



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE 342 OF 2010**

**DR.SIMON SIMONSE ..... PLAINTIFF**

**VERSUS**

**WORLDWIDE MOVERS (KENYA) LIMITED ..... DEFENDANT**

**RULING**

1. Before court is the defendant's application by way of Notice of Motion dated and filed on 19 July 2011. The pertinent prayers of the application are that this court do set aside the ex parte Judgement and Decree entered against the defendant on the 4 May 2011 and to allow the defendant unconditional leave to defend this suit. The court was also requested to stay the execution of the said ex parte Judgement as above until the hearing and determination of this application. The application was supported by the Affidavit of Chris D. Prior also dated 19th of July 2011. The application was opposed and a Replying Affidavit sworn by the plaintiff was filed on 3rd February 2012. With the leave of the court, Mr. Prior swore and filed his Supplementary Affidavit on 27 February 2012.

2. The application was made on the following grounds: –

- (a) That the plaintiff extracted Warrants of Attachment on 5 July 2011 and proceeded to proclaim the defendant's goods and the defendant is apprehensive that the plaintiff would proceed and cart away their assets at any time.
- (b) That the defendant herein was never served with the Summons to enter Appearance, the Plaint or any other document to enable them to enter appearance and file a defence to this matter.
- (c) That the plaintiff proceeded to swear and file false affidavits of service and the ex parte judgement that flows from such false affidavits and documents of service is irregular and entitled to be set aside *ex debito justitiae*.
- (d) That the defendant's counsel had expressly indicated to the plaintiff's counsel that they had instructions to accept service of the Plaint but the plaintiff's advocates refused to serve the defendant's counsel with the summons and instead resorted to filing false documents.
- (e) That even after the defendant's counsel had expressly undertaken to receive service on behalf of the defendant, no document was served on the said counsel at all to justify entry of the judgement herein.
- (f) That it is in the interests of justice and fairness that the defendant herein be granted unconditional leave to defend the suit herein.

(g) That the plaintiff has admitted that he did not secure his Entry Permit within the time required under the law, a factor that led to the plaintiff's consignment to be auctioned by the Customs and Excise Department.

(h) That the plaintiff's goods were not auctioned by the defendant neither was it the responsibility of the defendant to acquire an Entry Permit on behalf of the plaintiff and hence the plaintiff does not have a course of action against the defendant herein at all.

(i) That it is clear and beyond peradventure that the defendant has a good defence on merit against the plaintiff's claim which can only be ventilated if the ex parte judgement is set aside.

(j) That the plaintiff stands to suffer no prejudice which cannot be compensated by an award of costs if this application is allowed.

3. Mr. Prior in his supporting affidavit deponed to the fact that he was a director of the defendant company and he was aware that auctioneers came to the premises of the defendant threatening to take away the defendant's goods. He annexed copies of the Warrants of Attachment. He stated that he had perused the affidavit of service dated 5 November 2010 which had alleged service upon the defendant along with the Summons to Enter Appearance. He maintained that he had never seen or met any person by the name of Rashid Ngaira or anybody else who had attempted to serve him with any document on 2 November 2010 as alleged. He swore to the fact that on the 2 November 2010 at around 11 am he was out of the office on an assignment and thus could not have received the Summons herein from any person in or out of the office. He also stated that he had perused the affidavit of service dated 4 July 2011 alleging service upon the defendant with the Summons to Enter Appearance and he confirmed that the same was false for the following reasons:

(i) the defendant does not and did not at the material time as stated in the affidavit of service, have an employee or a secretary by the name of Sarah Surgut and

(ii) he had never seen or met any person the by the name of Rashid Ngaira or any other person who attempted to serve him with any document on 4 June 2011 as alleged.

4. Mr. Prior went on to say that on 6 November 2005, the defendant company gave express authority to its counsel on record to accept service on behalf of the defendant of all correspondence and court documents, if any, in connection with this matter. He stated that he had been advised by the advocates that no document had been served upon them by the plaintiff's advocates which he maintained lent credence to the fact that the plaintiff had deliberately hidden the fact that the suit herein had been instituted and judgement entered, until the execution process was in motion. He emphasised that it was the express responsibility of the plaintiff to procure all the necessary instruments and authorisation for the clearance of the plaintiff's consignment of goods to Kenya. He noted that the plaintiff's consignment being "*first time non-dutiable personal belongings*", the plaintiff was required to obtain an Entry Permit for his goods to be accepted into Kenya and in the absence of such Permit, the defendant cannot, in law, lodge any documentation or make payment including handling charges or port storage fees, for the release of the consignment, with the relevant authorities. He maintained that the defendant had sent several reminders to the plaintiff to avail it of the necessary documentation. Then, on 14 June 2005, the defendant wrote to the plaintiff informing him of the impending auction of his consignment and requested him to avert the auction process. He was also aware (and attached a copy of the plaintiff's Entry Permit), that the same had only been received by the defendant on 19 July 2005 while the plaintiff's consignment of personal goods had been auctioned on 30 June 2005. He was aware that the auction had been advertised in the Kenya Gazette by the Customs Department and attached a copy of the Gazette Notice to his said affidavit. Thereafter he noted that on the 17 August 2005, the advocates for the plaintiff had demanded a refund of the amount paid by the plaintiff to the defendant for the clearance of the plaintiff's consignment. In response to that letter, the defendant instantly refunded the entire amount less Shs.27,017/-being payment to the shipping line and other related costs. He annexed a copy of the defendant's letter dated 17 August 2005 together with a copy of the refund cheque and the defendant's invoice.

5. In reply, the Plaintiff, Simon Simonse, swore an affidavit dated 3 February 2012 in which he stated that his advocates had advised him that the orders sought by the defendant's application are not capable of being granted. He went on to say that service of the Summons to Enter Appearance, he had been informed, was actually effected at the defendant's offices at Allsops' Road at Ruaraka along the Thika Road. He annexed a copy of the Affidavit of Service sworn by the process server, the said Rashid Ngaira, filed on the 30 August 2010. The plaintiff stated that he had been informed by the process server, which he thought to be true, that Mr. Prior had been in the office of the defendant at the time. As regards the suggestion made by Mr. Prior in his affidavit in support of the application, that service of summons he had requested is made on the defendant's advocates, the plaintiff maintained that his advocates had advised him that legally service of summons ought to be effected on the defendant personally. Further, his advocates had alleged that the letter that Mr. Prior stated that he had written indicating service to be effected upon the defendant's advocates, had never been received and they had stated that: "otherwise they would not have wasted a lot of time looking for the defendant's offices to effect service". Thereafter, the plaintiff went on to say that it was clear that the defendant has not been able to prove that it had an arguable defence on record to warrant the setting aside of the default judgement. It was not in dispute that he had appointed the defendant as his authorised agent for the purposes of clearing his goods and, legally, the defendant had the full mandate to pay the Customs and clearance charges and to clear the goods in spite of the fact that there was a delay in the processing of his Entry Permit. The plaintiff maintained that the defendant had refused to execute what was required of it thereby resulting in the public auction of the plaintiff's goods and personal effects. The plaintiff maintained that such was investigated by the defendant in order to recover storage charges and the defendant's action clearly amounted to professional negligence and abdication of its contractual duty. He maintained that the defendant had no defence to his claim.

6. As far as the defendant's allegation that it was awaiting the processing of the plaintiff's Entry Permit to clear his goods, the plaintiff maintained that it was clear that the defendant had not availed any documents from the Customs authorities to the effect that his goods could not have been cleared before the issuance of such Entry Permit. The defendant had made no attempt to salvage the plaintiff's goods from being sold at public auction. The plaintiff maintained that he had incurred a lot of expenses in terms of legal fees, Court fees and auctioneers' charges. He noted that the fact that he had lost his personal effects which in his view were priceless, he maintained that the same were not readily available in the market. He had been advised by his advocates on record, which advice he believed was true, that legally the defendant ought to deposit the Decretal sum in court, pending the hearing and determination of his case, as a sign of good faith and as proof that it is in a position to settle the Decretal sum.

7. Mr. Prior swore a Supplementary Affidavit dated 27 February 2012. This time round he attached a copy of the defendant's contractual terms and conditions for the clearing of goods which had been availed to the plaintiff. He drew the court's attention to condition No. 3 (b) which provided that it was the sole responsibility of the plaintiff, at his own expense, to obtain all documents necessary for the importation of the goods to be completed. Mr. Prior reiterated that he had never been served as alleged on 4 June 2010 and he drew the court's attention to the Affidavit of Service and to the fact that the same lacked material particulars and could not be relied upon. He confirmed that he had never met the said Rashid Ngaira. Mr. Prior then stated that he was aware that there was:

***"another party that the Plaintiff entered into an agreement with over the same subject matter, including the Plaintiff's counsel and the nature and relationship or duties of each party."***

Mr. Prior maintained that such was a triable issue that ought to be ventilated at the hearing of this matter in due course. As regards the sale of the plaintiff's goods by public auction and the alleged liability of the defendant in negligence, Mr Prior stated that he had advised the plaintiff, on several occasions, that his properties were up for auction and he had advised him to forward to the defendant the documentation required to clear his cargo. Mr. Prior stated that he had written to the Customs and Excise Department on 15 June 2005 and 22 June 2005 requesting the Authority to stop the auction of the goods to enable the plaintiff to secure his Entry Permit. He attached copies of the letters to his affidavit marked as "CDP 11". Indeed the plaintiff had written to Mr. Prior on 22 June 2005 stating that he would be absent from Nairobi for a period of six weeks and that it was likely that the Entry Permit would be ready in the coming one or

two weeks. Mr. Prior attached a copy of the plaintiff's said letter dated 22 June 2005 marked as "CDP 12". Finally and almost as an afterthought, the deponent attached a draft Statement of Defence to his Supplementary Affidavit which contained a general denial of the Plaintiff particularly with regards to the allegation of negligence leveled against the defendant. At paragraph 10 of the draft Statement of Defence, the defendant went into great detail of the transaction, step-by-step.

8. The defendant filed its submissions as regards the application on 14 March 2012. It detailed that the application was hinged on two key grounds firstly, that the Summons to Enter Appearance was never served upon the defendant and secondly that the defendant has a *bone fide* defence that ought to be fully ventilated at the trial of the suit. On the first point, the defendant categorically denied that it was ever served with the Summons to Enter Appearance. The defendant drew the attention of the court to the affidavit of Mr. Prior and his denying having met Mr. Rashid Ngaira. Similarly, the defendant's advocate on record, one Anthony Gikaira, had stated that when the Notice of Entry of Judgement was allegedly served upon him in his office again by Mr. Ngaira, he was out of the office at the material time. Further, Mr. Prior confirmed that the person detailed in the Affidavit of Service who allegedly pointed out Mr. Prior to the process server, described as Sarah Surgut, had never been employed by the defendant either as a secretary or otherwise. Thereafter, the defendant pointed out a number of discrepancies as revealed by the Affidavits of Service. I was referred to the case of Yusuf Abdi v Kenya Power & Lighting Company Limited, Nairobi HCCC No. 645 of 2004 (unreported) a case in which Azangalala J. had found that a person employed in the Legal Department of the defendant therein was never employed by the defendant hence there could have been no service effected on the company. The court was then referred to the finding of Ibrahim J. (as he then was) in National Cereals & Produce Board v Mwanji Millers Ltd., Nairobi HCCC No. 1066 of 2000 (unreported). In concluding his finding, the learned Judge said this:

**"It is my view that the burden of proof lies on the plaintiff that they served the Summons on the Managing Director of the Company as they stated, to obtain judgement. They are unable to show that indeed Peter Chege was a director or employee of the Company at the time of the purported service..... The defendant is therefore entitled to unconditional leave to defend the suit".**

9. Similarly, in the case of Matthew Mugo T/A Super Gibs Tours & Travel v Samwel Kamau Njogu HC Civil Appeal No. 265 of 2001 (unreported) as per Visram J. (as he then was) found that there were a number of contradictions as regards the evidence of service before him and ruled as follows:

**"With this kind of contradiction, the Appellant ought to have been believed by the lower court. He was entitled to the benefit of doubt, simply because it is too drastic a step to remove a litigant from the seat of justice without a strong and just basis. Here, in my view, there was no such basis. And service of summons is fundamental to litigation. If the court is not fully convinced that the party has been served, the doubt shall be resolved in that party's favour. After all, the only prejudice to the other side would relate to costs, which can easily be remedied by an appropriate order. I find that the lower court erred in its decision that the Appellant had been served with summons to enter appearance".**

The defendant noted that the process server who served the summons (twice) is an advocate of this court who is also on record for the plaintiff in this matter. Although it may have been possible to have summonsed the process server for cross-examination, this would not have been possible in this matter because the process server was none other than the advocate representing the plaintiff. The defendant noted that the said advocate had not chosen to swear an affidavit to deny the averments of the defendant's deponent made under oath. Quoting Kibaki v Moi & Anor. CA Election Petition (2008) 2 KLR(EP), the defendant maintained that if the facts of the deponent are not disputed, cross-examination will not be ordered.

10. The court was further referred by the defendant, to the case of Kenya Grange Ltd v Linear Coach Company Ltd HCCC No. 431 of 2004 where my learned brother Waweru J. observed:

**"It is been denied on oath that the person he says he served is an employee of the defendant. In**

**these circumstances, I am not satisfied that there was proper service of the Summons to Enter Appearance and a copy of the Complaint upon the defendant. Without proper service, the Interlocutory Judgment must be set aside as a matter of right."**

The defendant wrapped up this part of its submissions by quoting again from the Matthew Mugo (supra) as follows:

**"..... If the court is not fully convinced that a party has been served, the doubt shall be resolved in that party's favour. After all, the only prejudice to the other side would relate to costs..."**

As regards the question of whether the defendant has a bona fide defence, the defendant submitted that the draft Statement of Defence annexed to the supplementary affidavit of Mr. Prior, raised critical issues that ought to proceed to trial.

11. The defendant maintained that paragraphs 10 -18 of the supporting affidavit and paragraphs 4, 7 – 9 of the supplementary affidavit have raised pertinent issues as regards the true effect and status of the contract between the parties, liability of the respective parties and provides a comprehensive reply and answer to allegations of the defendant's negligence. It maintained that although the plaintiff alleges the existence of an agreement with the defendant, his replying affidavit contains no details of the defendant's responsibility for the breach of the agreement. The defendant maintained that paragraph 7 (a) of the supplementary affidavit details that although the existence of the contract is not denied it reveals the tripartite nature of the same. In its view, this makes it a triable issue as regards the responsibilities of the three parties to the said agreement. The defendant drew attention to the list of documents annexed to the said agreement which included 2 original Bills of Lading, the original Packing List in English, the plaintiff's Passport and Work Permit or PRO 1 B (Diplomatic Exemption document). (Underlining, the defendant's). The defendant commented that no Work Permit was actually enclosed when the goods were being shipped to Kenya and worse still, the plaintiff did not even bother to insure the goods in question which were now being alleged to be "irreplaceable" by him. The defendant's point to this end, was that the plaintiff had entered into an agreement with two firms to ship and clear his consignment to Kenya. It required a full hearing, the production of the 2 agreements and strict proof to the requisite standards, that all or any of the failures and breach of the contract that the plaintiff now alleges, are payable by the defendant or otherwise. It was the defendant's submissions that the same cannot be summarily determined vide this application.

12. The defendant submitted that it was instructive to note that at all relevant times, the plaintiff had appreciated the need for an Entry Permit. He had admitted in his replying affidavit that there was a delay in the processing of his Entry Permit, which delay cannot be attributed to the defendant. The defendant noted that on 12 July 2005, after the auction had been conducted, the plaintiff's advocates wrote to the defendant stating: "... *Herein enclosed do please find a copy of the Entry Permit to facilitate the clearance of goods. Do also urgently let us know the required demurrage charges for our settlement...*" It was the defendant's view that the plaintiff had admitted by this statement that no demurrage charges could be paid and accepted without the Entry Permit. In the defendant's opinion these matters were all germane in proving whether the defendant had breached the contract or not and whether there was any failure as regards the standard of care on the part of the defendant. The defendant's submissions also referred me to Annexure "CDP 7" to the Affidavit in support of the application which was a letter written by the plaintiff's advocates in which it alluded to a meeting that was held in the defendant's offices on 11 August 2005 at which a decision had been made that the defendant would refund to the plaintiff, the demurrage charges only. In the defendant's opinion this was another issue that required clarification at the hearing of the case in due course, bearing in mind that on 19 August 2005, the defendant had paid to the plaintiff a cheque ostensibly covering the demurrage charges.

13. As regards the setting aside of the judgment, the defendant referred the court to the case of **Patel v E. A. Cargo Handling Services Ltd (1974) E. A. 75** wherein the Court of Appeal had stated:

**"The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where there is a**

**judgement..... The court will not usually set aside judgement unless it is satisfied that there is a defence on the merits. In this respect, the defence on the merits does not mean, in my view, a defence that must succeed..... It's an issue which raises a prima facie defence and which should go to trial for adjudication."**

It was the defendant's final submission that the issues raised by it raised a *prima facie* defence that could only be effectively and justly answered after a full trial. The defendant also brought to the court's attention the provisions of *Article 159 (2) (d)* of the *Constitution 2010* which details that in exercising judicial authority, courts and tribunals shall be guided by the principles *inter alia* that justice shall be administered without undue regard to technicalities of procedure.

14. In his turn, the plaintiff in his submissions briefly stated the facts of the case detailing that sometime in September 2004, the plaintiff was moving to Nairobi having secured employment with the Pax Christ Horn of Africa Trust. He noted that he had entered into an agreement with the defendant to obtain clearance of his consignment of personal goods at the port of Mombasa, such goods emanating from the Netherlands. He noted that on 9 November 2004 he had received confirmation from the defendant that his consignment of goods had arrived and the defendant requested the sum of Shs.340,000/-covering payment of duty, clearing charges and the defendant's commission. The plaintiff noted that the defendant had not followed up the clearing of the plaintiff's consignment of goods and, as a result, the same were auctioned by the Kenya Revenue Authority for failure to pay duty and for overstaying at the port of Mombasa.

15. The plaintiff narrowed down two issues for determination by the court so far as this application is concerned: –

(a) whether the defendant was served with summons to enter appearance;

(b) whether the defendant has a meritorious defence on record to necessitated been granted leave to defend.

As regards the first issue as to service of summons, the plaintiff relied upon the affidavit of service by the process server who is an advocate of this court. He maintained that it was clear that service had been effected properly on two occasions firstly on 7 June 2010 and secondly on the 2 November 2010 on both occasions upon the defendant's managing director Mr. Prior. The plaintiff maintained that the only issue that the defendant had raised was the allegation that there was no secretary by the name of Sarah Surgut employed by the defendant and that Mr. Prior was not in the defendant's office on the above mentioned dates which was a mere denial as the defendant had not given the name of its secretary at that particular time. It also noted that Mr. Prior had not even indicated which meeting he was attending outside the defendant's offices at the material times. There had been no denial by the defendant as regards the fact that its offices were situate at Ruaraka just off the Thika Road. The plaintiff maintained that the question is, if at all the process server did not serve the summons as indicated, from where did he get all those details about the defendant company? The only logical conclusion is that the defendant was actually served with Summons to Enter Appearance but decided to ignore the same and consequently the plaintiff submitted that that the application should not be allowed.

16. As far as whether the defendant had a meritorious defence, the plaintiff maintained was that the only point raised by the defendant was that he had not obtained and Entry Permit and that was the reason why the defendant did not clear the plaintiff's goods thereby resulting in the same being auctioned. The plaintiff referred me to **Section 164** of the *Customs and Excise Act Cap 472 of the Laws of Kenya*. This states as follows:

**"where by the provisions of the Act the owner of goods is required or authorised to perform any act, then, that act, unless the contrary appears may be performed on his behalf by an authorised agent..... and the person is authorised in writing by the owner either generally or in relation to a particular act, to perform the act on behalf of the owner."**

The plaintiff maintained that it was clear that the defendant was the duly authorized clearing agent

for the plaintiff and was legally mandated to clear the plaintiff's goods. He maintained that nowhere was there provided in law that the owner of the goods must be in the country for his goods to be cleared. The plaintiff also maintained that the defendant had provided no evidence that the plaintiff was required to be in the country at the time that the goods were to be cleared. In this regard, I was somewhat at a loss as to what was the point that the plaintiff was making in this particular submission. Thereafter, the plaintiff also referred me to the **Patel** case (supra) emphasising that it was the main concern of the court to do justice to the parties. To this end, the plaintiff stressed:

***"it is therefore clear that the court in exercising its discretion on whether to set aside the interlocutory judgement should consider whether the defendant has a defence that raises triable issues to the plaintiff's claim and in this case it is clear the defendant does not have a defence to the plaintiff's claim."***

The plaintiff also noted that the fact that the interlocutory judgement was entered on 8 December 2010 which included judgement for the amount of the liquidated claim. That case was to be set down for formal proof on the prayer for general damages and the same came up before court on 4 May 2011 wherein the plaintiff abandoned the claim for general damages and prayed for a Decree to be issued as per the interlocutory judgement. The plaintiff maintained that the defendant was only seeking to set aside the order of the court dated 4 May 2011 whose effect would be that the interlocutory judgement issued on 8 December 2010 will still remain in force. Finally, the Plaintiff maintained that the defendant's application was a belated attempt to frustrate him from enjoying the fruits of his judgement and prayed that the same be dismissed with costs.

17. What has caused me concern as to the service of Summons herein is the fact that the process server has deponed to serving the same twice, the first time on 7 June 2010 and later on 2 November 2010. No reason has been given by the Plaintiff in his Replying Affidavit as to why service was deemed necessary, twice. I have carefully perused the two Affidavits of Service dated 26 August 2010 and 5 November 2010 respectively. The 1<sup>st</sup> Affidavit talks of service upon Mr. Prior after the deponent had been introduced to him by "the secretary" – no name given. The 2<sup>nd</sup> Affidavit names "the secretary" as one Sarah Surgut but Mr. Prior in his Supplementary Affidavit strongly denies that anybody of that name was ever employed by the defendant company. First of all, I noted that the two Affidavits of Service did not comply with the provisions of **Order 19 rule 4** of the *Civil Procedure Rules 2010* as neither contained details of the true place of abode of the deponent. That apart, it appears that the Court is left under this heading of argument between the parties, with the choice of believing either Mr. Rashid Ngaira or Mr. Chris Prior as to which is telling the truth as to whether service of Summons was properly served upon the Defendant or otherwise.

18. It seems to me that I can avoid making that decision on the affidavit evidence contained for and against the defendant's application. It is something that I feel would be best canvassed at the trial of this matter in due course when the court will have the opportunity of hearing either or both gentlemen with evidence *viva voce*. I will say that I found the **Mathew Mugo case** (supra) useful in that where there is a contradiction of affidavit evidence as in this case, the finding therein would seem to lean towards allowing the defending party the benefit of the doubt:

**"because it is too drastic a step to remove a litigant from the seat of justice without a strong and just basis."**

For my part, I find myself able to decide upon the defendant's application confined to whether it has a *bona fide* defence to this suit or otherwise. The Defendant has summed up what it considers are the issues for trial under the 4 main headings of:

- (a) The Plaintiff's nature of the cause of action and the Defendant's reply thereto;
- (b) The subsistence and effects/terms of the contract between the parties;
- (c) The answers to the Defendant's (alleged) failures and

(d) The issue of the Entry (or Work) permit.

To this end, I have perused the draft Statement of Defence annexed to Mr. Prior's Supplementary Affidavit herein and marked "CDP 13". Paragraphs 1 – 9 thereof are either descriptive or straightforward denials in relation to the Plaintiff. However, paragraph 10, with its 12 sub-paragraphs, to my mind raises a number of issues which deserve to be aired at a full hearing with the necessary *viva voce* evidence in relation thereto. I have also taken into account the **Patel** case which is a Court of Appeal authority binding upon this Court and the long line of cases which have followed this landmark decision. I have no doubt that this is a suitable case for the interlocutory judgement to be set aside and for the Defendant to be heard at a full trial in due course.

19. However, before I leave this matter, I must take note of the Plaintiff's submissions as to the prayers sought in the Defendant's Notice of Motion dated 19 July 2011. Such sought to stay the execution of the *ex parte* Judgement and Decree entered as against the Defendant on 4<sup>th</sup> May 2011. In its 3<sup>rd</sup> prayer, the application also sought to set aside the Judgement and Decree entered against the defendant again on 4 May 2011 and that the defendant be given unconditional leave to defend this suit. The Plaintiff has correctly pointed out in his submissions, that the interlocutory judgement herein was in fact entered as against the defendant on 8 December 2010. What was ordered by this court on 4 May 2011 would appear to be the abandonment of the formal proof hearing and the commencement of execution proceedings arising out of that judgement of 8 December 2010. The Plaintiff would appear to be quite right. If I was to allow the Notice of Motion as currently before Court, I can only allow the 2<sup>nd</sup> prayer in relation to the stay of execution. The interlocutory judgement of 8 December 2010 would still be in place. However, it should be borne in mind that the judgement entered by the Court on 8 December 2010 was in connection with the liquidated demand in the Plaintiff and the question or assessment of damages was deferred for formal proof. It appears that at that hearing, the Plaintiff chose to abandon his claim for damages and merely to pursue his judgement for the liquidated sum. Again I find this action taken by the Plaintiff to be somewhat suspicious in that he should have served a notice upon the defendant in relation to the formal proof hearing. It's almost as if the Plaintiff was seeking to avoid that process. In view of such, I am of the mind to invoke the provisions of Order 10 rule 11 of the Civil Procedure Rules 2010 and accordingly I set aside the judgement entered herein on 8 December 2010. The plaintiff has submitted that if I was of a mind to allow the defendant's application, I should make orders as to the deposit of the Decretal sum in court and the payment of the throw away costs and the auctioneer's charges by the defendant. In view of what I have stated above as to the Plaintiff's handling of this matter, I don't feel inclined to so order.

19. I will in all the circumstances, allow the defendant's said application. I set aside the interlocutory judgement entered on 8 December 2010 and consequential Decree and the defendant shall have unconditional leave to defend this suit. The Defendant may enter appearance and file Defence within fourteen (14) days of delivery of this Ruling. Costs of the application shall be in the cause. Orders accordingly.

**DATED and DELIVERED at NAIROBI this 5<sup>th</sup> day of July, 2012.**

**J. B. HAVELOCK**  
**JUDGE**