

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
Civil Case 211 of 2001

THE CO-OPERATIVE BANK OF KENYA LTD. PLAINTIFF

VERSUS

BERNARD WANJOHI KINGA DEFENDANT

R U L I N G

Bernard Wanjohi Kinga (hereinafter referred to as the applicant) has come to this court under order XXI Rule 22, Order IXA Rules 10 & 11 of the Civil Procedure Rules, and section 3A of the Civil Procedure Act, seeking an order for stay of execution of the decree herein and an order for setting aside the judgment entered against him upon such terms and conditions as the court may deem just. The applicant maintain that he was not served with summons to enter appearance. He contests the affidavit of service by the process server wherein it is alleged that service was effected upon him through his adult son, maintaining that his only son is aged 15 years and was at the material time in boarding school.

The applicant further contends that he has a good defence to the Respondent's suit as he has never taken any loan or overdraft facility from it.

Counsel for the applicant relied on the following authorities:

- ***Filimona Agwandi Yalwala v/s Ronald Indimuli & Jared Shiundu Civil Appeal No. 69 of 1987.***
- ***Gandhi Brothers v/s H.K. Njage t/a H.K. Enterprises (Milimani Commercial Court) Civil suit No. 1330 of 2001.***
- ***National Industrial Credit Bank Ltd. v/s Githuku Ngethe Gathuka***

High Court Milimani Civil Case No. 1628 of 2000

For the Respondent it was submitted that the affidavit in support of the application was defective as it does not disclose the source of facts deponed to and that the identity of the advocate whose information was relied upon was also not disclosed. The counsel relied on the case of **Noor Mohamed Jonmohamed v/s Kassamali Virji Madhani Civil Appeal No. 42 of 1951.**

It was further submitted that the applicant was truly indebted to the Respondent and was merely obstructing the course of justice as service was properly effected, and the notice of judgment served on the applicant and therefore he was not coming to this court with clean hands. Counsel further cited the case of **Civil Appeal No. 181 of 1994. Njagi Kanyunguti alias Karingi Kanyunguti & others v/s David Njeru Njogu.**

I would first wish to distinguish the case of **Njagi Kanyunguti alias Karingi Kanyunguti & others** as that was an application for setting aside a judgment under order IXA rule 10 of the Civil Procedure Rules following the ex-parte hearing of the suit after the Defendant failed to attend court. In this case the ex-parte judgment was entered under Order IXA Rule 5 of the civil Procedure Rules for failure to enter appearance and file defence.

The applicant herein contends that he was never served with any summons to enter appearance. Although an affidavit of service was filed showing that the applicant was served through George Wambugu Wanjohi, an adult member of his family, the applicant has denied knowledge of any such person, maintaining that he has only one son who was not an adult and was away in school at the time of the alleged service. This averment has not been controverted by the Respondent. Moreover it is evident from the affidavit of service that the Process Server only visited the applicant's residence once and does not appear to have made proper inquiries as to the time when he could be found. In the circumstances I find that service on the alleged adult member of the family whose relationship with the applicant was not even established was not proper. Without proper service the applicant could not be penalized for failing to enter appearance or file a defence. In the case of **Baiyo v/s Bach [1987] KLR 89** it was held that where there is no proper service of summons then *ex debito justitiae* a judgment by default must be set aside because such a judgment can only be entered if there has been an initiating process concerning which a defendant is at fault. This is precisely the position herein.

Although the draft defence availed by the applicant is basically a blanket denial of the Respondent's claim. However, without proper service of summons it is not open to this court at this stage to go further to consider whether the applicant has a good defence to the Respondent's claim.

It was submitted that the applicant's affidavit was defective as he had not disclosed which facts are of his own knowledge and which facts are from information nor has he disclosed the source of his information. However, looking at the affidavit it is only paragraph 4 which depones to information from the applicant's advocate. Read together with paragraph 3 of the affidavit it is clear that the advocate referred to is the applicant's advocates on record. The source of information has therefore been

disclosed and I would accordingly reject the contention that the affidavit is defective.

The upshot of the above is that I do allow the application dated 28th September 2005 and set aside the judgment entered against the applicant in default of appearance and defence together with all consequential orders.

The applicant shall file his defence within 15 days from the date hereof.

Dated signed and delivered this 23rd day of November 2005.

H. M. OKWENGU

JUDGE