



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Case 498 of 2004**

**MUTHITHI INVESTMENTS LIMITED..... PLAINTIFF**

**VERSUS**

**ANDREW S. KYENDO.....1<sup>ST</sup> DEFENDANT**

**AMINA MOHAMED.....2<sup>ND</sup> DEFENDANT**

**WILLIAM K. MWANGANGI.....3<sup>RD</sup> DEFENDANT**

**ROSEMARY NYOKABI.....4<sup>TH</sup> DEFENDANT**

**JAMES BANGA.....5<sup>TH</sup> DEFENDANT**

**MESHACK O. AMBUKA.....6<sup>TH</sup> DEFENDANT**

**BERNARD M. MUTTAHA.....7<sup>TH</sup> DEFENDANT**

**W. OKEYO MBATA.....8<sup>TH</sup> DEFENDANT**

**J.M. KAGAI.....9<sup>TH</sup> DEFENDANT**

**JANE WANGECI.....10<sup>TH</sup> DEFENDANT**

**RAPHAEL K. THIMBA.....11<sup>TH</sup> DEFENDANT**

**MARY N. KAGO.....12<sup>TH</sup> DEFENDANT**

**DICK OUMA OCHIENG.....13<sup>TH</sup> DEFENDANT**

**DAVID AUMA .....14<sup>TH</sup> DEFENDANT**

**PATRICK NDIRANGU.....15<sup>TH</sup> DEFENDANT**

**SAID ALIA ABU .....16<sup>TH</sup> DEFENDANT**

**SAMUEL NGATIA.....17<sup>TH</sup> DEFENDANT**

JAMES NJOROGE.....18<sup>TH</sup> DEFENDANT  
MARY NDUKU KIOKO.....19<sup>TH</sup> DEFENDANT  
MAINA MUTAHI.....20<sup>TH</sup> DEFENDANT  
JOHN MWAURA WAINAINA.....21<sup>ST</sup> DEFENDANT  
MUDIA MUCHEMI.....22<sup>ND</sup> DEFENDANT  
NAMAN OGEMBO OGWENO..... 23<sup>RD</sup> DEFENDANT

### RULING

By chamber summons dated 18.01.06 stated to be brought under Order IXA rules 10 and 11 plus Order XXI rule 22 of the Civil Procedure Rules, sections 3 and 3A of the Civil Procedure Act, Cap.21, the 13<sup>th</sup> – 23<sup>rd</sup> defendants, *inter alia*, applied for:-

- a) Stay of Decree obtained herein pending the hearing and determination of the chamber application on merit;
- b) Setting aside the *ex-parte* Judgment entered herein and that the matter be heard on merit as against the 13<sup>th</sup> – 23<sup>rd</sup> defendants;
- c) Deeming of the annexed draft Defence dated 18.01.06 as properly filed.

The grounds upon which the chamber summons application is based are:-

1. That the plaintiff herein obtained *ex-parte* judgment herein against the 13<sup>th</sup> – 23<sup>rd</sup> defendants.
2. That a decree and eviction order has been obtained by the plaintiff and may proceed to execute the same as against the 13<sup>th</sup> – 23<sup>rd</sup> defendants at any time from now.
3. That the 13<sup>th</sup> – 23<sup>rd</sup> defendants were not served with summons to enter appearance.
4. That the annexed draft defence raises triable issues and therefore it will be in the interest of justice that the judgment be set aside and the matter do proceed for trial on merit.
5. That the said defendants stand to suffer irreparable loss and damage unless the orders sought herein are granted.
6. That this honourable court has powers and discretion to grant the order sought for the ends of justice to be met.

The application is supported by the affidavit of Maina Mutahi, 20<sup>th</sup> defendant which he deponed to have sworn on 18.01.06 on the authority of the 13<sup>th</sup> – 23<sup>rd</sup> defendants.

The 13<sup>th</sup> – 23<sup>rd</sup> defendants/applicants were represented in their application by learned counsel, Mrs B.S. Otundo holding brief for Mr G.M. Masese while the plaintiff/respondent was represented by learned counsel, Mr C.N. Njenga.

The *ex-parte* Judgment whose execution is sought to be stayed was delivered by this court on 24.11.05 following a hearing on 18.07.05 whereat the plaintiff was represented by learned counsel, Mr K. Kariuki while there was no appearance for all the 23 defendants. The court record establishes that the

defences of the 1<sup>st</sup> – 12<sup>th</sup> defendants were struck out by Mugo, J thereby leaving only the 13<sup>th</sup> – 23<sup>rd</sup> defendants as entitled to defend the suit. This court was informed that the 13<sup>th</sup> – 23<sup>rd</sup> defendants had not entered appearance despite service, leading to the *ex-parte* Judgment whose execution is now sought to be stayed and for the suit to be heard on merit as against the 13<sup>th</sup> – 23<sup>rd</sup> defendants on grounds that the 13<sup>th</sup> – 23<sup>rd</sup> defendants were in fact not served despite the assertion by plaintiff's previous counsel, Mr K. Kariuki that the 13<sup>th</sup> – 23<sup>rd</sup> defendants had been served. Arising from the denial by Maina Mutahi (20<sup>th</sup> defendant) of service upon the 13<sup>th</sup> – 23<sup>rd</sup> defendants, this court expressed a wish to have plaintiff's previous counsel, Mr K. Kariuki file affidavit response to the chamber summons dated 18.01.06, only to learn that the said Mr K. Kariuki had subsequently died in a road accident on 02.06.06. The court also learnt that the man, Mr Godfrey Gichuki who purported to have served the court process in question upon the 13<sup>th</sup> – 23<sup>rd</sup> defendants was alive and, upon so learning, the court directed that the said Godfrey Gichuki should file affidavit response to the chamber summons dated 18.01.06 on the issue of service upon the 13<sup>th</sup> – 23<sup>rd</sup> defendants/applicants. Following this court direction, Godfrey Gichuki filed a supplementary affidavit sworn by him on 25.07.06 relating to the issue of service on the 13<sup>th</sup> – 23<sup>rd</sup> defendants. He maintained by affidavit that he had served the 13<sup>th</sup> – 23<sup>rd</sup> defendants while the said defendants contended by affidavit that no service was effected on them. This court's Ruling dated 20.09.06 records that on 19.09.06 when Mr D. Njogu appeared for the plaintiff/respondent while Mr N. Mbugua held brief for Mr G.M. Masese for the defendants/applicants, both counsel also expressed the view that since there was contradictory evidence on record on the issue of service or otherwise upon the 13<sup>th</sup> – 23<sup>rd</sup> defendants, the process server, Mr Godfrey Gichuki should be made to appear before court for cross-examination on his evidence of service. Mr Godfrey Gichuki subsequently appeared before this court on 27.03.07 and was cross-examined and re-examined regarding his disputed service upon the 13<sup>th</sup> – 23<sup>rd</sup> defendants. Thereafter the parties advocates filed written submissions on the said service.

I have given due consideration to the contradictory evidence on record regarding the purported service on the 13<sup>th</sup> – 23<sup>rd</sup> defendant/applicants plus the rival submissions on the said evidence.

The court record establishes that the plaint in this case was filed on 14.05.04. The principal evidence relating to the issue whether the 13<sup>th</sup> – 23<sup>rd</sup> defendants were served with the requisite court process or not in this case is contained in the following affidavits:-

a) A 10 – paragraph affidavit by Godfrey Gichuki describing himself as a process server sworn on 01.09.04 in which he deposed –

i. That on 20.05.04 at 11.42 a.m. he effected service on John Mwaura Wainaina, 21<sup>st</sup> defendant at Nairobi – Othaya Matatu terminus Nyamira area, Nairobi; that the service was inside a shop written Sirge Electronics; that he, Geoffrey Gichuki was then accompanied by one Muroki who was employed by the plaintiff company and that Mr Muroki identified the 21<sup>st</sup> defendant to him; and that the 21<sup>st</sup> defendant declined to sign for the service.

ii. That on the same 20.05.04 at 2.10 p.m. Godfrey Gichuki served Mudia Muchemi, 22<sup>nd</sup> defendant at Umoja I Estate, Nairobi House No.F.85 near Chania Bar; that it is the same Muroki who also identified the 22<sup>nd</sup> defendant to him; and that the 22<sup>nd</sup> defendant declined to sign for the service.

b) A 21 – paragraph affidavit by the same Godfrey Gichuki also sworn on 01.09.04 in which he deposed that on 08.06.04 the plaintiff company detailed one of its employees, a Mr Wainaina to accompany him on the assignment of pointing out the defendants who had not been served with summons for the said Godfrey Gichuki to effect service on the same and that he effected service as follows:-

i. That on 08.06.04 at 9.35 a.m. he, Godfrey Gichuki served Dick Ouma Ochieng, 13<sup>th</sup> defendant at Makuti 2000 Club near Pinnacle Point stage; that Wainaina identified the 13<sup>th</sup> defendant to him; and that the 13<sup>th</sup> defendant declined to sign for the service.

- ii. That on the same date at 11.45 a.m. he, Godfrey Gichuki served James Njoroge, 18<sup>th</sup> defendant at Kayole Pinnacle Point, Nairobi near the DC's office; that Wainaina identified the 18<sup>th</sup> defendant to him; and that the 18<sup>th</sup> defendant declined to sign for the service.
- iii. That on the same date at 12.00 noon he, Godfrey Gichuki served David Auma, 14<sup>th</sup> defendant at Baraka site near Dandora Estate, Nairobi; that Wainaina identified the 14<sup>th</sup> defendant to him; and that the 14<sup>th</sup> defendant declined to sign for the service.
- iv. That on the same date at 12.40 p.m. he, Godfrey Gichuki served Naman Ogembo Ogweno, 23<sup>rd</sup> defendant at Nyama Villa in Kayole Estate, Nairobi; that Wainaina identified the 23<sup>rd</sup> defendant to him; and that the 23<sup>rd</sup> defendant declined to sign for the service.
- v. That on the same date at 1.10 p.m. he, Godfrey Gichuki served Samuel Ngatia, 17<sup>th</sup> defendant at City Cabanas restaurant, Nairobi; that Wainaina identified the 17<sup>th</sup> defendant to him; and that the 17<sup>th</sup> defendant declined to sign for the service.
- vi. That on the same date at 1.45 p.m. he, Godfrey Gichuki served Said Ali Abu, 16<sup>th</sup> defendant at a mini shopping complex in Imara Daima Estate, Nairobi; that Wainaina identified the 16<sup>th</sup> defendant to him; and that the 16<sup>th</sup> defendant declined to sign for the service.
- vii. That on the same date at 1.55 p.m. he, Godfrey Gichuki served Patrick Ndirangu, 15<sup>th</sup> defendant also at the mini shopping complex in Imara Daima Estate, Nairobi; that Wainaina identified the 15<sup>th</sup> defendant to him; and that the 15<sup>th</sup> defendant declined to sign for the service.
- c) A supporting affidavit by Maina Mutahi sworn on 18.01.06 in support of the chamber summons dated 18.01.06 challenging the *ex-parte* Judgment delivered by this court on 24.11.05. Maina Mutahi is the 20<sup>th</sup> defendant; he deponed that he had the authority of the 13<sup>th</sup> – 23<sup>rd</sup> defendants to swear the supporting affidavit; that counsel for the 13<sup>th</sup> – 23<sup>rd</sup> defendants informed him and his colleagues that he had perused the court record of this case and learnt, *inter alia*, that the case had proceeded *ex-parte* against the 13<sup>th</sup> – 23<sup>rd</sup> defendants and that an *ex-parte* Judgment had been obtained against them. Maina Mutahi, 20<sup>th</sup> defendant proceeded to depone that he and his colleagues, constituting the 13<sup>th</sup> – 23<sup>rd</sup> defendants, were never served with any summons to enter appearance and file defence and that, therefore, they were not aware that this case had been filed against them. He added that he and his colleagues have been staying on the suit property for over 15 years, erected permanent structures and that they stand to suffer irreparable loss and damage unless the *ex-parte* Judgment is set aside so that they can defend themselves.
- d) Supplementary affidavit by Godfrey Gichuki sworn on 25.07.06 in which he essentially reiterated that he had effected service on the 13<sup>th</sup> – 23<sup>rd</sup> defendants as previously deponed in his two affidavits sworn on 01.09.04. In his supplementary affidavit sworn on 25.07.06 he clarified with regard to service on the 19<sup>th</sup> defendant, Mary Nduku Kioko that she is one and the same person as the 12<sup>th</sup> defendant, Mary N. Kago and that when he attempted to serve her as 19<sup>th</sup> defendant, she reminded him that he had already served her with the same court process as 12<sup>th</sup> defendant and that there was no need to serve her again. Godfrey Gichuki also seems to have taken advantage of the opportunity he had been given to file affidavit response on the issue of service on the 13<sup>th</sup> – 23<sup>rd</sup> defendants and filled in a gap left by his two affidavits sworn on 01.09.04 with regard to service upon Maina Mutahi, 20<sup>th</sup> defendant on which those two affidavits had said nothing. Godfrey Gichuki deponed in his supplementary affidavit that he had served Maina Mutahi, 20<sup>th</sup> defendant On 20.05.04 at Snow – Light Academy in Kayole Phase I and that the 20<sup>th</sup> defendant had been identified to him by Muroki, who is the person he had said pointed out John Mwaura Wainaina (21<sup>st</sup> defendant) and Mudia Muchemi (22<sup>nd</sup> defendant) to him on 20.05.04. Godfrey Gichuki was made to appear before this court for cross-examination. He appeared on 27.03.07 and was

duly cross-examined and re-examined on the issue of service upon the 13<sup>th</sup> – 23<sup>rd</sup> defendants. He maintained during his cross-examination that he had effected service on the 13<sup>th</sup> -23<sup>rd</sup> defendants as deponed in his three affidavits alluded to earlier. He told this court that he was duly licensed as a court process server when he served the 13<sup>th</sup> – 23<sup>rd</sup> defendants on 20.05.04 and 08.06.04; that such licence is renewed every two years; that when he sought renewal of his biennial licence he had to surrender the expiring or expired licence; that he still had the licence which expired in 2006 which he had not renewed but that he had left it in the office. It was his case that the typist in his office had omitted to type from his draft affidavit a paragraph covering service effected on 20.05.04 which included service upon Maina Mutahi, 20<sup>th</sup> defendant; and that he did not compare the typed 10 – paragraph affidavit sworn on 01.09.04 with his handwritten draft before destroying the draft. He acknowledged that his supplementary affidavit sworn on 25.07.06 was sworn and filed almost two years after his first two affidavits he was supplementing but maintained that his supplementary affidavit was not an afterthought. He acknowledged that he filed his supplementary affidavit after being informed by plaintiff’s counsel that he would be required to appear before court and give evidence on the issue of service upon the 13<sup>th</sup> – 23<sup>rd</sup> defendants; that he called for copies of his previous two affidavits, of 01.09.04, to prepare for cross-examination; and that in the course of the preparation he realised his affidavits of 01.09.04 had said nothing about service upon Maina Mutahi, 20<sup>th</sup> defendant, so he swore the supplementary affidavit on 25.07.06, *inter alia*, to seal the gap. He described the omission in his two affidavits of 01.09.04 as a typographical error; that this was not the first time for such typographical error to occur in his affidavits of service and that whenever such errors occurred, he would file supplementary affidavits to correct the errors. He contended that he had not lied.

The picture emerging of Godfrey Gichuki may be sketched as under. He conceded not having compared the typed copy of his 10 – paragraph affidavit sworn on 01.09.04 relating to his purported service of 20.05.04 with his handwritten draft affidavit on that service before destroying his said draft. The effect of such omission was to deprive himself and the court of any documentary proof that his purported draft affidavit had a paragraph covering service on Maina Mutahi, 20<sup>th</sup> defendant. Godfrey Gichuki’s omission to compare the typed affidavit with the draft affidavit on which the typed affidavit was based depicts lack of diligence on his part. Godfrey Gichuki conceded that omissions by his office typist like the one under discussion here were a common phenomenon in that office. That should have put him on notice of the need to compare typed copies of any documents with his drafts but he apparently never bothered about it and seems to have been content to make no comparisons, in the hope of correcting omissions by way of supplementary affidavits. Such casual approach to matters touching on litigation is worrying. Godfrey Gichuki also acknowledged during his cross-examination on 27.03.07 that he had not renewed his process server’s licence which had expired the previous year (2006). It is also not clear why Godfrey Gichuki’s two affidavits of service sworn on 01.09.04 relating to service he said he had effected on 20.05.04 and 08.06.04 should have been sworn and filed some 3 - 4 months after the event. No explanation was proffered for the delay. Those are yet other examples of his lack of seriousness about his work.

As against the flippancy displayed by Godfrey Gichuki as illustrated by his omissions cited above, it may be noted on the positive side that, apart from his purported service on Maina Mutahi (20<sup>th</sup> defendant) which he slotted into his supplementary affidavit sworn belatedly on 25.07.06, and without details of time of such service, after learning he would be taken to task on his purported service upon the 13<sup>th</sup> – 23<sup>rd</sup> defendants, his purported service on the other 10 defendants furnishes details of places and times of the said service. The question then arises whether the furnishing of details of places and times of the purported service by itself constitutes proof of such service? Ordinarily it would be a strong indicator of the likelihood of the purported service as having taken place. However, in the present case the various instances of laxity and omissions cited above on the part of Godfrey Gichuki tend to erode the impact of the details of places and times towards establishing that the service in question was actually effected. Arising from the foregoing, it is doubtful whether the court can confidently count on Godfrey Gichuki’s word that his reported service actually took place. Serious question marks and doubts linger around the issue of service. In the circumstances, I find it unsafe to answer affirmatively the question whether service was in fact effected upon the 13<sup>th</sup> – 23<sup>rd</sup> defendants and I give them the benefit of doubt.

The upshot is that I hold that service upon the 13<sup>th</sup> – 23<sup>rd</sup> defendants was not proved to the required standard, i.e. on a balance of probabilities. Accordingly, the chamber summons application dated 18.01.06 is allowed, the *ex-parte* Judgment entered in favour of the plaintiff on 24.11.05 set aside, the draft Defence dated 18.01.06 deemed as properly filed and that this matter should proceed to trial on merit as prayed, on priority basis. Costs shall be in the course.

Orders accordingly.

Delivered at Nairobi this 29<sup>th</sup> day of October, 2007.

B.P. KUBO

JUDGE