



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**Civil Appeal 232 of 1996**

**KENNETH K. MWANGI ..... APPELLANT**

**VERSUS**

**THE CITY COUNCIL OF NAIROBI ..... RESPONDENT**

**(An Appeal from the Judgment and Order of Hon. A. Ongeri, SRM  
in Nairobi CMCC No. 54 of 1995 delivered on 21st August, 1996).**

**JUDGMENT**

By a Plaint dated 16th May, 1995 the Respondent (Plaintiff in the lower court) claimed from the Appellant the sum of Kshs.259,396.50 being the unpaid rates and penalties in respect of the Appellant's property located in Nairobi. The Appellant did not enter appearance or file defence, and an *ex parte* Judgment was entered against him on 19th July, 1995. Soon thereafter, the suit property was sold to a 3rd party in execution of the Judgment.

One year later, on 29th July, 1996, the Appellant applied to set aside the *ex parte* Judgment on the ground that he had never been served with Summons to Enter Appearance. The lower court, by its Ruling delivered on 21st August, 1996, declined to set aside the said Judgment, mainly on the ground that it was too late to do as the Judgment had been executed, and the suit property had been transferred to a 3rd party who was not a party to this suit, and whose rights would be affected. This is how the lower court expressed itself, in part:

**“Although there is undisputed evidence that service of summons was not personal, I find that the application to set aside the *ex parte* Judgment and all consequential orders is belated because the judgment has already been executed and the property changed ownership of the suit premises. The purchaser is a 3rd party to these proceedings as he was not joined as a party yet the orders sought by the defendant/applicant if granted would directly affect the purchaser. This in my opinion would be tantamount to condemning a party unheard.”**

It is against that Ruling that the Appellant has preferred this appeal, on the following five grounds:

- “1. The learned trial Magistrate having found as a fact that the appellant was not personally served with the summons to enter appearance ought to have inquired into whether or not Nganga was an agent or adult member of the appellant or appellant's family.***
- 2. Having found that the service was not proper the learned trial Magistrate erred in law and in fact in not ordering the judgment and decree passed *ex parte* set side *ex justitiae debito*.***
- 3. The service having been ineffective, the learned trial Magistrate misdirected herself in law and fact in failing to hold that there was no proper judgment from which a proper decree could issue to divest the property from the appellant.***
- 4. The ruling of the learned trial Magistrate was and is thus misconceived and improper.***
- 5. The judgment entered and decree passed by the Magistrate be set aside and the case do proceed to hearing on merit.”***

Mr Musyoka, Counsel for the Appellant, submitted that the lower court having found that service of the

summons was not “personal” ought to have set aside the Judgment. He argued that the Appellant’s deposition in support of his application to set aside clearly showed that the summons was served on a “Nganga” who was not identified, and in respect of whom, the Court made no inquiries considering that Nganga is a common generic Kikuyu name. The subsequent deposition by the process server to explain who Nganga was, was an afterthought, he argued. He cited the case of *Mathew Mugo vs Samuel Kamau Njogu (C A Nairobi 265 of 2001)* – a decision of this Court.

The Respondent to this Appeal was not represented at the hearing. However, Ms Janmohamed, for the Interested Party, argued that her client had purchased the property lawfully at a public auction and a Vesting Order had been issued. She urged the Court not to make the Orders prayed in this appeal, as that would affect an innocent third party. She also argued that the Affidavit filed in support of the application to set aside was defective as it was not dated, nor were the annexures to the same dated. That application ought to have been struck out on that ground alone.

Let me begin by addressing Ms Janmohamed’s last argument regarding the incompetency of the affidavit filed in support of the application to set aside the ex parte Judgment – which was the basis of the Ruling giving rise to this appeal. Mr Musyoka, Counsel for the Appellant, did not dispute that that affidavit, together with all the annexures, is not dated. This violates the Oaths and Statutory Declarations Act, Cap 15, and renders the said Affidavit incompetent. Clearly this was overlooked by the lower court. If this fact had been brought to the attention of the learned Magistrate, I think she would have struck it out. But the fact that she did not do so, or that it was overlooked, does not make that affidavit any more competent or proper than it was when filed. A statutory declaration or an affidavit that offends the law, and is therefore incompetent, is incompetent ab initio. I cannot breathe life into it at this appellate stage. I, therefore, strike the same out, leaving the Chamber Summons application standing on its own, without any support. On that ground alone, the Appellant’s application dated 29th July, 1996 to set aside the Judgment would fail.

Now, should I be held wrong on that conclusion, let me consider the other grounds of appeal. They all lead to one argument, that the lower court having found that service of summons was not “personal” ought to have set it aside. First, let me say that just because the service was not “personal” did not necessarily render the same ineffective in law. There are circumstances when service may be effected on an agent or through an adult member of the defendant’s family. Here, in this case, the Magistrate did not fully address that issue, and did not make a conclusive finding whether service was proper, because her mind was directed to one important issue that Judgment had been executed, and it was too late to set it aside. I would concur with her on that conclusion. It was indeed too late in the day that the application to set aside was made. Judgment having been executed, the suit property having been transferred, the court could not possibly make orders in vain.

Accordingly, I find no basis to this appeal, and dismiss the same, with no orders as to costs in favour of the Respondent who was absent at this appeal. However, the Interested Party is awarded the costs of this appeal.

Dated and delivered at Nairobi this 7th day of July, 2005.

**ALNASHIR VISRAM**

**JUDGE**