



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

**Civil Suit 326 of 2005**

**COASTAL KENYA ENTERPRISES LIMITED.....PLAINTIFF**

**VERSUS**

**KRISHAN BEHAL & SONS .....DEFENDANT**

**RULING**

The plaintiff, hereof, sued the defendant by a plaintiff filed in court on 16<sup>th</sup> June 2005. The defendant in that plaint was described as “**a firm carrying on business in Nairobi.**”

On or about 29<sup>th</sup> September 2005 exparte judgement was entered for the plaintiff, in default of an appearance.

An application was presented to court by chamber summons dated 27<sup>th</sup> January 2006, seeking to set aside that exparte judgment. The main ground in support of that application is that the defendant was never served with the summons.

The affidavit in support of that application was sworn by Jimi Maina, who described himself as the co-interim joint Administrator of the estate of SUNIL BEHAL. He stated in that affidavit that Sunil Behal t/a Krishna Behal & Sons was never served with the summons to enter an appearance. He annexed the affidavit of service of Joshua Ogudah to the application. The said process server deponed that he served Mr Krishan Singh Behal with the plaint and summons to enter an appearance, after being identified by Mr Satwinder Singh Bhogal, the managing director of the plaintiff.

The said Satwinder Singh Bhogal deponed in the replying affidavit that he was present when the process server served the plaint and summons to enter appearance. That service was effected upon Sunil Behal and not as mistakenly stated by the process server upon Krishan Singh Behal. That the said Krishan Singh Behal passed away sometimes back.

On the basis set hereinbefore the applicant, interim joint Administrator of the late Sunil Behal sought orders to set aside the exparte judgment.

The plaintiff in instituting this claim sued a firm. There was no disclosure of names of persons who were partners of that firm.

The joint administrator applicant comes to court and states, without documentary evidence, that the

proprietor of the defendant firm was Sunil Behal (deceased). The applicant did not file a draft defence, where perhaps this disclosure would have been. The court is not satisfied that there is proof of any connection between the defendant and the late Sunil Behal, sufficient to move this court to grant the orders sought.

The attempt by Satwinder Singh Bhogal to correct the affidavit of service of Joshua Ogudah cannot be allowed, even if he was present at the time of service, because it is a statement under Oath of the said Ogudah.

The applicant sought also a declaration that the ex parte judgment hereof is irregular on the basis the said Sunil Behal (deceased) was dead at the time it was entered, that is 29<sup>th</sup> November 2005. The court's response to that argument is that the operative date for purpose of entry of the ex parte judgment is the date of service. If indeed the death of late Sunil Behal occurred on 30<sup>th</sup> September 2005 service having been effected on 28<sup>th</sup> September 2005, then the ex parte judgment ought not to have been entered and if entered would be liable to be set aside. The applicant however cannot benefit from this finding because, as the court stated earlier, there is no sufficient evidence that the late Sunial Behal was the proprietor of the defendant firm.

The applicant's argument that execution should be stayed failure of the plaintiff to give notice under Order 21 Rule 6 would have a bearing if the application for stay was made by someone who has shown that they are a party to the action. Stay cannot be granted to a non party. Once again this argument is defeated by the applicant's failure to prove that the late Sunil Behal was a proprietor of the defendant firm.

For the reasons stated herein before I do find that the application dated 27<sup>th</sup> January 2006 must and does fail. The same is dismissed with costs being awarded to the plaintiff as against the said Jimi Maina.

**MARY KASANGO**

**JUDGE**

Dated and delivered this 12<sup>th</sup> June 2006.

**MARY KASANGO**

**JUDGE**