



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 51 OF 2014**

**SHAFFIQUE ALLIBHAI ..... PLAINTIFF**

**VERSUS**

**WILLIAM OCHANDA ONDURU T/A**

**OCHANDA ONGURU & COMPANY ADVOCATES .....1<sup>ST</sup> DEFENDANT**

**JOHNSTONE KIPLIMO ARAP CHEMOS .....2<sup>ND</sup> DEFENDANT**

**PARTIAL RULING**

**Setting Aside and Stay of Execution**

[1] The 1<sup>st</sup> Defendant applied for two significant orders; 1) A stay of execution; and 2) Setting aside of default judgment entered into on 25<sup>th</sup> April, 2014. He did so through the Notice of Motion dated 23<sup>rd</sup> May, 2014 and expressed to be brought under Order 10 Rule 11 and Order 22 Rule 22, of the Civil Procedure Rules, Section 3 and 3A and Section 1A and 1B of the Civil Procedure Act 2010. But for reasons which will become apparent shortly, I will issue a partial ruling on the question of setting aside and stay of execution. The parties filed elaborate affidavits and submissions. Counsels' oral addresses to the Court were equally expansive. But those submissions will be considered in the final ruling. Here, I will be concerned with limited arguments on the proviso to Order 22 rule 6 of the Civil Procedure Rules, 2010, precisely on the effect of lack of notice of entry of judgment in default of appearance or defence on execution issued therefrom.

[2] Without citing the relevant provision, the Applicant argued that he was not served with notice of entry of judgment in default of appearance or defence as required in law which affects the execution levied on him by James Kilonzo of Base auctioneers on behalf of the Respondent purportedly in execution of warrants of attachment and sale issued by this honourable court on a decree of Kshs. 17,142,176/=. The purported decree was drawn upon the judgment in default of appearance or defence entered into on 25<sup>th</sup> April, 2014.

[3] The Respondent on the other hand made a terse statement on the matter: **'That even if there was failure to give notice of judgment, this does not lend itself to setting aside the judgment'**.

## COURT'S RENDITION

[4] The Respondent was emphatic and fell short of questioning the authenticity of the receipts which the Defendant produced in Court as evidence that he filed a memorandum of appearance and defence on 12<sup>th</sup> March, 2014, and 27<sup>th</sup> March, respectively. The arguments prompted the curiosity of the Court on the matter and it is prudent a proper inquiry is carried out by the Deputy Registrar on the issue before I make a final decision thereon; that aspect is inextricable and core to the prayer for the setting aside of judgment in default of appearance or defence herein. I have not subjected those receipts to any forensic investigation and I hereby request the Deputy Registrar to initiate an inquiry to confirm their veracity or otherwise. Given the nature of the matter under inquiry, it would be wise to give parties an opportunity to comment on the report of the inquiry as it will have a bearing on the decision of the Court. Thereafter, I will make my decision on the question of setting aside the judgment in default. Meanwhile, the issue of Order 22 rule 6 of the Civil Procedure Rules is of fundamental significance and may be dealt with separate from the question of setting aside the judgment in default as shall be borne out later. For those reasons, I will deliver this partial decision on the issue: Whether I should order a stay of execution of the warrants of attachment herein or set aside the warrants altogether. That makes my work easier.

### **Non-service of notice of entry of default judgment**

[5] The proviso to Order 22 rule 6 of the Civil Procedure Rules provides as follows:-

***Provided that, where judgment in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less than ten days' notice of the entry of judgment has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution.***

[17] The above proviso is cast in mandatory terms; no execution by payment, attachment or eviction shall issue on judgment in default unless at least a ten days' notice of the entry of judgment has been given to the judgment-debtor either at his address of service or is served upon him personally. There are good reasons why the proviso was enacted and I suspect it was informed by the constitutional desire to bring to the attention of the Defendant the fact of entry of judgment, and that would also prevent unscrupulous plaintiffs who may seek to abuse the process of the Court through execution of a judgment where there has been no or no proper service of summons to enter appearance and the plaint. I say these things because it is not uncommon that unscrupulous plaintiffs have obtained judgment in default of appearance or defence on false return of service. The notice will expose such mischief and provide opportunity for remedy. The proviso was introduced into the repealed Civil Procedure Rules after such unfortunate executions and attachments befell many unsuspecting defendants in the 1990's. There is no mischief, however, in this case. But I needed to emphasize the importance of the said notice; it sanctifies the right of the plaintiff to execute and legitimizes the execution. It is, therefore, an important facet of and serves a useful purpose in administration of justice. It is not to be treated as mere technicality. The Respondent has not denied it did not issue the required notice of entry of judgment and the record reveals none was served on the Defendant. Whereas I agree with counsel for the Respondent that absence of such notice of entry of judgment '***does not lend itself to setting aside the judgment***'..., however, it lends any execution levied therefrom to be set aside *ex debito justitiae* for it is wholly irregular. On that basis, the execution by way of attachment issued and levied against the Defendant herein is irregular and it is accordingly set aside. So also are any or all consequential processes or action that attended to the warrants of attachment issued herein. Meanwhile, pending a decision on the whether the judgment in default herein should be set aside, I order a stay of any execution of the decree. The DR should submit a report on the impugned receipts within 14 days of this Partial Ruling. It is so ordered.

**Dated, signed and delivered in open court at Nairobi this 9<sup>th</sup> day of October, 2014**

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**F. GIKONYO**

**JUDGE**