

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
CIVIL CASE NO. 283 OF 1992

**KENYA COMMERCIAL
FINANCE CO. LTD
.....PLAINTIFF**

V E R S U S

**JOHNSON
OMBAKI.....
.....DEFENDANT**

R U L I N G

This suit was filed on 21/1/92 by the Plaintiff against the Defendant seeking to enforce a commercial debt. The court file then went missing. On 28/9/93, the Plaintiff applied and was allowed to reconstruct the same. This was done vide the order of Mr. Njai, a Principal Deputy Registrar of this Court made on 22/10/93. Before that, it appears that the Plaintiff had obtained an ex parte judgment in default of appearance on the part of the Defendant. When the execution process was put in action the Defendant applied to have the ex parte judgment set aside. In his supporting affidavit, the Defendant alleged, among other things, that he had not been served with the summons to enable him enter appearance. When the matter came for hearing before OLE KEIWUA, J. (as he then was) the question of service was addressed. The process server who had allegedly effected service was called for examination and cross – examination. The Learned Judge was not satisfied that the Defendant was properly served and his order was that he would “proceed to hear the parties on the other aspects of the application.” With all due respect, I am unable to understand what was left to be heard after the Learned Judge had come to the conclusion he did. The Court record after that Ruling is a mess. It appears that execution process was put in action again on 31/3/2000 yet after that order there is another order which appears to have been made on 7/1/2000. Which was made first? Why should the record not be chronological? On 9-5-2000 it was ordered that an application for execution be heard on 20/6/2000. There is no record on that date instead the matter was before the Court on 3/7/2000 when the application was granted. Then, when the matter came before Mr. Njai again the Court noted for the 1st time OLE KEIWUA J’s (as he then was) ruling referred to earlier. After that confusion, the matter found its way back to course.

A date for hearing the application for setting aside was fixed by consent in the Registry for 11th and 12th June, 2001. There was no appearance for the Defendant on 11th June. Despite the position being as I have tried to set it out above, I received no guidance from Mrs. Mbabu Learned counsel for the Plaintiff who proceeded to call her witness and examined her. What was the purpose of her calling witnesses if there was already a judgment in place in favour of her client? That action on her part was misleading and she was under an obligation to this Court to inform me what matter was before the court. If I may repeat myself, it is clear from what was coming before the court was the application for setting aside the exparte judgment. It is unfortunate that the Defendant’s Advocate failed to attend when his client’s application was set to be heard.

However, I have taken the trouble to consider all matters on record and my view is that the Ruling of OLE KEIWUA J. (as he then was) had the effect of disposing of the application. If the Defendant had not

been properly served, he was not bound by the proceedings. The ex parte judgment that had been entered against him was, therefore, of no effect.

I, therefore, allow the Defendant's application for setting aside the ex parte judgment as prayed. Since this is an old matter, I invite the parties to suggest possible hearing dates for hearing before the end of this year.

DATED and DELIVERED at NAIROBI this 2nd day of July, 2001.

ALNASHIR VISRAM

JUDGE