



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

**Civil Suit 722 of 1999**

**CFC BANK LIMITED.....PLAINTIFF**

**VERSUS**

**CHARLES K. ARAP TANUI.....DEFENDANT**

**R U L I N G**

This is a Chamber Summons application dated 3<sup>rd</sup> July, 2007, and brought under Order IXA rule 10, Order XXI rule 21 and Order XVIII rule 2 of the Civil Procedure Rules and section 3 and 3A of the Civil Procedure Act. It has been brought by the Defendant in which he seeks a stay of execution of the decree and all consequential orders pending the hearing and determination of the application. The Defendant also seeks to set aside *ex parte* judgment entered against him on the 10<sup>th</sup> of November, 1999 and 20<sup>th</sup> January, 2000 and all other consequential orders. The Defendant also seeks to cross-examine one George K. Mwaura on the contents of his affidavit of service dated 13<sup>th</sup> October, 1999. That prayer was not pursued. The Defendant also sought to be given leave to file his memorandum of appearance and also his defence as per the draft defence annexed to the application.

The application is supported by the affidavit of the Defendant and on grounds on the face of the application. The gist of the application is that the Defendant was not served with the summons to enter appearance and the plaint and that the affidavit of service by George K. Mwaura contained falsehoods. The Defendant contends that the *ex parte* judgments entered against him were irregular and that he had a good defence.

The application was opposed. The Respondent Bank has filed a replying affidavit sworn by the Senior Legal Counsel one Rita Wambui Kuria dated 27<sup>th</sup> September, 2007. In that affidavit, Ms. Kuria deposes that the application to set aside the judgment is an afterthought, sought more than seven years after the entry of judgment. Ms. Kuria contends that the application is *mala fide*, brought in bad faith and is full of falsehood and that it is calculated to delay and defeat justice. Ms. Kuria sets out in her affidavit attempts made to trace and serve the Defendant in 1999, and the subsequent efforts to effect a warrant of arrest against him after entry of judgment and after issuance of the warrant of arrest. Ms. Kuria continues to depose that on 21<sup>st</sup> June, 2007 the Defendant was arrested and presented before the Deputy Registrar in Kisumu Law Courts, where he was released on a personal bond of Kshs.50,000, to attend the court at Milimani on 3<sup>rd</sup> July, 2007.

I have considered the contents of the affidavit. The Defendant also filed a notice of preliminary objection in which the Plaintiff has given notice that it will apply that the instant application be struck out on the ground that it is fatally defective.

When the application came up for hearing before me on 28<sup>th</sup> July 2008, the preliminary point was not pursued. Mr. Wainaina representing the Defendant argued the application on his behalf. He had brief submissions. Counsel submitted that the Defendant's contention was that he was never served with the plaint and the summons to enter appearance. Counsel submitted that the Defendant in his supporting affidavit has deposed that he has never worked for Transami and that therefore the affidavit of service claiming that he was served in that place was false. Counsel also submitted that the judgment entered in the case was irregular and should be set aside. Mr. Wainaina continued to submit that the Defendant had a good defence which raised triable issues therefore he should be given an opportunity to defend the suit.

Mr. Gathogo for the Respondent opposed this application. Counsel urged the court to find that the Defendant has been indolent for bringing the application seven years after the judgment in the case was entered. Mr. Gathogo urged the court to note that in 2001 the Plaintiff instructed an advocate who sought the court's indulgence to settle this matter out of court. Counsel continued to submit that the plaint and the summons to enter appearance were duly served upon the Defendant and that the Defendant signed and dated the two documents and therefore the allegation that there was no service is not true. Mr. Gathogo also urged the court to find that the notice to show cause has been served severally upon the Defendant and that he has never complied with the notice by presenting himself to court to show cause in answer to the notice. Mr. Gathogo urged the court to dismiss the application.

I have looked at the affidavit of service. I note that the process server, one GEORGE K. MWAURA deposed that he served the Defendant on the 8<sup>th</sup> October, 1999 at 4.30 p.m. at the offices of Transami (Kenya) Limited in Mombasa. The process server indicated that the Defendant was identified to him by a secretary in the said office whose name he did not give. It is however clear from his affidavit that he did not know the Defendant before. The process server has also indicated that the Defendant accepted service and signed on the reverse side of the original copy of the summons. The signed copy is annexed to the affidavit of service and it bears the Defendant's name in full with a signature and an acknowledgment of the receipt with a date and time on it.

Order V rule 9 of Civil Procedure Rules is very clear on the manner in which service should be effected upon a Defendant in a suit. This rule requires that service should be made on the Defendant in person unless he has an agent empowered to accept service. The facts in this case are that there was personal service on the Defendant and that he acknowledged that service on the reverse of the summons which was also annexed to the affidavit of service and which is on the record. It is to be noted that the service was effected in October 1999 which is 9 years ago.

In the affidavit in support of this application the Applicant purporting to answer the allegation that he was served with the summons by George K. Mwaura on 13<sup>th</sup> October, 1999, denied that he has ever lived or worked in Mombasa, and also denied ever meeting George K. Mwaura. The Applicant has also denied the signature on the reverse of the summons purported to be his.

There is conflicting affidavit evidence regarding whether or not the Applicant was served with the summons and the plaint in this case. This conflict could only have been resolved by the cross-examination of the Respondent's material witness, that is the process server who alleges to have served the Applicant with the processes. Unfortunately, the Applicant has not requested to cross-examine the Process server. In fact the Respondent did not also offer the process server for examination.

The Respondent has urged the court to look at the proceedings and find that the Applicant instructed an advocate in this matter who has on several occasions appeared in court on his behalf. I have noted in the file that indeed the Applicant has had an advocate appearing for him. On the 8<sup>th</sup> June, 2001, Mr. Gitonga appeared for the Applicant in answer to a notice to show case issued against the Applicant. The importance of this observation on my part is that the Applicant has been aware of the *exparte* judgment entered against him in default memorandum of appearance and defence since 2001, yet he has chosen to come court to challenge that judgment in 2007, seven years down the line. The *exparte* judgment was itself entered 9 years ago. Since the Applicant had knowledge of the *exparte* judgment at least two years after it had been entered, he should have made this application at that time. I have no hesitation to find that this application is an afterthought and that it has been made to defeat the judgment that has been

entered against the Applicant and to deny the Respondent from enjoying the fruits of his judgment. If indeed the Applicant had not been served with the summons and the plaint in this case, the first thing that he should have done after appearing in court for the notice to show cause was to immediately file an application to set aside the exparte judgment on that basis. The Applicant has not explained why he took so long to make this application. It is my view that why he did not apply to set aside the exparte judgment in the earliest opportunity is because he had duly been served with the summons and the plaint as alleged in the affidavit of service of one George Mwaura. I also do not hesitate to find that the reason why the Applicant has not required to have George Mwaura summoned to testify in this court in order for the Applicant to cross-examine him on the issue of the alleged service of the summons must be for the purpose of withholding important evidence which may not be in his favour.

I have taken the liberty to go further and peruse the draft statement of defence and set-off filed by the Defendant/Applicant herein. I have also looked at the plaint filed by the Plaintiff in this case. I do find that the statement of defence and set-off is not a reasonable defence to the Plaintiff's claims. I find that it does not raise any triable issues that would justify this court exercising its discretion to grant the Defendant leave to defend the suit, whether on a condition or not.

Having considered this application, I do find that the Applicant was duly served with the plaint and the summons to enter appearance on 13<sup>th</sup> October, 1999. I am satisfied that he did not enter any appearance or file defence within the prescribed period or by the time the exparte judgment was entered against him. The resultant judgment was therefore a regular one. I do find further that the Defendant's draft defence and set-off, annexed to the supporting affidavit and marked 'CKG4', does not raise any triable issues and is not a reasonable defence to the Plaintiff's claim. In the circumstances, I am of the view that the Defendant has no right to defend the suit whether conditionally or otherwise. I find that this application lacks in merit and is therefore dismissed it with costs to the Respondent.

**Dated at Nairobi this 26<sup>th</sup> day of September, 2008.**

**LESIIT, J.**

**JUDGE**

***Signed and delivered in the presence of***

Mr. Kimathi holding brief for Mr. Wainaina for the Plaintiff

Mr. Gathogo for the Respondent

**LESIIT, J.**

**JUDGE**