



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

**Civil Case 1057 of 1999**

**ERASTUS ADERO GOGO.....PLAINTIFF**

**VERSUS**

**NICODEMUS WAITE MURAGURI.....1<sup>ST</sup> DEFENDANT**

**EVA WAMUYU MURAGURI .....2<sup>ND</sup> DEFENDANT**

**CONSOLIDATED SALES & SERVICES (TECH LTD).....3<sup>RD</sup> DEFENDANT**

**R U L I N G**

This is an application by the 2<sup>nd</sup> defendant who seeks an order for stay of execution, as well as an order for setting aside the judgement which had been granted against her.

It is the applicant's case that she was never served with the Complaint or Summons to enter appearance. It is also the Applicant's case that the process of execution was irregular as the plaintiff decree-holder had failed to serve her with a notice that an ex parte judgement had been granted against her.

The proviso to Order 21 rule 6 of the Civil Procedure Rules reads as follows:-

**“Provided that, where judgement in default of appearance or defence has been entered against a defendant, no execution by payment attachment or eviction shall issue unless not less than ten days notice of entry of judgement has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution.”**

In this case, the plaintiff had taken out an execution process, through which it sought the arrest and committal to civil jail of the applicant, in the event that the said applicant failed to pay the sum of KShs. 17,715,390/85. The said sum was said to be payable pursuant to a Decree issued in this case.

In effect, the process of execution was intended to compel the applicant to pay the decretal amount. To that extent, the execution process fell squarely within the proviso to Order 21 rule 6 of the Civil Procedure Rules. Therefore, the applicant should have been served with at least ten days notice of entry of judgement.

The applicant asserted that she had not been served with any notice that an ex parte judgement had been entered against her.

Although the plaintiff did not expressly respond to that assertion, a perusal of the court record did

reveal that a “**Notice to Execute**” was duly served on the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, at their offices, on 10<sup>th</sup> September 2001. The affidavit of service states that service was effected at the 3<sup>rd</sup> floor of Kenya Commercial Building, along Enterprise Road, Industrial Area, Nairobi.

However, the said notice has two shortcomings, first, it gave a notice of only seven days, instead of giving at least ten days notice. That defect alone renders the notice fatally defective.

Secondly, the notice was not served upon the applicant personally, as required.

According to the affidavit of service, the notice was slipped “**beneath the door and pinning a copy on the door.**”

In any event, the applicant has sworn an affidavit, stating that she was not ever served with any such notice. That deposition has not been challenged, and I therefore accept it, as factually correct.

In the circumstances, the process of execution was irregular as it was not preceded by the requisite notice to the applicant. For that reason, I do order that the execution be stayed.

Meanwhile, as regards the application to set aside the judgement, it is noted that the applicant denies having been served with the Plaintiff and Summons. She stated that although she was a resident of Ongata Rongai, she moved to that area in the year 2002.

The process server has not sworn an affidavit to counter that deposition. Also, the process server failed to attend court for purposes of cross-examination, notwithstanding the fact that the applicant had given due notice to the advocates for the plaintiff, to make the process server available.

In the circumstances, I accept the applicant’s deposition, and thus find that she was not served with the Plaintiff or Summons to enter appearance, nor did she sign copies thereof.

For that reason, the judgement which was granted herein on 18<sup>th</sup> May 2001 is irregular, and is therefore set aside.

It is also noteworthy that the plaintiff concedes the fact that the applicant has raised “**serious allegations, and alleged fraud and forgery.**”

For instance, the draft defence of the applicant asserts that the 1<sup>st</sup> defendant had no authority to act for or on behalf of either the 2<sup>nd</sup> or 3<sup>rd</sup> defendants. She also denies receipt of the money allegedly lent to the 3<sup>rd</sup> defendant, by the plaintiff. That gives rise to the legitimate issue as to how the liability of the applicant arose, for money which was lent to the company. The issue arises because there does not appear to be any nexus, immediately apparent, as between the applicant and the loan. When I talk of a nexus that is immediately apparent, I have in mind something such as a guarantee executed by the applicant, to secure the lending to the 3<sup>rd</sup> defendant.

In the light of the serious issue raised by the applicant, I hold the view that the draft defence gives rise to a triable issue. Therefore, if the judgement had been regular, I would nonetheless have set it aside, so as to accord the applicant the opportunity to have her day in court. In arriving at that decision, I derive guidance from the words of SIR WILLIAM DUFFUS P. in the case of **PATEL V E A. CARGO HANDLING SERVICES LTD [1974] E.A 75 at page 76:**

**“The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgement as is the case here the court will not normally set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean, in my view, a defence that must succeed, it means as SHERIDAN J. put it “a triable issue”, that is an issue which raises a prima facie defence and which should go to trial for adjudication.”**

In conclusion, the ex parte judgement against the 2<sup>nd</sup> defendant is hereby set aside. And the costs of this application are awarded to the 2<sup>nd</sup> defendant.

Dated and Delivered at Nairobi this 19<sup>th</sup> day of October 2006.

**FRED A. OCHIENG**

**JUDGE**