



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 78 of 2004

NYANGARESI ONGORO.....1<sup>ST</sup> PLAINTIFF

SAMUEL ORINDO OMOKAYA.....2<sup>ND</sup> PLAINTIFF

VERSUS

FIDELITY COMMERCIAL BANK LIMITED.....DEFENDANT

RULING

By this application, the Defendant/Applicant prays for orders that the default judgment entered herein be set aside; and that the money paid to the Plaintiff's auctioneers be returned to the Applicant. The application is brought by an Amended Chamber Summons dated 8<sup>th</sup> July, 2009 and based on **Order V Rule 9, Order 1XA Rules 10 and 11, Order L Rule 17 and Order XXI Rule 6** of the **Civil Procedure Rules**, and **Sections 3A and 63(e)** of the **Civil Procedure Act**.

To the application, both parties filed written submissions. After considering the pleadings and the submissions of counsel, I find that the main issue is whether the judgment entered in this matter was regular. If it was irregular, it ought to be set aside *ex debito justitiae*. But if it was not irregular, the court is still endowed with a wide and unfettered jurisdiction under **Order IXA**. Wide, however, as the discretion of the court may be, it ought to be exercised judicially depending on the facts of each particular case.

On the facts of this case, the Defendant/Applicant's counsel filed a Notice of Appointment of Advocates on 15<sup>th</sup> March, 2004. The Plaintiff was subsequently amended on 3<sup>rd</sup> December, 2008 and was endorsed for service on M/s Wandabwa & Company, Advocates for the Applicant. Notwithstanding this express endorsement on the face of the amended plaintiff, it was never served on the said advocates. Instead, it was served directly upon Fidelity Commercial Bank Ltd, Wandabwa's clients, even though that Bank's name had been deleted from the list of those to be served.

This sort of confusion could lead to uncalled for delay with the Bank thinking that its advocate was duly served as indicated on the face of the amended plaintiff. This would render the judgment irregular for non service on the person named to be served, and is a good reason for setting aside the judgment *ex debito justitiae*.

The default judgment entered herein is accordingly set aside along with all consequential orders. The Defendant to meet the Plaintiff's costs, and the Auctioneer to tax his costs.

Orders accordingly.

**L. NJAGI**  
**JUDGE**

**DATED and DELIVERED at NAIROBI** this 6<sup>th</sup> day of November, 2012

**ODUNGA**  
**JUDGE**

