



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT KENYA AT NAIROBI**  
**COMMERCIAL DIVISION, MILIMANI**  
**Civil Suit 689 of 2004**

**NAIROBI FLOUR MILLS LIMITED .....PLAINTIFF**

**VERSUS**

**JOHNSON KITHETE t/a FARMERS GENERAL STORES.....DEFENDANTS**

**RULING**

The defendant's chamber summons dated 3rd May 2005 is brought under Order IXA Rule 10 of the Civil Procedure Rules. It seeks to set aside judgment entered against the defendant in default of appearance.

The defendant's application is based on the allegation of non-service of the summons upon the defendant.

The defendant gives two reasons why he holds that he could not have been served. Firstly is that his business is known as MUNGI FARMERS TOBACCO, COL LTD. and not MUINGE STORES as stated in the affidavit of service. The defendant, it is to be noted, did not attach evidence of his alleged limited liability company. The court has therefore no opportunity of verifying where the truth lies in the two opposing affidavits. The second reason given by the defendant was that he was in Mombasa on a business trip for two weeks, from 6.1.2005 to 19.1.2005, and therefore could not have been served on 8.1.2005. One immediately notes that the trip to Mombasa was a business trip. That being so, the defendant failed to attach evidence, of having been away, on the day of the alleged service.

The defendant deponed that he only came to know about the judgment on receipt of notification of entry of judgment.

The defendant's counsel in submissions stated that it is for the party, who alleges that service of the summons took place to prove. He argued that the process server had not in his affidavit of service, and in the further affidavit proved service took place.

Defence counsel faulted the affidavit of service in wrongly describing the defendants business place as "Muinge"; for the process server not disclosing how he knew that the lady he found at the shop was defendant's wife; and for the process server's failure to state how the defendant introduced himself; and for the failure of the process server to state the street, road or building where he effected service. Counsel then concluded by saying that the defendant had a defence, which raises triable issues.

The application was opposed. The affidavit in reply sworn by Preyesh Shah. The deponent stated that the defendant is known to him personally and that he had delivered goods to the defendant's several businesses within Machakos township. The deponent doubted that the draft defence raised triable issues because of the defendant's failure to produce receipts of alleged payment of the plaintiff's debt.

Plaintiff's counsel in submission said that the defendant was served with the summons, and that the place

of service was definite as seen in the affidavit of service. That the defendant had failed to summon the process server and since he had not done so the affidavit of process server is all the court has, to assist in determining whether service was effected. He then drew the attention of the court to paragraph 4 of the draft defence, and said that to plead therein, that the defendant had paid the debt, then to fail to prove such payment with receipt was in itself admission of the debt. The draft defence, therefore, counsel argued, was a mere sham, with just mere denials and did not therefore raise triable issues. He concluded by saying that service of the summons was very regular and said that the defendant does not deserve the orders sought.

There are two issues to consider in this ruling. First is, whether there was service of the summons. If there was no service, then judgment will be set aside *ex debito justitiae*. If service however was effected, the second issue to consider is whether the defendant raises a defence with triable issues.

On the first issue, I have considered the affidavit of service filed in court on 10th February 2005. That affidavit, other than it wrongly states the defendant's shop, by mistakenly stating it as **"MUINGE STORES,"** rather than **"MUINGI,"** cannot be faulted. The process server succinctly stated how he served the summons. He clearly states that he failed to find the defendant on two occasions, but traced him at his shop on 8th January 2005. He then clearly stated that the defendant introduced himself to the process. That affidavit in my finding cannot be faulted. In my finding therefore, the defendant was served with the summons. The defendant alleged that he was in Mombasa on the material date of service but failed to prove this with any documentary evidence, particularly if as he states, he was on a business trip. The burden of proving that he was not in Machakos on the material date lies squarely on the defendant. See section 108 Evidence Act it provides: -

**"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."**

On the issue whether the draft defence raises any triable issues. In paragraph 4 of the draft defence the defendant state: -

"The defendant admits having been supplied with some goods by the plaintiff which he fully paid for but avers that they did not amount to kshs 4, 77, 255. 70"

To reiterate the defendant admits having been supplied by the plaintiff with some goods. The defendant did not give particulars of the said "some goods" and that just exposes the draft defence to be a mere denial. I accept the plaintiff's submission that it was incumbent upon the defendant to give details of the payments, if any, of the goods supplied and I would add that the defendant ought to have given value to "some goods" he acknowledges were supplied to him.

I find and I hold that the defendant's defence does not raise triable issues to the plaintiff's claim.

The end result is the following orders: -

**(1) That the defendant's application dated 3rd May 2005 is dismissed with costs to the plaintiff.**

Dated and delivered this 19th day of August 2005.

**MARY KASANGO**

**JUDGE**