



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Suit 1720 of 1991**

**ZULFIKAR JIWA.....PLAINTIFF/RESPONDENT**

**-versus-**

**KISII FARMERS CO-OPERATIVE UNION LIMITED.....DEFENDANT/APPLICANT**

**RULING**

In this Chamber Summons dated 18<sup>th</sup> August 2008, the Applicant, who was the Defendant during the trial, is asking this court for orders:

*“THAT this Honourable Court be pleased to vary and/or set aside the exparte judgment herein together with all the consequential orders dated 22<sup>nd</sup> September 1998.”*

That is prayer number 4 while prayer number 5 is for costs. Prayer numbers 1, 2 and 3 required interim orders which had been granted.

Under Order IX B Rule 8 of the Civil Procedure Rules, this should have been a simple and short application but when I tried to indicate that fact to the two learned counsel in this matter, Mr. Osoro Mogikoyo for the Applicant and Mr. Kihiko for the Respondent, each insisted that unless he addressed me for at least one hour, he would not have prosecuted the Chamber Summons. As the hearing proceeded, I kept on learning why each counsel had insisted on addressing the court at length as they went on citing good case authorities useful in circumstances other than the circumstances obtaining in this case where the involvement of each one of the five firms of advocates in the matter was being highlighted instead of only focusing upon the involvement of M/s Satish Gautama, Advocates, for the Plaintiff, and M/s Maosa & Company, Advocates, for the Defendant.

This is because the judgment in question in the Chamber Summons before me was delivered on 22<sup>nd</sup> September 1998 the relevant hearing having taken place on 29<sup>th</sup> June 1998. By that time none of those other firms of advocates was involved and M/s Nyatundo & Company Advocates as well as M/s Osoro Mogikoyo & Company Advocates are firms of advocates who came into this suit only this year. The judgment in question has already been in existence for ten years unexecuted. Could it have remained unexecuted all that long without the Defendant knowing its existence? The cited authorities are useful in an atmosphere of truth, openness and honesty. These are SHABIR DIN –v- RAM PARKASH ANAND (1955) E.A. 48;

MAINA –V- MURIUKI (1984) KLR 407;

CHARLES MWALIA –V- THE KENYA BUREAU, OF STANDARDS, HCCC No.1058 of 2000, in the Commercial and Taxation Division at Milimani.

In this Chamber Summons, the Defendant is claiming that the judgment was irregularly and improperly obtained because the Defendant was not notified of the date when the matter was to come up for hearing and that therefore the Defendant has been condemned unheard on the unadmitted claim which is contrary to the rules of Natural Justice; and

that it was not until the Defendant appointed his present advocates, M/s Osoro Mogikoyo & Company Advocates, that the said advocates on 11<sup>th</sup> August 2008 perused this court's case file in this suit and discovered that the questioned judgment had been entered in this suit against the Defendant and that a warrant of attachment in execution of the judgment had also been issued. The Defendant continues to say that had it been notified of the hearing date of this suit, the Defendant would have promptly come to court to defend the case because the Defendant/Applicant herein has a good defence to the Plaintiff's unadmitted claim; and that neither M/s Maosa & Company Advocates nor M/s Migos Ogamba & Company Advocates has ever brought to the Defendant's attention that there is on record judgment of the court dated 22<sup>nd</sup> September 1998; that neither the Plaintiff nor the Plaintiff's Advocates has ever issued the Defendant with Notice of Delivery of the judgment dated 22<sup>nd</sup> September 1998; and that this Chamber Summons would not have been brought earlier than it was brought because the existence of the judgment and decree were not known to the Defendant until 11<sup>th</sup> August 2008.

The Plaintiff is on the other hand saying that no warrant of attachment had been issued in this matter with regard to the decree only issued on 3<sup>rd</sup> July 2008. He does not agree the judgment dated 22<sup>nd</sup> September 1998 was irregular and improper and he takes that stand because during the hearing of the suit in 1998 the Defendant was duly represented in the matter by Messrs Maosa & Company Advocates, and on 16<sup>th</sup> February 1998 at exactly 11.00 a.m. the Defendant's said Advocates were served with a hearing notice dated 12<sup>th</sup> February 1998 which they accepted by stamping and signing on the rear. They were annexed and marked Z J 1 (a) and (b) being photostats. The relevant return of service was filed on 24<sup>th</sup> June 1998 as proof of service. He said that during the hearing he gave his evidence proving his claim when he also produced relevant exhibits. The hearing having been concluded, the Defendant's Advocates were duly informed by the court of the date of delivery of the judgment and annexure Z J 3, a notification letter dated 14<sup>th</sup> September 1998 was exhibited.

After the judgment had been delivered, on 11<sup>th</sup> November 1998 the Plaintiff's Advocates wrote to the Defendant's Advocates informing them of the subject judgment. Another letter followed dated 11<sup>th</sup> October 2000 and following failure by the Defendant's Advocates to respond, on 17<sup>th</sup> October 2000 the Plaintiff's Advocate wrote directly to the Defendant. Photostats of those letters were in annexures Z J 4. Thereafter contact between the two sides continued in an effort to satisfy the judgment more so when a new firm of Advocates Messrs Migos Ogamba and Company took over the Defendant's case from Messrs Maosa and Company Advocates. That resulted into the writing of a letter on 23<sup>rd</sup> November 2000 by Messrs Migos Ogamba to the Plaintiff's Advocate marked Z J 7, being a request that the Plaintiff's Advocate withholds any precipitate action pending forwarding of payment proposal by the Defendant. That letter was copied to the Defendant.

From all that the Plaintiff argues that it is clear that the Defendant and its Advocates have always been in the full picture as regards the subject judgment contrary to the Defendant's allegations in this Chamber Summons.

Messrs Osoro Mogikoyo conveyed that stand by the Plaintiff to Mr. Maosa and asked Mr. Maosa for his comments. In his affidavit dated 9<sup>th</sup> September 2008 therefore, Mr. Thomas N. Maosa deponed that he had been shown an affidavit sworn by Zulifikar Jiwa on 1<sup>st</sup> September 2008 by Messrs Osoro Mogikoyo & Company Advocates and asked to comment on the parts that touch on his (Maosa's) firm.

Mr. Maosa said it was true his firm had been on record as acting for the Defendant herein and that in early 1998 his firm ceased acting for the Defendant in this matter. He went on to state as follows:

*"5. THAT immediately I ceased acting, I*

*instructed my associate in the office to file a formal application to withdraw from acting for the Defendant.*

*6. THAT after giving the instructions, I assumed that my associate applied and obtained leave from the court to cease acting for the defendant.*

*7. THAT I was surprised when Mr. Mogikoyo of M/s Osoro Mogikoyo & Company Advocates approached me and showed me the aforesaid affidavit indicating that my firm was still on record when the matter proceeded ex parte and that there was some letters written to my firm regarding the judgment.*

*8. THAT I have now realized that I was under a mistaken believe that my associate had filed an application for leave to withdrawn from acting for the Defendant and even prosecute it.*

*9. THAT the hearing Notice now being shown to me, dated 12<sup>th</sup> February 1998 and marked Z J I was never*

brought to my attention if at all it was received in my office. In view of this, I do not appear to have written to the Defendant to inform it about the hearing date.

10. THAT equally the notice of delivery of ruling in the case now being shown to me marked Z J 3 and the letter dated 11<sup>th</sup> September 1998 and 11<sup>th</sup> October 2000 marked Z J 4 and marked Z J 5 respectively were not brought to my attention if at all they were delivered to my firm. I do not appear to have communicated the contents thereof to the Defendants either.”

Mr. Maosa did not disclose the name of his alleged associate. He did not disclose why he had to file the application to withdraw from acting through his associate instead of filing it himself. He did not explain why he was withdrawing from acting and the exact date of the alleged withdrawal.

From the totality of what I have recorded down therefore my answer to the question I posed at the beginning is, No. That is the judgment dated 22<sup>nd</sup> September 1998 could not, in the circumstances of this suit, have remained unexecuted for all those ten years without the Defendant knowing its existence until 11<sup>th</sup> August 2008. Let the Defendant/Applicant bring the truth for in truth the Applicant could not even have delayed filing this Chamber Summons.

In the questioned judgment dated 22<sup>nd</sup> September 1998, the learned trial Judge, Lady Justice Owuor, as she then was, stated as follows:

*“This case came up for hearing on 29<sup>th</sup> of June 1998 in the absence of the Defendant and his counsel. I was satisfied from the affidavit of service filed herein that the defendant and his Counsel had been sufficiently notified of the fact that the case would be going on for hearing. The court was also informed by Mr. Gautama, counsel for the Plaintiff, that Mr. Maosa’s clerk was outside the court, had talked to Mr. Gautama and then left.”*

It was the learned Judge’s finding “that the defendant and his Counsel had been sufficiently notified of the fact that the case would be going on for hearing.” That finding has never been questioned in an appeal and set aside. It stands. In the circumstances I should not to-day be heard saying something to the contrary even if the Applicant in this Chamber Summons wants me to enter that contradiction.

I find nothing irregular and improper about the subject judgment and therefore this Chamber Summons dated 18<sup>th</sup> August 2008 be and is hereby dismissed with costs to the Plaintiff/Respondent.

Dated this 31<sup>st</sup> day of October 2008.

**J. M. KHAMONI**

**JUDGE**