



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO 2959 OF 1997**

**NAIROBI CITY COUNCIL.....PLAINTIFF**

**VERSUS**

**SHEIKH FAZAL LOLAHI NOORDIN &**

**CHARITABLE TRUST.....DEFENDANT**

**RULING**

This is an application on behalf of the defendant by way of Chamber Summon under Order 9A Rules 3(1), 10 and 11 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

Lady Justice E. Owuor handled the application on 26th February, 1998 and granted a stay of order of attachment given on 7th January, 1998 and the order of sale of the subject matters made on 22nd January, 1998.

As at the time the application came up for hearing on 12th March, 1998 the order for stay had been overtaken by events as counsel informed the court that the sale took place on 25th February, 1998 a day before the present application was filed. however, as the formalities to complete the sale had not been finalised counsel argued prayer No. (c) which reads:

“(c) The Ex-parte judgment of this Honourable court given herein on 10th December, 1997, and the Decree therefore issued by this court on 22nd December, 1997 and all subsequent proceedings and orders be set aside.”

The application is supported by an affidavit sworn by one Abdul Waheed Sheikh as one of the Trustees of the defendant. The thrust of the defendant’s case is that no summons or other process issued by the court in this suit were served upon the defendant.

The plaintiff through counsel has strenuously opposed the application. Grounds of opposition were filed alongside the replying affidavit. It is the plaintiff’s case that the defendant was properly and lawfully served and that the execution process was carried out meticulously as by law required.

The end result of this application shall depend on whether or not any service of court process was effected upon the defendant or its representatives or agents.

The first affidavit on record is sworn by one Geoffrey Mbutia a process server of this court. It was filed on 10th December, 1997 and it is deponed therein that he served one Abdul Chatur Sheikh with the summons to enter appearance together with a copy of the plaint. He accepted service but declined to sign on the reverse of the summons in acknowledgement thereof. The said Abdul Chatur Sheikh is also said to

have confirmed to the process server that he is the chairman of the Board of Trustees of the defendant herein.

At the hearing of the application, the learned counsel for the defendant called Mr Abdul Waheed Sheikh to testify on the service of summons. Mr Abdul Waheed Sheikh told the court that he is one of the Trustees of the Defendant. there are two other trustees who are his brothers - Mr Abdul Hameed Sheikh and Mr. Abdul Chafur Sheikh. he went on to say that he lives in Muthaiga while Abdul Hameed Sheikh resides in Riverside Drive. Abdul Chafur Sheikh has been residing in the United Kingdom and he did not know any person by the name Abdul Chatur Sheikh. If such a person exists, he has never been a trustee of the defendant.

The process server, filed a subsequent affidavit which is annexed to the reply to the application wherein he says, the person referred to in his affidavit of service as Abdul Chatur Sheikh should read

Abdul Ghafur Sheikh. This was purely a typing error which we did not notice when signing the affidavit.

Mr Abdul Waheed Sheikh told the court that even after the amendment made by the process server, the position as to service would not change because his brother was - in November, 1997 - in the United Kingdom and so was he- Mr Abdul Waheed Sheikh. There was no way Abdul Ghafur Sheikh would be in Kenya without his knowledge and if he were to be here he would be residing with him.

Mr Abdul Waheed Sheikh admitted that the building at which the service was effected is known to him and that one of his brother Abdul Shakoor Sheikh resides therein. However, his said brother is not one of the trustees and is not connected with the trust in any capacity. They are not in talking terms nor do they visit each other.

For reasons not known to the court, the process server was not called to be cross-examined on the contents of his affidavit.

I saw Mr. Abdul Waheed Sheikh testify. I watched his demeanour. Before I wrote the ruling I asked to see his passport to confirm whether he was out of the country when service was effected, because he said he was in the United Kingdom with his brother Abdul Ghafur Sheikh. I have seen the original passport and copies thereof are part of this record.

On my part, I believe what Mr Abdul Waheed Sheikh told the court. I consider his evidence as truthful and honest. The fact that he admitted knowing the building where service was allegedly effected and that indeed one of his brothers lives there, adds to his credibility.

I accordingly, find that the defendant was not served with summons to enter appearance and that any judgment purported to have been entered cannot be sustained.

It was irregular.

In view of the foregoing the said judgment entered on 10th December, 1997 is hereby set aside. Consequently all orders that flowed therefrom must be and are hereby set aside.

Fresh service must be effected upon the defendant under the rules. The defendant shall have the costs of this application. Orders accordingly.

Dated and delivered at Nairobi this 8th day of April, 1998.

A. MBOGHOLI MSAGHA

JUDGE

