



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

**Civil Case 1996 of 2000**

**BULLION BANK LIMITED.....PLAINTIFF**

**VERSUS**

**KISHORE SUNDERAJI ADESHARA.....1<sup>ST</sup> DEFENDANT**

**JAYSHREE KISHORE ADESHARA.....2<sup>ND</sup> DEFENDANT**

**HARESH SONI.....3<sup>RD</sup> DEFENDANT**

**R U L I N G**

This is an application by the 3<sup>rd</sup> defendant, for stay of execution, as well as for the setting aside of the exparte judgement which had been entered against him, on 19<sup>th</sup> March 2001.

It is the applicant's case that he was never served with the Plaint or Summons to enter appearance.

Basically, the applicant contends that he was not at his offices, at Mombasa, on 21<sup>st</sup> February 2001, when the process server purported to have served him. The applicant says that on that date, he was travelling from Mombasa to Malaba, Uganda. He has even produced extracts of his passport to back his contention.

However, when the plaintiff's counsel examined the relevant page of the passport, he noted that it had two doubtful points. First, the date (at page 7 of the passport) is 22<sup>nd</sup> February 2001, as opposed to 21<sup>st</sup> February 2001. Secondly, the said stamp did not indicate whether or not the applicant was entering or leaving Uganda. In effect, the plaintiff believes that the applicant's passport does not back his assertions.

Faced with those observations, the applicant pointed to the fact that on the same page, there was another stamp, which was dated 25<sup>th</sup> February 2001, and which was clearly marked "Exit".

In the light of the foregoing, what does the court make out about the applicant's contentions?

First, I note that the applicant did not at any time suggest that he was at the Malaba border point on 21<sup>st</sup> February 2001. At paragraph 7 of his affidavit, he said:-

**“THAT further I aver that on the alleged date of service, I was on my way to Malaba, Uganda for business, where I arrived on the 22<sup>nd</sup> February 2001.”**

That deposition clearly explains why the applicant's passport bears the date 22<sup>nd</sup> February 2001, for it is the date when he reached Malaba.

I do take judicial notice of the fact the distance between Mombasa and Malaba is such that it can easily explain why the applicant left Mombasa on the morning of 21<sup>st</sup> February 2001, and got to Malaba on the next day. I find absolutely nothing unusual about that.

In any event, if the plaintiff had wished to cast any doubts on the said facts, which the applicant had stated under oath, the plaintiff should have applied for leave to cross-examine the applicant. However, as the plaintiff did not cross-examine the applicant on the contents of his affidavit, I find them to be uncontroverted.

Not only were the said contents uncontroverted, the explanation that the applicant exited Uganda on 25<sup>th</sup> February 2001, further supports his version of the events.

Having accepted the applicant's statement on his whereabouts on 21<sup>st</sup> February 2001, I find that he could not have therefore been served in the manner spelt out in the Affidavit of service sworn by J. Mbevi, on 14<sup>th</sup> March 2001. That finding alone is sufficient to dispose of this application, as it would imply that the judgement entered against the 3<sup>rd</sup> defendant was irregular, so that it would have to be set aside, as a matter of right.

In **REMCO LIMITED V. MISTRY JADVA PARBAT & CO. LTD & 2 OTHERS, HCCC NO. 171 of 2001**, the Hon. Ringera J. (as he then was) expressed himself thus:-

**“I begin by stating the applicable law as I understand it. First if there is no proper or any service of the summons to enter appearance to the suit, the resulting judgement is an irregular one which the court must set aside *ex debito justitiae* (as matter of right) on application by the defendant. Such a judgement is not set aside in exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself. Secondly, if the default judgement is a regular one, the court has an unfettered discretion to set aside such judgement and any consequential decree or order upon such terms as are just as ordained by Order IXA rule 10 of the Civil Procedure Rules.”**

The foregoing words were reiterated in all the other three authorities which the applicant relied on, namely;

- (i) **RELIANCE BANK LTD V JOSEPH W. NJOROGE, HCCC NO. 623/99.**
- (ii) **GANDHI BROTHERS V. H.K. NYAGA t/a H.K. ENTERPRISES, HCCC NO. 1330/01.**

The applicant had also raised the issue of the process server lacking the requisite authority to serve process on him or on anybody else. He did write to the Deputy Registrar on 3<sup>rd</sup> August 2005 asking him to confirm if Mr. J. Mbevi was a registered process server as at 21<sup>st</sup> February, 2001.

In response to that inquiry, the Chairperson of the Process Servers Committee wrote back, on 16<sup>th</sup> June 2005, stating as follows:-

**“ RE: PROCESS SERVER J. MBEVI**

**Your letter dated 3<sup>rd</sup> August, 2005 refers.**

**The above named person is not a Licensed Process Server and is therefore not authorise (sic!) to serve process.”**

The plaintiff did point out, correctly if I may say so, that the Chairperson did not expressly indicate that the person named J. Mbevi was not a process server as at 21<sup>st</sup> February 2001. But, in my considered view, the fact that that fact was not stated expressly does not, in the circumstances of this case, mean that the court cannot discern the implication. I say so because in the Letter of 3<sup>rd</sup> August 2005, the advocates for the applicant had asked the Deputy Registrar to state whether or not Mr. J. Mbevi was a licensed process server, as at 21<sup>st</sup> February 2001. One would therefore presume that since the chairperson of the Process Servers Committee was responding thereto, the information he provided was in answer to that specific inquiry.

However, even if Mr. J. Mbevi was not a licensed process server at the material time, that fact alone would not be sufficient ground to set aside the fact of service, if it had been regular. Pursuant to the provisions of Order 5 rule 6(3) of the Civil Procedure Rules:-

**“No objection may be made to service of a summons on the grounds that the person who served the summons either was not authorised so to do or that he exceeded or failed to comply with his authority in any way.”**

Therefore, had this application been founded only on the process servers lack of authority, I would have disallowed it.

Another issue that was raised by the plaintiff was to the effect that the applicant ought to have applied for leave to cross-examine the process server. Having failed to do so, the applicant should not ask the court to disbelieve the contents of the affidavit of the said process server, submits the plaintiff.

Had the process server's been the only affidavit on the issue of service, I could have agreed with the plaintiff, that if the contents of his affidavit had not been challenged, they could have been held to be the truth. But in this case, the person who had allegedly been served also swore an affidavit, in which he categorically denied having been served. I have already made a finding that the applicant was not served. By necessary implication, the contents of the affidavit sworn by the process server cannot be true.

For all the foregoing reasons, I hold that the 3<sup>rd</sup> defendant had not been served with the Plaint and summons to enter appearance. That being the case, the judgement entered against him was irregular. Consequently, the said judgement must be, and is therefore hereby set aside *ex debito justitiae*. All the other actions, orders or steps taken pursuant to the said judgement are also hereby set aside.

The 3<sup>rd</sup> defendant is allowed fifteen (15) days to enter appearance and file his defence.

The costs of the application are awarded to the 3<sup>rd</sup> defendant.

Dated and Delivered at Nairobi this 4<sup>th</sup> day of April 2006.

FRED A. OCHIENG

JUDGE