



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
Civil Case 689 of 2002**

**STANBIC BANK LIMITED.....PLAINTIFF**

**VERSUS**

**AIRDUCT ENGINEERING LTD.....1<sup>ST</sup> DEFENDANT**

**HARMEL SINGH SAGOO.....2<sup>ND</sup> DEFENDANT**

**INDI SINGH SAGOO.....3<sup>RD</sup> DEFENDANT**

**M. S. SANDHU.....4<sup>TH</sup> DEFENDANT**

**R U L I N G**

This is an application dated 24<sup>th</sup> October 2005. It was filed by the 2<sup>nd</sup> defendant, who was seeking an order for stay of execution, as well as an order for the setting aside of the judgement which was entered against him on 6<sup>th</sup> October 2004.

In support of the application, the applicant swore an affidavit, in which he denied having been served with the plaint or summons to enter appearance.

It is instructive that in the Affidavit of Service, Mr. John Kinuthia Njoroge, the said process server stated as follows, at paragraph 4 thereof:

**“THAT on 15<sup>th</sup> May 2003 at around 12.30 p.m, I travelled to Industrial Plant along Kampala Road where, on arrival at the gate, I met a security guard manning the gate (who refused to give me his name), to whom I introduced to and the purpose of my visit, thus allowing me into the compound, and directed me to Mr. Harmel Singh Sagoo who was in the company of his brother Mr. Indy Singh Sagoo the 3<sup>rd</sup> Defendant herein who was already known to me.”**

To my mind, by specifying that Mr. Indy Singh Sagoo was already known to him, the process server must be deemed not to have previously known the 2<sup>nd</sup> Defendant. If he had known him too, the process server would have said so expressly.

At paragraph 5 of his affidavit, Mr. John Kinuthia Njoroge, who was the process server, said:-

**“THAT on introduction, I served Mr. Harmel Singh Sagoo with Summons to Enter Appearance and the plaint which he accepted and acknowledged by signing at the back of my copy and affixing date and time which I hereby return the service of Summons to Enter Appearance as being duly served.”**

Clearly, therefore, the 2<sup>nd</sup> defendant was introduced to the process server. However, the process server does not explicitly specify the person who introduced the 2<sup>nd</sup> defendant to him. That issue is left to us to surmise from the fact that the 2<sup>nd</sup> defendant was in the company of the 3<sup>rd</sup> defendant. In effect, in all probability, the process server would like the court to believe that it was the 3<sup>rd</sup> defendant who introduced the 2<sup>nd</sup> defendant to him (the process server).

Bearing in mind the foregoing, the court is now being told by the 2<sup>nd</sup> defendant that he was not at the premises of Industrial Plant on 15<sup>th</sup> May 2003, at 12.30 p.m., as alleged by the process server. The said statement was made by the 2<sup>nd</sup> defendant, on oath. He also stated that the directors of the 1<sup>st</sup> defendant, as well as the company known as Industrial Plant (E.A.) Limited, had been physically removed from the offices at Kampala Road, in 2000. The removal had been effected by the Receiver, said the 2<sup>nd</sup> defendant. Therefore, neither Industrial Plant (E.A.) Ltd nor the 2<sup>nd</sup> defendant was at the premises whereat the process server alleges to have effected service on 15<sup>th</sup> May 2003.

On his part, the 3<sup>rd</sup> defendant, who is said to have introduced the process server to the 2<sup>nd</sup> defendant, has also denied having done so. In his affidavit, the 3<sup>rd</sup> defendant depones he was not at the premises in question, at any time, on 15<sup>th</sup> May 2003.

The depositions by both the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have been verified by Mr. Vincent K'Odera, the **"Projects Engineer"** at Industrial Plant Limited. Mr. K'Odera explained that his employer was placed under receivership, by the plaintiff, in 2000. He also explained that the receiver who had been appointed by the plaintiff, Mr. Graham Silcock, had retained his services at the premises of Industrial Plant Limited. However, the receiver had physically removed both the 2<sup>nd</sup> and 3<sup>rd</sup> defendants from the company premises.

From the foregoing evidence, which was uncontroverted, I find that the 2<sup>nd</sup> defendant was not at the place where the process server allegedly served him with the Plaint and Summons. In effect, he could not have been served with the Plaint or Summons.

Having reached the conclusion that the 2<sup>nd</sup> defendant was not served with the Plaint or summons, it follows that the judgement which was entered against him, on the grounds of his failure to enter appearance, was irregular. The court cannot countenance an irregular judgement on its record, and must set it aside **ex debito justitiae**.

In arriving at that conclusion, I have not had to ask myself whether or not the 2<sup>nd</sup> defendant had an arguable defence. It has not been necessary to exercise my mind in that regard because:-

**"where service is defective it will, to my mind, be unconscionable to insist on an applicant showing he has a defence to the claim before a court can exercise its judicial discretion in his favour,"** as was held by Hon. Bosire J. (as he then was) in **KENYA COMMERCIAL BANK LTD V NYATAIGE & ANOTHER [1990] KLR 443 at p. 445**.

Where a judgement was obtained irregularly, the defendant is thus not only entitled to have it set aside as a matter of right, but the court should set aside such judgement without imposing any conditions.

For all the foregoing reasons, the judgement entered against the 2<sup>nd</sup> defendant on 6<sup>th</sup> October 2004 and all consequential orders are set aside and vacated forthwith. The 2<sup>nd</sup> defendant is hereby granted unconditional leave to defend the suit.

Costs of the application dated 24<sup>th</sup> October 2005 are awarded to the 2<sup>nd</sup> defendant.

Finally, the 2<sup>nd</sup> defendant should file and serve his Defence within fifteen (15) days from the date of this

Ruling.

Dated and Delivered at Nairobi this 29<sup>th</sup> day of March 2006.

FRED A. OCHIENG

JUDGE