly served with the Summons to Enter Appearance and a copy of the plaint as demonstrated in the process servers affidavit which he also annexes to his affidavit. The Director also sets out the Plaintiffs' claim giving the brief facts that led to the filing of the suit.

**Mr. Mwethera** deposes that the Plaintiffs are owed Seven Million, One Hundred and Sixty Three Thousand (7,163,000/-) being the balance of amounts due to them for printing of ballot papers delivered to the Defendants at their own request.

The application was argued by **Mr. Makori** on behalf of all the Defendants. **Mr. Makori** submitted that the conclusion that can be heard from the three supporting affidavits is that service of the summons was irregular having been served on Cynthia the Receptionist instead of any of the Defendants or a principal

officer of the 1<sup>st</sup> Defendant. **Mr. Makori** relied on the case of **MACAULEY VS. DE BOER & ANOTHER [2002] 2 KLR**, where **Onyancha, J.** sets out factors to be taken into consideration in an application of this nature. He relies on holding 1 and 2 where the learned Judge held as follows:

***“1. The High Court has inherent power and discretion to set aside an ex parte judgment after deciding that the circumstances of the case before it are such that it would be in the interest of justice that such a judgment should be set aside.***

***2. The court in deciding whether to set aside the judgment will take into consideration the following factors:***

- a) the reasons why the defaulting party failed to file defence within the prescribed time;***
- b) whether or not the applicant’s application was filed without delay;***
- c) whether or not the applicant has prima facie a good defence;***
- d) whether or not the applicant has generally acted diligently;***
- e) whether or not the granting of the prayer to set aside would be easily compensated in costs and that it would, considering all circumstances of the case, be to the ends of justice to exercise the court’s discretion in favour of the applicant; and***
- f) every case however will be considered in the context of its own circumstances as no two cases may easily be exactly the same.”***

I have considered the tests set out by the learned Judge in the cited case. I agree with the tests. However, the tests in cited case do not fit the circumstances of the instant case.

**Mr. Nyakiangana** opposed the application on behalf of the Plaintiffs. It was his submission that the summons to enter appearance were properly served upon the Defendants as admitted by Cynthia in her supporting affidavit. Learned Counsel submitted that the Defendants did not have a good defence because the debt was acknowledged as per their annexure at page 19 of the Plaintiffs’ bundle. Counsel also submitted that the Plaintiff has annexed a summary of the printed papers, invoices issued to the Defendants and the delivery of the printed papers duly acknowledged by the Defendants. Counsel also submitted that the cheques, issued being part payment of the sums claimed, were also annexed and that none of these documents have been disputed by the Defendants. He submitted that in light of all those documents and the failure to dispute any, the Defendants did not have a good defence and they should not be allowed to defend the suit.

I have duly considered the application and the rival submissions by counsels. It is quite clear from the process server’s affidavit that the service of the summons and the plaint was effected upon a receptionist of the 1<sup>st</sup> Defendant. **Order V rule 2(a)** provides that service upon a corporation should be effected either on the Secretary, Director or Principal Officer of the Corporation. For purposes of service upon the 1<sup>st</sup> Defendant, the Plaintiffs should have effected the service of the summons upon either of the three named officials. It is not denied that the process server did not serve either of the three named officials of the Corporation, but he left the bundle of documents with a receptionist working for the 1<sup>st</sup> Defendant on the very first day that an attempt to serve the summons upon the Defendants was made. In regard to the 1<sup>st</sup> Defendant, the service upon the receptionist was not a proper service upon it.

Regarding the second to the ninth Defendants, no service was effected upon any one of these Defendants and neither was any attempt made to serve them. The process server’s affidavit of service on which the Plaintiffs rely to prove is clear that no attempt to serve these Defendants was made.

Judgment in this matter was entered on the 3<sup>rd</sup> of March, 2008 upon a request for entry of judgment by

the Plaintiffs filed in this court on the 19<sup>th</sup> February, 2008. The request was made upon default of entry of Memorandums of Appearance and Defences by any of the Defendants, within the stipulated time. Subsequent to the entry of judgment, a decree was issued in this case and the execution process begun, when proclamation was made at the 1<sup>st</sup> Defendant's premises, on the 17<sup>th</sup> of March, 2008.

It is now trite that where there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular one and that the court must set aside such a judgment *ex debito justitiae*. When setting aside such a judgment, the court will not be exercising any discretion whether or not to do so, but will set aside such a judgment as a matter of judicial duty, in order to uphold the integrity of the judicial process itself. When setting aside an irregular judgment, the court will not concern itself with whether or not the Defendants have a defence on the merits. See **GANDHI BROTHERS VS. H.K. NJAGE T/A H.K. ENTERPRISES MILIMANI, HCCC NO. 1300 OF 2001** and **REMCO LIMITED VS. MISTRY JADRA PARBAT & CO. & 2 OTHERS MILIMANI HCCC NO. 171 OF 2001.**

It follows from what I have stated herein above, that in my discernment of this matter, there was no proper service of the summons to enter appearance on the 1<sup>st</sup> Defendant and no service at all on the 2<sup>nd</sup> to the 9<sup>th</sup> Defendants. The ex parte judgment must be set aside *ex debito justitiae*, together with all consequential orders that followed.

Having come to this conclusion, I am satisfied that the Defendants' application is merited. I do set aside the exparte judgment together with all the consequential orders. The Defendants have fourteen (14) days within which to file and serve their defence(s).

The cost of the application be in the cause.

***Dated at Nairobi this 27<sup>th</sup> day of June 2008.***

**LESIIT, J.**

**JUDGE**

***Read, delivered and signed in presence of:***

Muthonu holding brief for Mr. Makori for the Defendants

Mrs. Ongicho holding brief for Mr. Nyakiangana for the Plaintiffs

**LESIIT, J.**

**JUDGE**