REPUBLIC OF KENYA
MILIMANI COMMERCIAL COURTS, NAIROBI
Civil Case 684 of 2003

KENYA BUS SERVICES LTD……..…....……..PLAINTIFF

-V E R S U S

SAMMY NJERU……..…..1ST DEFENDANT

LINEAR COACH CO. LTD ……..….....2ND DEFENDANT

R U L I N G

By this application, the applicant seeks from the court the following orders-

1. THAT a stay of execution be granted pending the hearing and determination of this application.

2. THAT the judgment entered herein and all consequential orders be set aside ex debito justitiae.

3. THAT the 2nd defendant be granted leave to file defence.

4. THAT costs of this application be provided for.

The application is brought by way of a chambers summons expressed to be made under O.IXA rule 10, O.XXI rule 22(1) of the Civil Procedure Rules and S.3A of the Civil Procedure Act. It is supported by the annexed affidavit of IBRAHIM MANOTI, the general manager of the 2nd defendant, and is premised on the grounds that-

(a) The applicant was never served with the plaint and summons to enter appearance.

(b) The applicant has a cogent defence to the suit.

The application is opposed. Acting on the plaintiff/respondent's instructions, Mr. Sankale Ole Kantai, advocate, swore a replying affidavit on 18th January, 2005 and had it filed in court on 20th January, 2005.

Canvassing the application before me on 13th May, 2005, Mr. Nyakiangana appeared for the applicants while Mr. Kinyanjui appeared for the respondent. Mr. Nyakiangana argued that the applicant was never served with the summons to enter appearance and the plaint. He also contended that the affidavit of service is very shallow as the process server does not disclose the place of service, who directed him there, and who identified the manager upon whom he allegedly served the process. At any rate, the place where the process server allegedly effected service is nowhere near the defendant's registered offices. Mr. Nyakiangana further maintained that the 1st defendant is deceased and could not have been served. Upon requesting for judgment to be entered against the defendants, the plaintiff's counsel did not comply with the conditions imposed by the Deputy Registrar and therefore the judgment entered subsequent thereto was irregular. Counsel also submitted that the draft defence raises serious triable issues. These include the fact that the vehicle does not solely belong to the second defendant as it is jointly owned with a third

party, the issue of negligence is heavily contested, and so is jurisdiction. All these, he said, were triable issues. He then referred the court to **REMOCO LTD**. v. **MISTRY JADVA PARBAT & CO. LTD. & ORS**., HCCC No. 171 of 2001 (Milimani).

Opposing the application, Mr. Kinyanjui stated that the plaintiff's position is basically that the defendants were properly served according to the first two affidavits of service. The applicants had requested that the process server be availed for cross examination, but when the plaintiff obliged, the defendant/applicants did not show up. They have not have not produced a copy of the 1st defendants death certificate. Having been served, the defendants had a chance to appear but they did not, judgment was then entered upon the Deputy Registrar being satisfied that it was proper to do so. Counsel then referred the court to **MANJU PATEL** v. **EXPRESS KENYA LTD**, Nairobi HCCC No.2979 of 1996, and requested the court to reject the application and allow the judgment on record to stand.

In reply, Mr. Nyakiangana reiterated that the Deputy Registrar's orders to serve the 1st defendant personally and the 2nd defendant at its registered office were not complied with, and the plaintiffs had, at any rate, admitted that the 1st defendant was not served personally. He requested the court to grant the orders as prayed. I have considered the pleadings, the application and the submissions of counsel. There are two defendants in this matter. O.V. rule 8 of the Civil Procedure Rules provides-

> **"Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant."**

The first defendant is a human person while the second defendant is a body corporate. It is imperative that each of them be served with summons in accordance with the law governing service on their respective species. Service on the human species is governed by O.V rule 9 (1) read with O.V. rule 12. Rule 9(1) states-

> **"Whenever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient."**

In turn, O.V rule 12 is in the following words-

> **"Where in any suit the defendant cannot be found, service may be made on an agent of the defendant empowered to accept service or on any adult member of the family of the defendant who is residing with him."**

The common thread in both provisions is that basically, the defendant ought to be served personally except where he cannot be found or he has an agent empowered to accept service. In the instant case, there was no attempt to serve the first defendant and there is not even a pretence that he was served personally. His summons to enter appearance were left and signed for by a Mr. Peter Mirambo, said to be a manager of the second defendant. It is not alleged anywhere that any effort was made to serve the 1st defendant personally, and that he could not be found. Even if he could not be found, the documents should have been served on an adult member of his family or his agent, if any, who was empowered to accept service. Mr. Mirambo is not stated to be a member of the 1st defendant's family. Can he be said to have been the 1st defendant's agent empowered to accept service? Commenting on a provision in the Indian Code of Civil Procedure 13th edition, which is in pari materia with our O.V rule 9, Mulla says-

> **"Before service of summons on a person other than the defendant is held to be sufficient under this rule, it must be established by evidence that the person had been duly authorised to accept service on behalf of the defendant."**

There is no evidence that Mr. Mirambo was duly authorised to accept service on behalf of the 1st defendant. I therefore find that the 1st defendant was never served personally, and the purported service on him through an unauthorised third party was improper.

It has already been observed that the second defendant is a body corporate. Service on such bodies is provided for in O.V. rule 2 of the Civil Procedure Rules. This rule states-

> **"Subject to any other written law, where the suit is against a corporation the summons may be served-**
>
> **(a) on the secretary, director or other principal officer of the corporation; or**
>
> **(b) if the process server is unable to find any of the officers of the corporation mentioned in rule 2(a), by leaving it at the registered office of the corporation or sending it by prepaid registered post to the registered postal address of the corporation, or if there is no registered postal address of the corporation by leaving it at the place where the corporation carries on business or by sending it by registered post to the last known postal address of the corporation."**

In paragraph 2 of the supporting affidavit sworn and filed on 20th December, 2004 by Ibrahim Manoti, the 2nd defendant's general manager avers-

> **"The 2nd defendant was never served with a copy of summons to enter appearance or plaint by the plaintiff as alleged in the affidavit of service filed on 13th February, 2004."**

In the affidavit filed on 13th February, 2004, the process server, one Loison Waweru, states in paragraphs 2 and 3-

> **"2. THAT on the 2nd December 2003 at around 9.00am I received from M/s Kantai & Company, advocates for the plaintiff summons to enter appearance together with a plaint both in duplicate with instructions to serve the same upon Linear Coach Company Limited and Another at their Bus terminus within Nairobi.**
>
> **3. THAT upon going to the said booking offices, I introduced myself to the secretary and the purpose of my visit, she directed me to the company manager Peter Mirambo who received the said documents, went through them before signing on behalf of the company and on behalf of the 1st defendant, their driver."**

Copies of the summons which were signed are attached to the affidavit of service, and they indicate that they were received by Peter Mirambo on 2nd December, 2003 at 12.40pm. In his affidavit in support of the application, Mr. Manoti confines himself to merely stating that the second defendant was never served as alleged in the affidavit of service. The process server has given the name and designation of the person upon whom he served the summons to enter appearance and the plaint. If the 2nd defendant was not served at all as alleged by Mr. Manoti, then what would one make of the documents signed by Mr. Mirambo? Is it that the 2nd defendant does not have an employee by the name of Peter Mirambo, or is it that Peter Mirambo is not a manager? Mr. Manoti's affidavit is totally silent on that issue and does not even allude to it. As the existence of a manager called Peter Mirambo is not denied, this leaves me with only one conclusion i.e. the second defendant was served through Mr. Peter Mirambo.

O.V rule 2 (a) requires that service on a corporation be effected "on the secretary, director or other principal officer of the corporation." The term "principal officer" is not defined and, in the absence of a definition or an authority to the contrary, I take the view that the expression includes a manager. I therefore find that the 2nd defendant was properly served through its manager called Peter Mirambo. Consequently, judgment against the 2nd defendant is regular.

The application before the court is brought, *inter alia*, under O.IXA rule 10 of the Civil Procedure Rules. This rule states-

> **"Where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."**

Case law is replete with authorities to the effect that the above rule confers on the court an unfettered discretion to set aside even a regular judgment and any consequential decree or order. However, that discretion must be exercised judicially. In the case of **SHAH v. MBOGO & ANOR.**, [1967] E.A. 116, Harris J. considered the principles governing the exercise of the court's discretion to set aside a judgment obtained ex parte. The learned judge then said at p.123-

"This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."

These sentiments were accepted, adopted and applied in many subsequent cases.

The principles governing the setting aside of an ex parte judgment were further visited in **SEBEI DISTRICT ADMINISTRATION** v. **GASYALI & Others.**, [1968]E.A.300, in which at p.301-2, Sheridan J. cited with approval the words of Ainley J. (as he then was) in **JAMNADAS V. SODHA** v. **GORDHANDAS HEMRAJ [1952]** 7 ULR. 11, wherein the latter had said-

> **"…The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of a court…"**

Applying these principles to the matter at hand, I have considered the nature of the action. Looking at the plaint and the proposed defence, I note that paragraph 4 of the former states-

> **"4. At all material times the 2nd defendant was the owner of the motor vehicle KAP 484A while the plaintiff was the owner of motor vehicle KAN 113K."**

In response to this paragraph, the 2nd defendant states in paragraphs 3 and 4 of its draft defence as follows-

> **"3. The 2nd defendant denies being the owner of motor vehicle Registration Number KAP 484A and further denies that his employees, agents and/or servants drove the said motor vehicle.**
>
> **4. The 2nd defendant is a stranger to the matters pleaded in paragraph 4 of the plaint."**

Without making a definite finding at this stage, a "copy of records" from the office of the Commissioner of motor vehicles and dated 1st September, 2003 gives the names of Linear Coach Co., Ltd., & D.T.K. Ltd. as the registered owners of vehicle No.KAP 484A. Another copy of a police abstract on a road accident shows that at the time of the accident, the said vehicle was driven by one Sammy Njeru Karuana, on whose behalf the 2nd defendant's manager received a copy of summons. The 2nd defendant's denials are therefore devoid of any substance.

Paragraph 5 of the plaint then states-

> **"On or about 1st August, 2003 at 1.00am or thereabouts the plaintiff's authorised driver was lawfully driving the plaintiff's said motor vehicle KAN 113K along Eldoret-Nakuru Road when the 1st Defendant as the driver servant and agent of the 2nd defendant so carelessly drove managed and controlled the 2nd defendant's motor vehicle KAP 484A that he caused it to violently collide onto the plaintiff's said motor vehicle thereby causing extensive damage to the same and rendering it to be a total loss."**

This is followed by paragraphs (a) to (j) of the particulars of negligence, and paragraph 6 details the loss and damage suffered by the plaintiff. In response thereto, the 2nd defendant states in paragraphs 5 and 6

of its draft defence-

> **"5. The second defendant deny (sic) that on 1.8.2003 the said motor vehicle KAP 484A was being driven carelessly along Eldoret-Nakuru Road by the 1st defendants (sic) and that it was caused to violently collide into motor vehicle registration number KAN 113K.**
>
> **6. The 2nd defendant denies all the particulars of negligence and particulars of damage as pleaded and enumerated in paragraphs 5 and 6 of the plaint and puts the plaintiff to strict proof thereof."**

Paragraphs 7 and 8 of the plaint then follow in the following words-

> **"7. Despite demand being made and notice of intention to sue being given the defendant has failed refused and neglected to pay the sum claimed.**
>
> **8. The cause of action accrued within the jurisdiction of this Honourable court."**

The defendant's response thereto in paragraphs 7 and 8 of the draft defence is as follows-

"7. The 2nd defendant is a stranger to the pleadings in paragraph 8 of the plaint.

> **8. Paragraph 7 of the plaint is not admitted.**
>
> **9. The defendant further avers that the plaint herein is incurably defective and an application to struck it out (sic) shall be raised at the hearing hereof."**

Weighed vis-à-vis the allegations in the plaint, the 2nd defendants statements of defence are mere denials which do not raise any triable issues.

For the above reasons, I find in total that judgment against the 1st defendant was irregular and I hereby set it aside *ex debito justitiae* along with any consequential orders. As for the 2nd defendant, I find that the judgment was regular and I see no reason for interfering with it. The application therefore partly succeeds in the case of the 1st defendant, but fails in respect of the 2nd defendant.

Each party will therefore bear its costs of the application.

Dated and delivered at Nairobi this 2nd day of June 2005

L. NJAGI

JUDGE