



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**

**Misc Appli 23 of 2005**

**REPUBLIC .....**  
**APPLICANT**

**VERSUS**

**THE REGISTRAR OF CO-OPERATIVE**

**SOCIETIES.....1STRESPONDENT/  
APPLICANT**

**THE COMMISSIONER OF CO-OPERATIVE ..... 2ND  
RESPONDENT/APPLICANT**

**EX-PARTE**

**1. JOHN GITHINJI WANGONDU )**

**2. PAUL MACHARIA NJORA )**

**3. BENSON NDIRITU KWIRIKIA )**

**4. MWANGI WA KIHUNI )**

**5. JOEL KARIUKI MUGO )**

**6. FREDRICK MWANGI NDIRANGU )**

**7. PETER KARIUKI KIBO )**

**8. SIMON NDIRANGU WACHIHI )**

**9. GICHINGA KANYUGI ..... APPLICANTS/RESPONDENTS**

**RULING**

By a Chamber Summons brought under Order IXA Rule 9, 10 & 11 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Registrar of Cooperative Societies and the Commissioner of Co-operative Societies (hereinafter referred to as the applicants) seek inter alia orders to set aside the ex-parte ruling entered against the applicants in default of appearance and defence on the 3rd day of August 2005 and further that the applicants be granted unconditional leave to file their replying affidavit and that their draft notice of preliminary objection annexed to their application be deemed as duly filed.

In an affidavit sworn by Fredrick Odhiambo the Commissioner for Co-operative Societies, it is contended that service of the motion was never effected upon the applicants. It was further contended that one Mr. David Oduol Odhiambo had no instructions to receive summons on behalf of the applicants and that in any case service ought to have been effected upon the Attorney General.

Mr. Muteithia who appeared for the Respondent urged the court to find that service was properly effected upon the applicants as deponed in the affidavit of the process server.

Relying on the case of **Republic v/s Director of Fisheries ex-parte Wanainchi Marine Products (Kenya) Ltd KLR (2002) 581**. Mr. Muteithia maintained that service was properly effected upon the applicants and not the AG as the applicant is the one whose action is subject of the complaint. Service was therefore in accordance with order 53 rule 3 (2) of the Civil Procedure Rules.

Mr. Muteithia further submitted that the application before the court is defective as it is brought under section 3A when there are clear provisions upon which it ought to have been brought. Finally he submitted that the affidavit in support of the application was defective as it does not state the place of abode of the deponent or the place of swearing and that the jurat was also on a separate page. He therefore urged the court to strike out the affidavit and dismiss the application.

Having carefully considered this application the affidavit in support and the grounds of opposition as well as the submissions made by both counsels, I do uphold the submissions that the affidavit sworn by Fredrick Odhiambo in support of the this application is defective as the affidavit does not indicate the place where the affidavit was sworn and the jurat is also on a separate page. It does not therefore meet the requirements of the Oaths and Statutory Declarations Act (Cap. 15). The affidavit is accordingly struck out and the application must therefore fail as it has nothing to support it. Nevertheless, I have noted that the affidavit of service filed by the process server on the 20th April 2005 depones that the application dated 10th March 2005 was served upon one Mr. Odhiambo at NSSF Building 12th Floor on the 1st April 2005. Going through the court file it is evident that the hearing date for the application was taken ex-parte by the advocate for the applicant on the 20th April 2005, and a hearing notice was to issue to the Respondent for the hearing of the application which was fixed for 7th July 2005. There is however no evidence of any hearing notice having been served on the applicant for the hearing of 7th July 2005. That means that the applicant had no notice of the hearing. Order LIII rule 3 (1) was therefore not complied with and the hearing of the application ought not to have proceeded ex-parte.

I find that there is just and sufficient cause for this court to move suo motto under section 3A to meet the ends of justice by setting aside the ex-parte proceedings of 7th July 2005 and the consequent ruling delivered on the 3rd August 2005.

The upshot of the above is that:

- (1) The affidavit sworn by Fredrick Odhiambo on the 27th September 2005 is struck out.***
- (2) The application dated d27th September 2005 is dismissed.***
- (3) The ex-parte proceedings of 7th July 2005 and the consequent ruling of 3rd August 2005 are hereby set aside by the court on its own motion.***

***Orders accordingly.***

***Dated signed and delivered this 24th November 2005.***

**H. M. OKWENGU**

**JUDGE**

