



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

Civil Appeal 247 of 1996

MANJI CHARANIA1ST APPELLANTS

MEHRUN MANJI 2ND APPELLANT

VERSUS

MARGARET OMUTERE RESPONDENT

**(Being an Appeal against the Ruling/Order of Honourable B. Rashid (Mrs) dated
21st August, 1996 in the Senior Resident Magistrate's Court at Nairobi CMCC No.6337 of 1995)**

BETWEEN

MARGARET OMUTERE PLAINTIFF

VERSUS

MANJI CHARANIA1ST DEFENANT

MEHRUN MANJI 2ND DEFENDANT

RULING

1: BACKGROUND OF APPEAL

1. The original plaintiff/respondent had on the 21 April 1994 been in the employment of the original defendant 1 and 2. They already accused her of theft by servant. She was charged but on 1.7.95 was duly acquitted of the offence.
2. She sued her employers the defendants 1 and 2. They were served with summons to enter appearance on 5.9.95 at 4.30 p.m. They allegedly declined to sign the summons but accepted the same.
3. An exparte hearing was heard (B. Rashid S.R.M.) and judgment for false imprisonment and malicious damage was entered against the original defendants 1 and 2.
4. The original plaintiff executed and the decretal amount having been released was finally deposited in the joint account with Southern Credit Bank Ltd in the name of the two advocates.
5. The defendants 1 and 2 applied for the setting aside of the exparte judgment on grounds that they had

not been served with the summons. They also stated that service was said to have been effected in Highridge whilst they lived in Westlands.

6. The trial magistrate dismiss the application for setting aside the exparte judgment. The original defendant appealed to this court for redress.

7. II Findings

In the year 1996, I recall that a similar issue of service had arisen. There was a rule, which I believe still persist, that in order to remedy questions of whether a person had been served or not, especially in the case of an interlocutory judgment that there be further service at the formal proof stage by way of a hearing notice.

8. The two appellants original defendants claim they were never served. Their places of residence was in Westlands and not Highridge. The process-server in this case ought to have been called to give evidence as to where and when he effected service under Order 18 Civil Procedure Rules

9. I would accept the defendants explanation as to the doubt raised on service.

10. I did in another case decline to set aside an order for an expate judgment on grounds that I was satisfied and had ample evidence that the defendant had been correctly served. In this appeal the issue of the place of service is questionable.

11. I would allow this appeal and duly set aside the ex parte judgment entered against the appellants.

12. The original suit to be heard a fresh before another magistrate. The parties are to continue holding the deposit as security till the finalization of the suit.

13. The cost of this appeal will be in the cause and to await the finalization of the lower court case.

Dated this 23rd day of May 2006 at Nairobi

M.A. Ang'awa

Judge

Chaudhri & Associates Advocates for the appellant

Ogutu, Wariuki & Co. Advocates for the respondent