



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL AND TAX DIVISION**  
**CIVIL CASE NO. 508 OF 2015**

**ATHI RIVER STEEL PLANT LTD.....PLAINTIFF**

**VERSUS**

**KIPSIGIS STORES LTD.....DEFENDANT**

**RULING**

1. This ruling relates to a Notice of Motion Application dated 17<sup>th</sup> May 2016 and brought under the provisions of Section 1A, 1B 3A and 63(e) of the Civil Procedure Act, Order 10 Rule 1, Order 51 Rule1, and Order 22 Rule 22 of the Civil Procedure Rules and Article 159 (2) (d) of the Constitution of Kenya. It is supported by the grounds on the face of it and the supporting and supplementary Affidavit sworn by Samuel Cheruiyot dated 17<sup>th</sup> May, 2016 and 24<sup>th</sup> October, 2016 respectively.

2. The Applicant is seeking for orders that the Judgement entered herein on 25<sup>th</sup> November, 2015 be and the consequential decree and orders be set aside. The process server Dickson Ooko Giani be examined on oath on the Affidavit of service sworn on 5<sup>th</sup> November, 2015, and any other order the Court may deem appropriate and just to grant. The costs of the Application be provided for.

3. The background facts herein are that, the Plaintiff commenced this suit vide a Complaint dated 9<sup>th</sup> October, 2015 and filed in Court on 16<sup>th</sup> October, 2015. Summons to Enter Appearance were issued on 28<sup>th</sup> October, 2015. On 5<sup>th</sup> November 2015, Dickson Ooko Giani a process server filed an Affidavit of service allegedly having served the Defendant/Applicant with Summons on 31<sup>st</sup> October 2015. On 24<sup>th</sup> November 2015, the Plaintiff requested for an Interlocutory Judgment as the Defendant had not entered Appearance nor filed a defence. Judgement in the sum of Kshs.31,767,282 plus interest and costs was entered in favour of the Plaintiff on 25<sup>th</sup> November 2015. On the 9<sup>th</sup> April 2016, the Applicant was served with a Notice of Taxation and Party to Party Bill of costs.

4. Immediately, the Applicant instructed the law firm of Kiplangat & Associates to take up the matter, as it had not been served with any summons to enter Appearance in any matter hence the Application herein. Samuel Cheruiyot denies service of Summons on the ground that, he has never met the Process Server; one Dickson Ooko Giani who alleged served him the Summons on 31<sup>st</sup> October 2015. He further denies having an employee by the name Rachel Chelangat, through whom the Process server identified him. He seeks for cross examination of the Process Server on the Affidavit of Service he swore in relation to the subject service.

5. He deposes that there is a pending case; **HCCC NO 504 of 2015; Kipsigis Stores Limited Vs Kenya**

***Commercial Bank Limited*** and therefore he had no reason not to enter appearance had he been served with summons. That the Applicant has a good defence, as per annexed draft defence, which raises serious triable issues and should be heard on merit. As he was not served the Judgment herein is thus irregular and ought to be set aside.

6. The Application was opposed vide a replying Affidavit sworn by Aman Behal, a Senior Sales Executive of the Plaintiff Company dated 24<sup>th</sup> June 2016. He maintained that the Applicant was properly served and submitted that the Process Server is easily available for cross examination. That the Applicant has to prove that it does not have an employee by the name of Rachel Chelangat. That it is clear from the Affidavit of the Process Server that the Applicant was served in Sotik Town. That the Applicant witness Samuel Cheruiyot is in the habit of refusing to accept service of Court process and acknowledging the same, as seen when he was served with the Notice of Taxation and Bill of costs herein. That the fact that he has another matter in Court is irrelevant herein and illogical. The Respondent described the Applicant's annexed Draft Defence as a sham, mere denial and an afterthought only meant to delay the case. That the Applicant is truly indebted to the Respondent over unsettled invoices arising from unpaid goods sold by the Applicant. The Applicant vide a letter dated 12<sup>th</sup> March 2015 admitted owing a sum of Kshs.27.5 million, proposing to clear the same by 31<sup>st</sup> May 2015. In the circumstances, the Application "lacks merit, is an abuse of the Court process and a waste of Judicial time" and therefore should be dismissed with costs.

7. In the aforesaid supplementary Affidavit, Mr Cheruiyot reiterated that he was not served with summons and would like the Process server cross examined. He denied the Company has an employee called Rachel Chelagat. He further denied the allegations that he is in the habit of refusing service of Court process arguing that the notice of Taxation and Bill of costs was served on a clerk in the Company and not him. He deposed that the Applicant is not indebted to the Plaintiff as alleged. That Applicant did not purchase any goods from the Respondent or any delivered as alleged. That the letter dated 12<sup>th</sup> March 2015 is exhibited for the first time in this matter, thus it is "an illegality and or was illegally manufactured, procured and or obtained" by the Plaintiff. The Application should therefore be allowed as Prayed.

8. The Application was disposed of by the Parties vide written submissions. I have considered the rival submission and raise the following issues for determination:

- ***Whether the Applicant was served with summons to enter Appearance;***
- ***Whether the Applicant's annexed Draft Defence raise triable issues;***
- ***Whether the Application has merit and should be allowed as prayed***

9. I shall deal with the issue of service first. The Applicant witness Mr Cheruiyot has denied having been served with summons to enter appearance. The Respondent insists he was served. Indeed both Parties concur the key to unlock the rivalry position is to cross examine the Process Server. I agree that is the way to go. Although the Respondent has faulted the manner in which the Applicant has applied for the same, I shall in the Interest of substantive justice allow the request. It is only through the same that the Court will be able to determine inter alia:

- ***Place, time and the manner of service;***
- ***The identity of the person served;***
- ***The person identifying the person served in particular, one Rachel Chelangat; and***
- ***Whether the proper person representing the Applicant Company was served.***

10. In view of the aforesaid I order that the Parties take a date for the cross examining of the Process Server one Dickson Ooko Giani. Thereafter the Court will deal with the other issues for determination.

11. Orders accordingly.

**Dated, delivered and signed in an open Court at Nairobi on this 5<sup>th</sup> day of June 2017.**

**G. L. NZIOKA**

**JUDGE**

**In the presence of:**

Mr. Mureithi for Mr. Gathu for the Applicant

Mr. Mwangi for Kiplangat for the Respondent

Teresia - Court Assistant