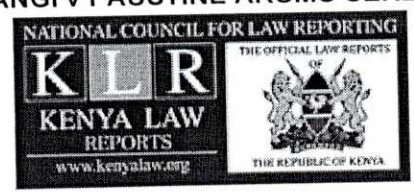
MR ONGOYA CIVIL LIT. 15

PRINT

ELIJAH C. MWANGI v PAUSTINE AKUMU SEREJE [1996] eKLR



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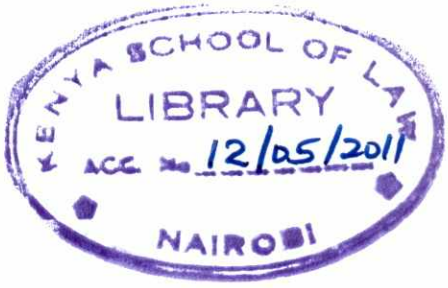

REPUBLIC OF KENYA

Court of Appeal at Mombasa

Civil Appeal 88 of 1996

ELIJAH C. MWANGI.....APPELLANT

AND

PAUSTINE AKUMU SEREJE.....RESPONDENT

(Appeal from a ruling of the High Court of Kenya at Mombasa (Mr. Justice Mbogholi) dated 8th day of August, 1995

IN

H.C.C.C. NO. 57 OF 1995

****

RULING OF THE COURT

On 8th August, 1995 the superior court (A. Mbogholi Msagha, J.) granted a conditional stay against execution of a decree passed by the Senior Resident Magistrate's Court in Senior Resident Magistrate's Civil Case No. 182 of 1995. This order was made in High Court Civil Appeal No. Miscellaneous 57 of 1995. The use of the word miscellaneous in numbering of the appeal is wrong as what was filed was a substantive appeal against refusal by the learned magistrate to set aside an ex-parte judgement entered against the present applicant which judgement was entered for non-appearance of the applicant in that court. As the learned judge has pointed out the crux of the matter was whether or not the applicant had been properly served. The superior court was moved by the applicant under Order 41 rule 4 of the Civil procedure Rules.

This appeal has been filed without any leave to appeal having been obtained as there is no automatic right of appeal under Order 42 the Civil Procedure Rules. See Order 42 rule 1 (1) (z). Rule 4 of Order 41 is not referred to therein. No appeal lies except with leave under Order 41 rule 4.

We have therefore no alternative but to strike out this appeal but as the point regarding failure to obtain leave was not taken at the first available opportunity by the respondent's counsel, we make no order as to costs. The applicant can of course still prosecute the appeal in the superior court if he wishes to.

Before parting with this appeal we would express our misgiving about judgement in default of appearance being entered when the summons was allegedly served on the applicant's driver. This is in direct contravention of order 5 rule 9 of the Civil Procedure Rules. See Waweru v. Kirano (1969) EA. 172 wherein even service on the wife of the defendant without enquiring about the defendant's whereabouts was held to be bad service. A driver cannot be treated as a member of a defendant's family or an agent empowered to accept service within the meaning of order 5 rule 12 of the Civil Procedure Rules.

Dated and delivered at Mombasa this 18th day of July, 1996.

R.O. KWACH

.....

JUDGE OF APPEAL

P.K. TUNOI

.....

JUDGE OF APPEAL

A.B. SHAH

.....

JUDGE OF APPEAL

I certify that this is true copy of the original.

DEPUTY REGISTRAR

REPUBLIC OF KENYA
IN THE HICH COURT OF KENYA AT BUNGOMA
CIVIL SUIT NO. 73 OF 2002

JOYCE N. MUSOKO ..... **PLAINTIFF**

VS

HENRY MUTENYO ..... **DEFENDANT**

JUDGMENT

By a plaint dated 20.5.2002 Joyce N. Musoko sued Henry Mutenyo and made the following prayers against him:

(a) *A declaration that the defendant has erected a building which substantially encroaches on the Plaintiff's plot No. E. BUKUSU/S. KANDUYI/4171 and should compensate the plaintiff for inconvenience and trespass.*

(b) *A demolition order for the removal of the encroachment.*

(c) *A permanent Injunction restraining the defendant his agent and or servants from further interference, construction and or working on the Plaintiff's parcel No. E. BUKUSU/S. KANDUYI/4171.*

(d) *Costs of this suit.*

(e) *Interest at the usual court rates.*

(f) *Any other relief that this Honourable court may deem fit and just to grant.*

It would appear the pleadings plus the summons were served upon the defendant and he failed to enter appearance nor file a defence. Interlocutory Judgment is said to have been entered against the defendant on 1st April 2003 upon the request of the plaintiff. The suit was therefore fixed for formal proof.

The plaintiff testified without calling a witness.

Before considering the plaintiff's evidence which were tendered before me I must satisfy myself that the interlocutory Judgment was properly entered. The record reveals that on 1st April 2003 one Mr. Chango appeared at the Civil registry representing the firm of Mr. Khakula for the plaintiff. It is also indicated that the defendant was absent. It is noted that the defendant did not enter appearance. On the same date the matter was placed before the Deputy Registrar who made an order for this suit to proceed for hearing on formal proof.

The request for Judgment dated 17th September 2002 was lodged in court on 24th September 2002.

There is no interlocutory Judgment made by the Deputy Registrar on record. This suit therefore proceeded by formal proof on the mistaken belief that there was an interlocutory Judgment. Hence the proceedings of

11.2.2004 were erroneously taken in the absence of the defendant. The defendant should have been served with a hearing notice.

In the event that I am shown that indeed there was an interlocutory Judgment then I am of the view that the same was erroneously entered because there was no proper service. The affidavit of service of Moses Wafula Simiyu sworn on 10th August 2002 shows that the defendant was not personally served. It would appear service was effected upon one Edwin Mutenyo, who is alleged to be the defendant's son. This is contrary to the provisions of order V rule 9 of the Civil Procedure rules which provides that a defendant must be served personally or in the alternative his agent empowered to accept service. The aforesaid affidavit of service does not mention that Edwin Mutenyo was the agent of the defendant.

In the end I have concluded that there was no proper service. Consequently any ex parte Judgment which might have been entered is ordered set aside. The defendant was not served with a hearing Notice to attend the hearing of 11.2.2004, hence there were no competent proceedings. I exercise my inherent power to set aside the said ex parte proceedings ex-bito Justititae.

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The defendant should be properly served with the pleadings and summons.

Costs shall be in the cause.

DATED THIS 26th DAY OF March 2004

J.K. SERGON
JUDGE

3.

PRI

LONRHO MOTORS EAST AFRICAN LIMITED t/a BRUCE TRUCKS & ENGINEERING V INDEPENDENT ADJUSTERS (K) LTD t/a MCLARENS TOPLIS & ANOTHER & ANOTHER [2005] eKLR

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 2694 of 1998

LONRHO MOTORS EAST AFRICAN LIMITED

t/a BRUCE TRUCKS & ENGINEERING..... PLAINTIFF

VERSUS

INDEPENDENT ADJUSTERS (K) LTD

t/a MCLARENS TOPLIS .....1ST DEFENDANT

KENYA WILDLIFE SERVICES..... 2ND DEFENDANT

RULIN.G

By their Chamber Summons of the 28.1.2005 the Applicant seeks to set aside the judgment in default entered herein for the Plaintiff on the 9.5.2000.

The Applicant contends that the summons herein had not been served upon it and that the service of the proceedings on a Mr. Geoffrey Waurumo was not on a person authorized to receive any summons and that he was not a principal officer of the company.

This dispute led to Mr. Kiambo being called to give evidence in support of his affidavit filed on the 1.4.2005 in which he admitted being employed by the Applicant Company but that he was not a principal officer of the Applicant Company. He admitted receiving the summons to enter an appearance.

In cross examination he said he was a Loss Adjuster who did reports for the Applicant. He was not in management but was an employee at the time he was given the summons.

Order V rule 2(a) of the Civil Procedure Rules states that:

"Subject to any other written law, where the suit is against a corporation the summons may be served

(a) on the secretary, director or other principal officer of the company or

It is not in dispute that Mr. Kiambo was neither secretary nor a Director of the Applicant. Was he a principal officer?

I accept that he was a senior employee of the Applicant. A principal officer must be some person other than the Company Secretary or a Director of the company. He must in fact be a senior officer of the company.

In the case of **Remco Ltd v Mistry Jadra Pastat & Co. Ltd & Others (2002) I EA 233 (CCK)** Ringera, J (as then was) held that a company was not properly served as a receptionist who received the proceedings was neither a secretary, director nor principal officer of the company.

In this case although Mr. Kiambo was an employee of the company I am of the view that he was sufficiently senior to perform the duties of a principal officer.

That, however, does not dispose of the matter for even if the proceedings were served a court has discretion to set aside the ex parte judgment if the judgment debtor has shown it has a prima facie reasonable defence to the suit.

It appears that the Applicant was instructed by an insurance company in Japan to have repairs done to some of the vehicles which belonged to the Second Defendant and instructed the Plaintiff/Respondent to conclude the work.

In the proposed statement of defence annexed to the replying affidavit of the Applicant it is admitted that the Applicant instructed the plaintiff/respondent to carry out repairs to the said vehicles but states that it was an authorized agent of the said insurance company.

In the replying affidavit sworn by Victor Majani the Group Credit Manager of the plaintiff he depones that on the 23.4.1994 the Applicant instructed the plaintiff/respondent to undertake repairs on the vehicles belonging to the 2nd defendant but did not disclose that the instructions were given on behalf of the said insurance company.

In paragraph 5 and 6 of the said affidavit the deponent states:

"5. That the 1st defendant while disclosing to the plaintiff that the 2nd defendant was the owner of the motor vehicles and even insisting that on completion of repairs would have to meet the 2nd defendant's approval, did not at all state that the 2nd defendant would be responsible for the repair and related charges. Thus when the 2nd defendant sought to know whether the repairs of the motor vehicles had been completed and thus whether the same could be collected, the plaintiff sought the following documents from the 2nd defendant pending such release:

(i) A letter from the 1st defendant authorizing release and undertaking to pay the repair costs; and

(ii) A clearance satisfaction note.

"6. That on completion of the repairs the 1st defendant expressly authorized release of the said motor vehicles by the plaintiff to the 2nd defendant and undertook to effect payment for the workshop services rendered which were totaling Kshs. 3,373,941.70 (being made of repairs and storage charges) and indeed effected payment of a sum of Kshs.2,600,000/= being part payment leaving a balance of Kshs.1,036,741.70, which it kept promising that it would settle".

The documents annexed to the affidavit shows that the applicant by a letter of the 28.12.1994 confirmed it was in order to release the vehicles to the 2nd defendant. This letter refers to the Applicant having received part of the funds towards the cost of repairs and they had been in touch with the said insurers with regard to settlement of the sums due.

From the correspondence it appears that the Applicant was acting for an insurance company in Japan in the settlement of an insurance claim made by the 2nd defendant. However, the Applicant took on itself the responsibility of authorizing the release of the vehicles having authorized the plaintiff/respondent to receive the same.

The question of agency does not therefore arise as the vehicles belonged to the second defendant and were repaired at the request of the Applicant. The insurers in Japan were not in anyway parties to the transaction.

In the result I do not find that the Applicant has a defence to the claim.

In the event I dismiss this application with costs to the 1st respondent.

Dated and Delivered at Nairobi this 30th day of September 2005.

P.J RANSLEY

JUDGE

REPUBLIC OF KENYA
IN THE HIGH COURT KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI

Civil Suit 689 of 2004

NAIROBI FLOUR MILLS LIMITED .....PLAINTIFF

VERSUS

JOHNSON KITHETE t/a
FARMERS GENERAL STORES.....DEFENDANTS

RULING

The defendant's chamber summons dated 3rd May 2005 is brought under Order IXA Rule 10 of the Civil Procedure Rules. It seeks to set aside judgment entered against the defendant in default of appearance.

The defendant's application is based on the allegation of non-service of the summons upon the defendant.

The defendant gives two reasons why he holds that he could not have been served. Firstly is that his business is known as MUNGI FARMERS TOBACCO, COL LTD. and not MUINGE STORES as stated in the affidavit of service. The defendant, it is to be noted, did not attach evidence of his alleged limited liability company. The court has therefore no opportunity of verifying where the truth lies in the two opposing affidavits.

The second reason given by the defendant was that he was in Mombasa on a business trip for two weeks, from 6.1.2005 to 19.1.2005, and therefore could not have been served on 8.1.2005. One immediately notes that the trip to Mombasa was a business trip. That being so, the defendant failed to attach evidence, of having been away, on the day of the alleged service.

The defendant deponed that he only came to know about the judgment on receipt of notification of entry of judgment.

The defendant's counsel in submissions stated that it is for the party, who alleges that service of the summons took place to prove. He argued that the process server had not in his affidavit of service, and in the further affidavit proved service took place. Defence counsel faulted the affidavit of service in wrongly describing the defendants business place as "**Muinge**"; for the process server not disclosing how he knew that the lady he found at the shop was defendant's wife; and for the process server's failure to state how the defendant introduced himself; and for the failure of the process server to state the street, road or building where he effected service. Counsel then concluded by saying that the defendant had a defence, which raises triable issues.

The application was opposed. The affidavit in reply sworn by Preyesh Shah. The deponent stated that the defendant is known to him personally and that he had delivered goods to the defendant's several businesses within Machakos township. The deponent doubted that the draft defence raised traible issues because of the defendant's failure to produce receipts of alleged payment of the plaintiff's debt.

Plaintiff's counsel in submission said that the defendant was served with the summons, and that the place of service was definite as seen in the affidavit of service.

That the defendant had failed to summon the process server and since he had not done so the affidavit of process server is all the court has, to assist in determining whether service was effected. He then drew the attention of the court to paragraph 4 of the draft defence, and said that to plead therein, that the defendant had paid the debt, then to fail to prove such payment with receipt was in itself admission of the debt. The draft defence, therefore, counsel argued, was a mere sham, with just mere denials and did not therefore raise triable issues. He concluded by saying that service of the summons was very regular and said that the defendant does not deserve the orders sought.

There are two issues to consider in this ruling. First is, whether there was service of the summons. If there was no service, then judgment will be set aside ex debito justitiae. If service however was effected, the second issue to consider is whether the defendant raises a defence with triable issues.

On the first issue, I have considered the affidavit of service filed in court on 10th February 2005. That affidavit, other than it wrongly states the defendant's shop, by mistakenly stating it as "**MUINGE STORES**," rather then "**MUINGI,**" cannot be faulted. The process server succinctly stated how he served the summons. He clearly states that he failed to find the defendant on two occasions, but traced him at his shop on 8th January 2005. He then clearly stated that the defendant introduced himself to the process. That affidavit in my finding cannot be faulted. In my finding therefore, the defendant was served with the summons. The defendant alleged that he was in Mombasa on the material date of service but failed to prove this with any documentary evidence, particularly if as he states, he was on a business trip. The burden of proving that he was

not in Machakos on the material date lies squarely on the defendant. See section 108 Evidence Act it provides: -

> **"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."**

On the issue whether the draft defence raises any triable issues. In paragraph 4 of the draft defence the defendant state: -

> **"The defendant admits having been supplied with some goods by the plaintiff which he fully paid for but avers that they did not amount to kshs 4, 77, 255. 70"**

To reiterate the defendant admits having been supplied by the plaintiff with some goods. The defendant did not give particulars of the said "*some goods*" and that just exposes the draft defence to be a mere denial. I accept the plaintiff's submission that it was incumbent upon the defendant to give details of the payments, if nay, of the goods supplied and I would add that the defendants ought to have given value to "*some goods*" he acknowledges were supplied to him.

I find and I hold that the defendants defence does not raise triable issues to the plaintiffs claim.

The end result is the following orders: -

(1) That the defendant's application dated 3rd May 2005 is dismissed with costs to the plaintiff.

Dated and delivered this 19th day of August 2005.

MARY KASANGO
JUDGE

REPUBLIC OF KENYA
IN THE HIGH COURT KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI

Civil Suit 689 of 2004

NAIROBI FLOUR MILLS LIMITED .....PLAINTIFF

VERSUS

JOHNSON KITHETE t/a
FARMERS GENERAL STORES.....DEFENDANTS

RULING

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The defendant's application is based on the allegation of non-service of the summons upon the defendant.

The defendant gives two reasons why he holds that he could not have been served. Firstly is that his business is known as MUNGI FARMERS TOBACCO, COL LTD. and not MUINGE STORES as stated in the affidavit of service. The defendant, it is to be noted, did not attach evidence of his alleged limited liability company. The court has therefore no opportunity of verifying where the truth lies in the two opposing affidavits.

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The defendant deponed that he only came to know about the judgment on receipt of notification of entry of judgment.

The defendant's counsel in submissions stated that it is for the party, who alleges that service of the summons took place to prove. He argued that the process server had not in his affidavit of service, and in the further affidavit proved service took place. Defence counsel faulted the affidavit of service in wrongly describing the defendants business place as "**Muinge**"; for the process server not disclosing how he knew that the lady he found at the shop was defendant's wife; and for the process server's failure to state how the defendant introduced himself; and for the failure of the process server to state the street, road or building where he effected service. Counsel then concluded by saying that the defendant had a defence, which raises triable issues.

The application was opposed. The affidavit in reply sworn by Preyesh Shah. The deponent stated that the defendant is known to him personally and that he had delivered goods to the defendant's several businesses within Machakos township. The deponent doubted that the draft defence raised traible issues because of the defendant's failure to produce receipts of alleged payment of the plaintiff's debt.

Plaintiff's counsel in submission said that the defendant was served with the summons, and that the place of service was definite as seen in the affidavit of service.

That the defendant had failed to summon the process server and since he had not done so the affidavit of process server is all the court has, to assist in determining whether service was effected. He then drew the attention of the court to paragraph 4 of the draft defence, and said that to plead therein, that the defendant had paid the debt, then to fail to prove such payment with receipt was in itself admission of the debt. The draft defence, therefore, counsel argued, was a mere sham, with just mere denials and did not therefore raise triable issues. He concluded by saying that service of the summons was very regular and said that the defendant does not deserve the orders sought.

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To reiterate the defendant admits having been supplied by the plaintiff with some goods. The defendant did not give particulars of the said "*some goods*" and that just exposes the draft defence to be a mere denial. I accept the plaintiff's submission that it was incumbent upon the defendant to give details of the payments, if nay, of the goods supplied and I would add that the defendants ought to have given value to "*some goods*" he acknowledges were supplied to him.

I find and I hold that the defendants defence does not raise triable issues to the plaintiffs claim.

The end result is the following orders: -

(1) That the defendant's application dated 3rd May 2005 is dismissed with costs to the plaintiff.

Dated and delivered this 19th day of August 2005.

MARY KASANGO
JUDGE

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI

Civil Suit 816 of 2000

HOUSING FINANCE COMPANY OF KENYA LIMITED.....PLAINTIFF

VERSUS

JUSTUS OKWATCHO.....1ST DEFENDANT
PRISCILLA NYAWIRA OKWATCHO.....2ND DEFENDANT

RULING

The defendants by their chamber summons dated 24th June 2005 seek the setting aside of judgment and decree obtained by the plaintiff in default of appearance. The application is brought under Order I XA Rule 10.

The defendants charged their property **NAIROBI BLOCK 106/5** to the plaintiff on or about 1990 for kshs 630, 000. In the affidavit of the 1st defendant, in support of the application it is deponed that the interest chargeable was not 16.5% per annum; that neither he nor the second defendant were served with statutory notice, of the plaintiff's intention to sell the charged property; that both defendants were not aware of the advertisement of the charged property and as a consequence of not being aware, of the sale of the charged property, they were unable to monitor the auction sale; that they were unaware of the interest charged in the plaintiff. The 1st defendant denied that they were ever served with the summons. In submissions the defendant's counsel found fault with

the affidavit to service; counsel said that the defendants were not served, and particularly emphasized that the affidavit of service, does not disclose that the 2nd defendant, was served. He denied that the cell phone number, given in the affidavit of service, belonged to the 1st defendant. Counsel submitted that the particulars given by the process server, regarding 1st defendant's place of residence was conjunctive; he said if indeed service was effected then nothing would have been easier than the 1st defendant acknowledging service. In view of the large amount in this claim, counsel said it was important for the court to be satisfied about service. Counsel argued that under section 74 (3) Registered Land Act (cap 300) the only option opened to the plaintiff was to file suit, and not to sell the charged property. Counsel said that in any case the defendants were not notified of the sale, and therefore the due process of a sale of a charged property was not followed. Counsel drew the court's attention to the draft defence annexed to the supporting affidavit.

The application was opposed. The replying affidavit stated that the plaintiff had in all circumstances acted within the law and followed the valid procedures. That the defendants, on defaulting were served with demand notices, statutory notice, and notifications of sale. The deponent stated that the application ought not to be granted and that the draft defence was a mere denial. Plaintiff's counsel in opposition drew the court's attention to the affidavit of service and said that it was the defendants who selected not to file their defence or memorandum. That it was the duty of the defendants to ask for the process server to avail himself for cross examination, but this they did not do, and therefore the service, cannot be discredited. That it was also not enough for the

defendant, to say that they did not default in payment, of their debt, and yet fail to annex evidence of repayment.

The defendants counsel in final response said that under Order 5 rule 15 the court can summon the process server to attend court for cross examination. That it was not the burden of the defendant to summon the process server. Counsel also argued that the affidavit of service breached section 35 of the Advocates Act for having been drawn by an unqualified person. To this, plaintiff's counsel responded that the affidavit was competent and capable of assisting the court in determination of service.

I wish to start by considering the submissions by defence counsel on Section 35 Cap 16. That section lays an obligation, on any person drawing documents stated in section 34, to endorse the name and address of the firm of advocates. I have looked at the affidavit of service filed in court on 19th May 20004. The said affidavit is drawn by Francis M Ndaiga and it is filed by Mathenge Muchemi Advocates. There was no evidence presented before me, that the said Francis Ndaiga is not advocate, but even if he was not an advocate I am satisfied that the mischief these two sections were addressing was that there be notice that there is an advocate who is answerable for the legal document. I find that having the name of Mathenge & Muchemi Advocates satisfies that requirement.

Regarding section 74 (3) RLA, which defence said laid a burden on the plaintiff to get another security from the defendants before filing suit; I was unable to follow the logic of that argument. That section provides: -

> **"The chargee shall be entitled to sue for the money secured by the charge in the following cases only –**

(a) **where the chargor is bound to repay the same;**

(b) **where by any cause other than the wrongful act of the chargor or chargee, the charged property is wholly or partially destroyed or the security is rendered insufficient and the chargee has given the chargor a reasonable opportunity for providing further security which will render the whole security sufficient, and the chargor has failed to provide such security;**

Counsel failed to convince me that, that section is relevant to the facts before me.

In considering an application such as the one before me I am required, in exercise of my discretion to consider whether service effected on the defendant was proper. Order V Rule 8 provides: -

"**Save as otherwise prescribed, where there are more defendants than one, service of the summons hall be made on each defendant.**"

Having considered the affidavit of service filed herein on 19th May 2004, I find that the 2nd defendant, was not served with summons as the above rule requires. According to that affidavit only the 1st defendant was served. I therefore find that judgment entered against the 2nd defendant on 27th may 2005 to be improper and I therefore will set it aside ex debito jusititiae.

In regard to the service of the 1st defendant I find that it was not faulted by the submissions made before me. To say that the affidavit was mere conjecture, merely because the 1st defendant did not acknowledge service is I think to simplify the matter. It is not always that parties agree to acknowledge service of process on them, they do, for own reason refuse to acknowledge service. I do therefore find the service on the 1st

defendant was proper. In exercise of my discretion, I am obligated to consider whether the draft defence herein, is a reasonable one or whether it raises triable issues: See PATEL V CARGO HANDLING SERVICES LTD [1974] EA 75.

The draft defence denies the rate of interest to be 16.5% per annum and yet the charge instrument, which the 1st defendant does not deny signing contains the rate of interest at 16.5% per annum. The defendants then, in their defence, went into a lot of detail about their lack of knowledge of their indebtedness, of the sale of the charge property and of any demands sent to them. The argument in the defence, essentially is saying, that the sale of the property was wrongful. Having said that the sale was wrongful the defendants do not counter claim for the loss of the property. Their failure to counter claim leaves their defence to be categorized as a mere denial. It is not conceivable that one who says, that their property ought not to have been sold, and then allege that it was fraudulently sold can do so without seeking a counter claim. To fail to file a counter claim leaves the defendants complaint to be empty clamour. I find that the draft defence herein raises no triable issues that can go for trial.

I also find that there is no obligation on the court to summon the process server for cross-examination. It is the responsibility of the applicant to so summon him.

The end result is that the court will issue the following order: -

(1) **That judgment entered on 27th May 2005 as it relates to the 2nd defendant is hereby set aside for lack of service;**

(2) **The application dated 24th June 2004 as it relates to the 1st defendant is hereby dismissed with costs to the plaintiff.**

Date and delivered this 17th day of August 2005.

MARY KASANGO
JUDGE

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REPUBLIC OF KENYA

MILIMANI COMMERCIAL COURTS, NAIROBI

Civil Case 684 of 2003

KENYA BUS SERVICES LTD.....PLAINTIFF

-V E R S U S-

SAMMY NJERU.....1ST DEFENDANT

LINEAR COACH CO. LTD .....2ND DEFENDANT

R U L I N G

By this application, the applicant seeks from the court the following orders-

1. THAT a stay of execution be granted pending the hearing and determination of this application.
2. THAT the judgment entered herein and all consequential orders be set aside *ex debito justitiae.*
3. THAT the 2nd defendant be granted leave to file defence.
4. THAT costs of this application be provided for.

The application is brought by way of a chambers summons expressed to be made under O.IXA rule 10, O.XXI rule 22(1) of the Civil Procedure Rules and S.3A of the Civil Procedure Act. It is supported by the annexed affidavit of IBRAHIM MANOTI, the general manager of the 2nd defendant, and is premised on the grounds that-

(a) The applicant was never served with the plaint and summons to enter appearance.

(b) The applicant has a cogent defence to the suit.

The application is opposed. Acting on the plaintiff/respondent's instructions, Mr. Sankale Ole Kantai, advocate, swore a replying affidavit on 18th January, 2005 and had it filed in court on 20th January, 2005.

Canvassing the application before me on 13th May, 2005, Mr. Nyakiangana appeared for the applicants while Mr. Kinyanjui appeared for the respondent. Mr. Nyakiangana argued that the applicant was never served with the summons to enter appearance and the plaint. He also contended that the affidavit of service is very shallow as the process server does not disclose the place of service, who directed him there, and who identified the manager upon whom he allegedly served the process. At any rate, the place where the process server allegedly effected service is nowhere near the defendant's registered offices. Mr. Nyakiangana further maintained that the 1st defendant is deceased and could not have been served. Upon requesting for judgment to be entered against the defendants, the plaintiff's counsel did not comply with the conditions imposed by the Deputy Registrar and therefore the judgment entered subsequent thereto was irregular. Counsel also submitted that the draft defence raises serious triable issues. These include the fact that the vehicle does not solely belong to the second defendant as it is jointly owned with a third party, the issue of negligence is heavily contested, and so is jurisdiction. All these, he said, were triable issues. He then referred the court to **REMOCO LTD. v. MISTRY JADVA PARBAT & CO. LTD. & ORS.**, HCCC No. 171 of 2001 (Milimani).

Opposing the application, Mr. Kinyanjui stated that the plaintiff's position is basically that the defendants were properly served according to the first two affidavits of

service. The applicants had requested that the process server be availed for cross examination, but when the plaintiff obliged, the defendant/applicants did not show up. They have not have not produced a copy of the 1st defendants death certificate. Having been served, the defendants had a chance to appear but they did not, judgment was then entered upon the Deputy Registrar being satisfied that it was proper to do so. Counsel then referred the court to **MANJU PATEL v. EXPRESS KENYA LTD**, Nairobi HCCC No.2979 of 1996, and requested the court to reject the application and allow the judgment on record to stand.

In reply, Mr. Nyakiangana reiterated that the Deputy Registrar's orders to serve the 1st defendant personally and the 2nd defendant at its registered office were not complied with, and the plaintiffs had, at any rate, admitted that the 1st defendant was not served personally. He requested the court to grant the orders as prayed.

I have considered the pleadings, the application and the submissions of counsel. There are two defendants in this matter. O.V. rule 8 of the Civil Procedure Rules provides-

> **"Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant."**

The first defendant is a human person while the second defendant is a body corporate. It is imperative that each of them be served with summons in accordance with the law governing service on their respective species. Service on the human species is governed by O.V rule 9 (1) read with O.V. rule 12. Rule 9(1) states-

> **"Whenever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to**

> **accept service, in which case service on the agent shall be sufficient."**

In turn, O.V rule 12 is in the following words-

> **"Where in any suit the defendant cannot be found, service may be made on an agent of the defendant empowered to accept service or on any adult member of the family of the defendant who is residing with him."**

The common thread in both provisions is that basically, the defendant ought to be served personally except where he cannot be found or he has an agent empowered to accept service. In the instant case, there was no attempt to serve the first defendant and there is not even a pretence that he was served personally. His summons to enter appearance were left and signed for by a Mr. Peter Mirambo, said to be a manager of the second defendant. It is not alleged anywhere that any effort was made to serve the 1st defendant personally, and that he could not be found. Even if he could not be found, the documents should have been served on an adult member of his family or his agent, if any, who was empowered to accept service. Mr. Mirambo is not stated to be a member of the 1st defendant's family. Can he be said to have been the 1st defendant's agent empowered to accept service? Commenting on a provision in the Indian Code of Civil Procedure 13th edition, which is in *pari materia* with our O.V rule 9, Mulla says-

> **"Before service of summons on a person other than the defendant is held to be sufficient under this rule, it must be established by evidence that the person had been duly authorised to accept service on behalf of the defendant."**

There is no evidence that Mr. Mirambo was duly authorised to accept service on behalf of the 1st defendant. I therefore find that the 1st defendant was never served personally, and the purported service on him through an unauthorised third party was improper.

It has already been observed that the second defendant is a body corporate. Service on such bodies is provided for in O.V. rule 2 of the Civil Procedure Rules. This rule states-

> **"Subject to any other written law, where the suit is against a corporation the summons may be served-**
>
> **(a) on the secretary, director or other principal officer of the corporation; or**
>
> **(b) if the process server is unable to find any of the officers of the corporation mentioned in rule 2(a), by leaving it at the registered office of the corporation or sending it by prepaid registered post to the registered postal address of the corporation, or if there is no registered postal address of the corporation by leaving it at the place where the corporation carries on business or by sending it by registered post to the last known postal address of the corporation."**

In paragraph 2 of the supporting affidavit sworn and filed on 20th December, 2004 by Ibrahim Manoti, the 2nd defendant's general manager avers-

> **"The 2nd defendant was never served with a copy of summons to enter appearance or plaint by the plaintiff as alleged in the affidavit of service filed on 13th February, 2004."**

In the affidavit filed on 13th February, 2004, the process server, one Loison Waweru, states in paragraphs 2 and 3-

> **"2. THAT on the 2nd December 2003 at around 9.00am I received from M/s Kantai & Company, advocates for the plaintiff summons to enter appearance together with a plaint both in duplicate with instructions to**

serve the same upon Linear Coach Company Limited and Another at their Bus terminus within Nairobi.

3. **THAT upon going to the said booking offices, I introduced myself to the secretary and the purpose of my visit, she directed me to the company manager Peter Mirambo who received the said documents, went through them before signing on behalf of the company and on behalf of the 1st defendant, their driver."**

Copies of the summons which were signed are attached to the affidavit of service, and they indicate that they were received by Peter Mirambo on 2nd December, 2003 at 12.40pm. In his affidavit in support of the application, Mr. Manoti confines himself to merely stating that the second defendant was never served as alleged in the affidavit of service. The process server has given the name and designation of the person upon whom he served the summons to enter appearance and the plaint. If the 2nd defendant was not served at all as alleged by Mr. Manoti, then what would one make of the documents signed by Mr. Mirambo? Is it that the 2nd defendant does not have an employee by the name of Peter Mirambo, or is it that Peter Mirambo is not a manager? Mr. Manoti's affidavit is totally silent on that issue and does not even allude to it. As the existence of a manager called Peter Mirambo is not denied, this leaves me with only one conclusion i.e. the second defendant was served through Mr. Peter Mirambo.

O.V rule 2 (a) requires that service on a corporation be effected **"on the secretary, director or other principal officer of the corporation."** The term **"principal officer"** is not defined and, in the absence of a definition or an authority to the contrary, I take the view that the expression includes a manager. I therefore find that

the 2nd defendant was properly served through its manager called Peter Mirambo. Consequently, judgment against the 2nd defendant is regular.

The application before the court is brought, *inter alia,* under O.IXA rule 10 of the Civil Procedure Rules. This rule states-

> **"Where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."**

Case law is replete with authorities to the effect that the above rule confers on the court an unfettered discretion to set aside even a regular judgment and any consequential decree or order. However, that discretion must be exercised judicially. In the case of **SHAH v. MBOGO & ANOR.,** [1967] E.A. 116, Harris J. considered the principles governing the exercise of the court's discretion to set aside a judgment obtained ex parte. The learned judge then said at p.123-

> **"This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."**

These sentiments were accepted, adopted and applied in many subsequent cases.

The principles governing the setting aside of an ex parte judgment were further visited in **SEBEI DISTRICT ADMINISTRATION v. GASYALI & Others.**, [1968]E.A.300, in which at p.301-2, Sheridan J. cited with approval the words of Ainley J. (as he then was) in **JAMNADAS V. SODHA** v. **GORDHANDAS HEMRAJ** [1952] 7 ULR. 11, wherein the latter had said-

> **"...The nature of the action should be considered, the defence if one has been brought to the notice of the court, however**

> **irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of a court..."**

Applying these principles to the matter at hand, I have considered the nature of the action. Looking at the plaint and the proposed defence, I note that paragraph 4 of the former states-

> **"4. At all material times the 2nd defendant was the owner of the motor vehicle KAP 484A while the plaintiff was the owner of motor vehicle KAN 113K."**

In response to this paragraph, the 2nd defendant states in paragraphs 3 and 4 of its draft defence as follows-

> **"3. The 2nd defendant denies being the owner of motor vehicle Registration Number KAP 484A and further denies that his employees, agents and/or servants drove the said motor vehicle.**
>
> **4. The 2nd defendant is a stranger to the matters pleaded in paragraph 4 of the plaint."**

Without making a definite finding at this stage, a **"copy of records"** from the office of the Commissioner of motor vehicles and dated 1st September, 2003 gives the names of Linear Coach Co., Ltd., & D.T.K. Ltd. as the registered owners of vehicle No.KAP 484A. Another copy of a police abstract on a road accident shows that at the time of the accident, the said vehicle was driven by one Sammy Njeru Karuana, on whose behalf the 2nd defendant's manager received a copy of summons. The 2nd defendant's denials are therefore devoid of any substance.

Paragraph 5 of the plaint then states-

> **"On or about 1st August, 2003 at 1.00am or thereabouts the plaintiff's authorised driver was lawfully driving the plaintiff's said motor vehicle KAN 113K along Eldoret-Nakuru Road when the 1st Defendant as the driver servant and agent of the 2nd defendant so carelessly drove managed and controlled the 2nd defendant's motor vehicle KAP 484A that he caused it to violently collide onto the plaintiff's said motor vehicle thereby causing extensive damage to the same and rendering it to be a total loss."**

This is followed by paragraphs (a) to (j) of the particulars of negligence, and paragraph 6 details the loss and damage suffered by the plaintiff. In response thereto, the 2nd defendant states in paragraphs 5 and 6 of its draft defence-

> "5. **The second defendant deny (*sic*) that on 1.8.2003 the said motor vehicle KAP 484A was being driven carelessly along Eldoret-Nakuru Road by the 1st defendants (*sic*) and that it was caused to violently collide into motor vehicle registration number KAN 113K.**
>
> 6. **The 2nd defendant denies all the particulars of negligence and particulars of damage as pleaded and enumerated in paragraphs 5 and 6 of the plaint and puts the plaintiff to strict proof thereof."**

Paragraphs 7 and 8 of the plaint then follow in the following words-

> "7. **Despite demand being made and notice of intention to sue being given the defendant has failed refused and neglected to pay the sum claimed.**

8. The cause of action accrued within the jurisdiction of this Honourable court."

The defendant's response thereto in paragraphs 7 and 8 of the draft defence is as follows-

"7. The 2nd defendant is a stranger to the pleadings in paragraph 8 of the plaint.

8. Paragraph 7 of the plaint is not admitted.

9. The defendant further avers that the plaint herein is incurably defective and an application to struck it out *(sic)* shall be raised at the hearing hereof."

Weighed *vis-à-vis* the allegations in the plaint, the 2nd defendants statements of defence are mere denials which do not raise any triable issues.

For the above reasons, I find in total that judgment against the 1st defendant was irregular and I hereby set it aside *ex debito justitiae* along with any consequential orders. As for the 2nd defendant, I find that the judgment was regular and I see no reason for interfering with it. The application therefore partly succeeds in the case of the 1st defendant, but fails in respect of the 2nd defendant.

Each party will therefore bear its costs of the application.

Dated and delivered at Nairobi this 2nd day of June 2005

L. NJAGI
JUDGE

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT

MILIMANI COMMERCIAL COURTS, NAIROBI

HCCC NO. 1593 OF 2001

TOTAL KENYA LIMITED.....PLAINTIFF

-V E R S U S-

MARSMAN CONCRETE LIMITED.....DEFENDANT

R U L I N G

By a chamber summons application dated and filed on 7th April, 2005, and expressed to be brought under O.V rule 17 of the Civil Procedure Rules, and S.3A of the Civil Procedure Act, the plaintiff/applicant seeks from the court the following orders-

1. THAT the Honourable Court be pleased to grant leave to the plaintiff/applicant to serve the summons in this suit upon the defendant by way of an advertisement in a daily newspaper.

2. THAT the Honourable Court be pleased to order that the defendant do file and enter appearance within fifteen (15) days of the date of the advertisement.

3. THAT the Honourable Court be pleased to make all such further orders and/or directions as it deems fit and just to grant.

4. THAT the costs of this application be in the cause.

The application is supported by the annexed affidavit of REBECCA MBITHI, advocate, and is premised on the following grounds-

(a) THAT the defendant has no fixed place of business known to the plaintiff.

(b) THAT as a result of the foregoing the plaintiff, through their advocates, have been unable to effect service on the defendant

(c) THAT there is no expectation that the defendant will be traced for purposes of service before the expiry of summons or at any time soon.

Canvassing the application before the court, Ms. Mbithi for the applicant traced the history of the suit from the date of filing to the date of extension of the summons on 31st January, 2005. In between, gallant efforts were made to serve the defendant, but they all went begging. An attempt was made to serve the defendant by way of registered post, and the letter was returned undelivered. Copies of the envelope duly addressed to the defendants and marked "RTS" and the certificate of registered postal article are attached to Ms. Mbithi's supporting affidavit and marked "RM-1". Consequent upon this state of affairs, I am satisfied for the above reasons that the summons herein cannot be served on the defendant in person. In the circumstances, I am further satisfied that it s fair and proper to order substituted service.

I accordingly make the following orders-

1. That the plaintiff/applicant be and is hereby granted leave to serve the summons in this suit upon the defendant by way of an advertisement in the Daily Nation Newspaper.

2. That the defendant do file and enter appearance within fifteen (15) days of the date of the advertisement.

3. That the costs of this application be in the cause.

Dated and delivered at Nairobi this 12th day of May 2005

L. NJAGI

JUDGE

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL DIVISION, MILIMANI

CIVIL CASE NO. 71 OF 2005

JOSEPH MURIGI.....PLAINTIFF

VERSUS

NATIONAL INSURANCE CORPORATION (UGANDA).....DEFENDANT

RULING

The Plaintiff seeks by chamber summons dated 4th February, 2005 leave of court to effect service of summons to enter appearance and plaint upon the Defendant outside the jurisdiction of this court, more particularly at Kamplala in the Republic of Uganda. The application is brought under Order V, Rule 21 of the Civil Procedure Rules.

I have read the supporting affidavit sworn by the Plaintiff's advocate, Mr. George Onyango Oloo. I have also perused the plaint and also the **Treaty Establishing the Common Market for Eastern and Sourthern Africa** (COMESA), particularly the **Protocal on Third Party Motor Vehicle Insurance Scheme** (Annex II of the Treaty) which is signed by both Kenya and Uganda, among other States. It would appear that the Defendant may be liable to settle the decree in Nakuru HCCC No. 504 of 1999

under the terms of the aforesaid protocal. The Defendant is described in the plaint as a registered company incorporated in Uganda.

The suit giving rise to the aforesaid decree was founded on tort committed in Kenya. The present suit is based on a contract (the aforesaid Treaty) which, by its terms, appears to be governed by Kenyan law, and thus comes within the provisions of Order V, Rule 21 (e) (iii) of the Civil Procedure Rules.

I will therefore grant the application and grant the leave sought in prayer No. 2 thereof. The Defendant may enter appearance within twenty-one (21) days after service upon it of summons to enter appearance. Costs in the cause. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF APRIL, 2005.

H.P.G. WAWERU

JUDGE

DELIVERED THIS.....DAY OF APRIL, 2005.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 82 OF 2002

(From the judgment of Civil Case No. 87 of 2000 of the Principal Magistrate's Court at NYAHURURU – C. N. SIFUNA, ESQ.)

LUCY WANJIRU KABUTHA.....APPELLANT

VERSUS

JANE MUTHONI MUCHERU.....RESPONDENT

JUDGMENT

This judgment is in respect of an appeal against the ruling of C. N. Sifuna, Resident Magistrate where she held that the appellant was sufficiently and effectively served with summons to enter appearance and thereby refused to set aside interlocutory judgment that had been entered against the appellant.

The facts giving rise to the appeal herein are fairly straight forward. The respondent filed Nyahururu Principal Magistrates Civil Case No. 339 of 1998 against Amos Mathenge and Mathew Chege praying for an order of transfer of a plot known as **L.R. NO. NYANDARUA/OL JORO OROK SALIENT/1810** or refund of the purchase price of Kshs.45,000/- plus costs and interest. The said plot was owned by the respondent and she

had appointed the said Mathtew Chege as her selling agent. The respondent was unable to recover the aforesaid sum from Chege and she filed PMCC No. 87 of 2001 against the appellant praying for a declaration that the appellant was liable to satisfy the decree in the former suit on the basis that Mathew Chege was an agent of the appellant. The summons to enter appearance were served upon Amos Mathenge who was said to be the husband of the appellant. The affidavit of service that was filed showed that the same was effected on 15th May, 2000. The process server stated that Amos Mathenge Namaru was the husband to the appellant and he had accepted and acknowledged service by signing on the reverse of the copies of the documents served. The affidavit of service did not show that Amos accepted service for and on behalf of the appellant.

The respondent then applied for judgment in default of appearance and interlocutory judgment was entered and formal proof was done and a final judgment was entered in favour of the respondent. when the appellant became aware of the judgment she applied to set it aside on the ground that she had not been served with summons to enter appearance but the application was disallowed thereby giving rise to this appeal.

In arguing the appeal Mr. Kariuki for the appellant submitted that Order V Rule 9(1) requires that whenever practicable, service shall be effected upon the Defendant in person unless he has an agent empowered to accept service on his behalf. It is not in dispute that the appellant was not personally served with summons to enter appearance and plaint but instead service was effected upon Amos Mathenge. The process server did not make any enquiries regarding the whereabouts of the appellant, counsel submitted. I have perused the affidavit of service sworn on 6th June, 2000 and I am in total agreement with the appellant's counsel on his submissions.

In ***WAWERU VS KIROMO [1969] E.A. 172*** the Defendant applied to set aside the service on him of a summons. The affidavit of the process server stated that the summons had been left with the Defendant's wife with instructions that she should keep it for her husband as he was not present at the time. It was held that as the process server

made no enquiry about the defendant's whereabouts it could not be said that he could not be found so as to allow service on his wife.

The appellant had sworn an affidavit in support of her application to set aside the exparte judgment in the trial court and deposed that although Amos Mathenge was her husband, they were not living together at the time when service was effected upon him, the appellant having filed divorce proceedings against Mr. Mathenge vide Divorce Cause No. 3 of 1995 at Nyahururu Principal Magistrate's Court. That fact had not been controverted.

In ***JOHN AKASIRWA VS ALFRED INAT KIMUSO*** Civil Appeal No. 16 of 1999 the Court of Appeal stated that:-

> ***"Proper service of summons to enter appearance in Litigation is a crucial matter in the process whereby the court satisfies itself that the other party to the litigation has notice of the same and therefore choose to enter appearance or not".***

If there is no proper service of summons to enter appearance, the court has no option but to set aside ex debito justitiae any default judgment on record, see ***GANDHI BROTHERS VS H. K. NJAGE T/A H. K. ENTERPRISES*** Milimani commercial Courts (Nairobi) Civil Suit No. 1330 of 2001.

Mr. Chege for the respondent, in opposing the appeal, argued thaT the trial magistrate, in declining to set aside the exparte judgment, was exercising her discretion and it had not been shown that her discretion was exercised in an unjudicial manner. He referred the court to ***MBOGO & ANOTHER VS SHAH [1968] E.A. 93*** where it was stated that an appellate court should not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision was clearly wrong because it had misdirected itself or because it had acted on matters on which it should not have acted.

No doubt that is the correct position in law but with respect to the trial magistrate, she had no discretion to exercise in the circumstances of the case since there was no service at all and as earlier said, the default judgment had to be set aside as a matter of right. Discretion would have arisen if service was proper and there had been for example delay in entering appearance.

Where there is no service of summons to enter appearance, an applicant does not have to show that he has an arguable defence so as to persuade the court to set aside an exparte judgment. In such circumstances, the court is under a duty to remedy the situation and uphold the integrity of the judicial process.

I am satisfied that the appeal must be allowed and I hereby do so and set aside the lower court's ruling delivered on 29th April, 2002 and allow the appellant's application dated 18th February, 2002. The respondent will bear the costs of this appeal as well as all the costs in the court below.

DATED, SIGNED & DELIVERED at Nakuru this 22nd day of October, 2004.

DANIEL MUSINGA

AG. JUDGE

22/10/2004

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 82 OF 2002

(From the judgment of Civil Case No. 87 of 2000 of the Principal Magistrate's Court at NYAHURURU – C. N. SIFUNA, ESQ.)

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VERSUS

JANE MUTHONI MUCHERU.....RESPONDENT

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This judgment is in respect of an appeal against the ruling of C. N. Sifuna, Resident Magistrate where she held that the appellant was sufficiently and effectively served with summons to enter appearance and thereby refused to set aside interlocutory judgment that had been entered against the appellant.

The facts giving rise to the appeal herein are fairly straight forward. The respondent filed Nyahururu Principal Magistrates Civil Case No. 339 of 1998 against Amos Mathenge and Mathew Chege praying for an order of transfer of a plot known as **L.R. NO. NYANDARUA/OL JORO OROK SALIENT/1810** or refund of the purchase price of Kshs.45,000/- plus costs and interest. The said plot was owned by the respondent and she

had appointed the said Mathtew Chege as her selling agent. The respondent was unable to recover the aforesaid sum from Chege and she filed PMCC No. 87 of 2001 against the appellant praying for a declaration that the appellant was liable to satisfy the decree in the former suit on the basis that Mathew Chege was an agent of the appellant. The summons to enter appearance were served upon Amos Mathenge who was said to be the husband of the appellant. The affidavit of service that was filed showed that the same was effected on 15th May, 2000. The process server stated that Amos Mathenge Namaru was the husband to the appellant and he had accepted and acknowledged service by signing on the reverse of the copies of the documents served. The affidavit of service did not show that Amos accepted service for and on behalf of the appellant.

The respondent then applied for judgment in default of appearance and interlocutory judgment was entered and formal proof was done and a final judgment was entered in favour of the respondent. when the appellant became aware of the judgment she applied to set it aside on the ground that she had not been served with summons to enter appearance but the application was disallowed thereby giving rise to this appeal.

In arguing the appeal Mr. Kariuki for the appellant submitted that Order V Rule 9(1) requires that whenever practicable, service shall be effected upon the Defendant in person unless he has an agent empowered to accept service on his behalf. It is not in dispute that the appellant was not personally served with summons to enter appearance and plaint but instead service was effected upon Amos Mathenge. The process server did not make any enquiries regarding the whereabouts of the appellant, counsel submitted. I have perused the affidavit of service sworn on 6th June, 2000 and I am in total agreement with the appellant's counsel on his submissions.

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I am satisfied that the appeal must be allowed and I hereby do so and set aside the lower court's ruling delivered on 29th April, 2002 and allow the appellant's application dated 18th February, 2002. The respondent will bear the costs of this appeal as well as all the costs in the court below.

DATED, SIGNED & DELIVERED at Nakuru this 22nd day of October, 2004.

DANIEL MUSINGA

AG. JUDGE

22/10/2004

THE KENYA LAW REPORTS

2004 VOLUME 1

Editor
GLADYS BOSS SHOLLEI

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2005

defendant. These should be more complete with tax returns and what was filed with the Registrar of Companies annually.

(f) All 4th defendants property, assets, stocks: The Court is also minded to order, particularly that the receivership was lifted that all the property, assets, books, records and documents of the company be delivered up to the 4th defendant. That is fair and proper in the circumstances and here 60 days should do.

(h) Paying the 4th defendant's creditors: May this await the trial. Probably during receivership this was done.

(j) (k): Costs of the suit plus damages and interest: These have to await the outcome of the trial.

(5) Costs: Both sides were agreed that by the way the hearing of this application has been conducted, costs be awarded on an all-indemnity- basis. Mr Oyatsi however added that those costs be on a higher scale.

The Court appreciates the great energy, research and commitment with which both sides handled this application or applications. However it is of the view that costs will be based on the normal rates but on an all-indemnity-basis.

In conclusion it is stated thus:

(a) The plaintiff has made out a case for this derivative claim to be laid and pursued to the end.

(b) The proper way to lay a derivative action is to begin with filing the suit, then following it with an application to be served along with the plaint, followed by the Court hearing and determining whether the plaintiff should continue with the action.

(c) At any time, and desirably as soon as the proceedings are instituted, the plaintiff to move the Court *ex parte* for orders of indemnity as to costs.

(d) Prayers (a) (c) (e) (f) in the present application are granted in the terms (see above).

(e) Costs in the normal rates to the plaintiff but on an all-indemnity-bases.

Orders accordingly.

Rapando v Ouma & 6 others

High Court, at Kisumu February 9, 2004
Warsame J

Civil Suit No 258 of 2000

***Civil Practice and Procedure** – service of summons – personal services – circumstances in which personal service can be dispensed with – return of service - matters that a process server must state in his return of service.*
***Civil Practice and Procedure** – summons to enter appearance— form of summons— duration which summons should give for the defendant to enter appearance – summons requiring appearance within 10 days from the date of service – whether such summons valid.*
***Civil Practice and Procedure**— judicial discretion— application to set aside an order made out of the exercise of discretion by a judge— application to set aside ex parte judgment – principles on which a court will interfere with a discretionary order.*

The 1st defendant/applicant came to court by way of a chamber summons praying that the *exparte* judgment and all consequential orders be set aside and/or reviewed and that the defendant be granted leave to file defence out of time. He argued that at the time the alleged service was effected, he was sick and was being treated at St Elizabeth Hospital, Mukumu which was to confirm that no service was effected upon him. He further alleged that he did not know anybody identified by the two names whom the process server claimed to have served the summons on his behalf.

The plaintiff /respondent argued that the 1st defendant was guilty of laches and that in any event he had been properly served.

Held:

1. Under order V rule 9 (1) of the Civil Procedure Rules whenever it is practicable, service shall be made on the defendant in person unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.
2. It is mandatory that the person serving must state in a return of service the following:
   a) The time when service was effected on the said person;
   b) The manner in which summons were served;
   c) The name and address of the person identifying the person served;

d) The place where service was effected;
e) Whether the person serving is known to the person served;
f) If there is no personal service, the person serving must indicate the relationship between the person served and the person summons were directed at in a precise manner; and
g) Must indicate that he required his/her signature in order to validate any purported service as that is the mandatory requirement of order V rule i5 and failure to adhere to the same would lead to rejection of such irregular service.

3. There should be no limits or restriction on the judge's discretion to set aside *ex parte* judgment except that if he does vary the judgment he does so on such terms as may be just. The main concern of the Courts is to do justice to the parties and the Court will not impose conditions on itself to fetter the wide discretion given by the rules save that discretionary power must be exercised judicially and not arbitrarily in order to safeguard the interest of both parties.
4. A summons to enter appearance requiring the person upon whom it is served to enter appearance within 10 days from the date of service instead of giving at least 10 days is defective and such defect makes the summons effected on the applicant improper and irregular.
5. The power to set aside *ex parte* judgment does not cease and/or extinguish because of the duration and or age of the decree.

Cases

1. *Patel v EA Cargo Handling Services Ltd* [1974] EA 75
2. *Shah, Atulkumar Maganlal v Investment & Mortgages Bank Ltd & 2 others* Civil Appeal No 13 of 2001
3. *Ceneast Airlines Ltd v Kenya Shell Ltd* Civil Appeal No 174 of 1999

Statutes

1. Civil Procedure Rules (cap 21 Sub Leg) order V rules 9(1), 12; 15 order IXX rules 10, 11
2. Civil Procedure Act (cap 21) section 3A

Advocates

Mr Otieno for the Applicant
Mr Kasamani for the Respondent

February 9, 2004, **Warsame J** delivered the following Ruling.

The matter before me concerns the exercise of judicial discretion under order IXA rule 10 and 11 and section 3A of the Civil Procedure Rules and Act. The application by way of chamber summons dated 5/10/03, which *inter alia* prayed for:

(c) that the *exparte* judgment herein and all consequential orders be set

side and/or reviewed.
(d) that the applicant be granted leave to file defence outside time."

The application is supported by the affidavit of the applicant namely Constantine Ouma who alleges that at the time the alleged service was effected, he was sick and was being treated at St Elizabeth Hospital Mukumu and confirms no service was effected upon him, during that time and/or any other time. The applicant further states he does not know anybody by the names Bwire Ouma and Joseph Mbugo whom the process server claims to have served the summons on his behalf. The applicant complains that the farming contract number 39629 does not fall on the land in dispute herein but on his own different piece and parcel number 1307 after sub division of plot number 149. He claims the land in dispute is on 1308 and he should not suffer as he was never served and much more the land in dispute is completely different from his sugarcane farming contract.

It was the submission, of Mr D Otieno learned counsel for the applicant that since the applicant has denied knowledge of the two persons who accepted service on his behalf and since the respondent did not disclose and/or explain the relationship between the applicant and the said person, then the application ought succeed. He further submitted that there is no credible evidence that proper service, as envisaged under order 5 rule 12 was effected by the respondent.

However, the application was opposed by Mr Kasamani learned counsel for the respondent who urged me to dismiss the application for it was unmysterious on the following grounds.

(1) That the 1st defendant is guilty as laches as the decree sought to be set aside is dated 13th July 2001 therefore the applicant should not benefit from the discretion of the Court.
(2) That the applicant was properly served and the person served is an adult family member of the applicant and since he does not deny the physical address on the affidavit of service, then that ought to be his place of residence.
(3) That the applicant has no defence and it would be an exercise infutility to set aside judgment which is three years old, hence he urged me to dismiss the application with costs.

The matter that has fallen for my determination is whether there was proper

service, whether proper summons were taken out by the plaintiff and/or whether proper summons were taken out by the plaintiff and/or whether the said summons were properly effected on the first defendant/applicant herein. As I understand personal service has been and would be good mode of service without underscoring other acceptable mode of service. As per order V rule 9 (1) "wherever it is practicable, service shall be made on the defendant in person unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient". It is clear that the law permits that service be affected on the defendant and/or such service shall always be effected on the defendant unless there are compelling reasons to not to do so and in such circumstances other mode of service is permitted. However it is mandatory that the person serving must state in a return of service the following.:

(1) Time when service was effected on the said person
(2) The manner in which summons were served.
(3) The name and address of the person identifying the person served.
(4) The place where service was effected.
(5) Whether the person serving is known to the person served.
(6) If no personal service, the person serving must indicate the relationship between the person served and the person summons were directed at in a precise manner.
(7) Must indicate that he required his/her signature in order to validate any purported service as that is the mandatory requirement of order V rule 15 and failure to adhere to the same would lead to rejection of such irregular service.

It is not in dispute that no personal service was effected on the first defendant/applicant and it also not in dispute the person served was not a known agent of the applicant. However, it is contended by the respondent that proper service was done hence the discretion of the Court cannot/ should not be exercised in favour of the applicant.

As regards the exercise of my discretion, certain fundamental principles must be satisfied and/or established. In *Patel v EA Cargo Handling Services Ltd* (1974) it was held "there be no limits or restriction on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just .....the main concern of the Courts 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 must add that discretionary

power must be exercised judicially and not arbitrarily in order to safeguard the interest of both parties. In doing so the Court must be guided by the facts and circumstances both prior and subsequent and the respective merits of the parties claim.

I have looked at the plaintiff's claim which is in respect of LR No N/ Wanga Koyonzo 1308 while the first defendant's sugarcane farming contract is on 1307, which is completely different from that of the plaintiff, that is the defence of the applicant which I must consider though not on a defence. As earlier stated the main concern of the Court is to do justice to the parties, however the Court has no discretion where it appears there has been no proper service, it becomes mandatory to set aside the *ex parte* judgment.

I am aware that to deny a person a hearing is draconian and should be the last resort while it would be equally bad to deny a person the fruits and success of a claim, which is justified. The Courts would always go by the basis that an *ex parte* judgment having been entered neither upon merits of the case or by the consent of the parties whether by default or otherwise is subject to the Court's discretionary powers.

I have looked at the summons to enter appearance addressed to the applicant and it is my considered opinion that the same is defective and therefore invalid. It requires the applicant to enter appearance within 10 days from the date of service instead of giving at least 10 days. Such defect makes the summons effected on the applicant improper and irregular, hence the same is defective and the applicant was not even required to act on it.

In Civil Appeal No 13/01 (unreported) *Atulkumar Maganlal Shah Vs Investment & Mortgages Bank Ltd & 2 others*. It was held by the Court of Appeal.

> "It was being contended by the appellants before Mbaluto J, that the summonses which had been issued on the case and served on all the appellants and Nakumatt had all been invalid because they had provided for entry of appearance within 10 days instead of giving them atleast 10 days to enter appearance. The learned judge found that summonses had been defective on that respective and ordered fresh summons to issue and we too agree"

In *Ceneast Airlines Ltd vs Kenya Shell Ltd* Civil Appeal No 174/1999

(unreported)

> "If the summons is defective the service of the same upon the other party must itself be defective."

It is clear in mind that the affidavit of service which is dated 3/10/00 states that service was affected on the same day, however the time and other essential ingredients were omitted by the process server and it is extremely difficult to attach any value to that mode of service. It was incumbent upon the process server to verify and authenticate the relationship between the person served and defendant in order to forstel any future denial by the said person. I am afraid to say that his return of service was too casual and in the process committed fundamental lapse which clearly mitigates in favour of the applicant.

Lastly it was submitted by Mr Kasamani learned counsel for the respondent that the applicant is guilty of laches, as the decree been set aside is 3 years old; However I must state that the power to set aside *ex parte* judgment does not cease and/or extinguish because of the duration and/or age of the decree. An *ex parte* judgment would be concern to a person when he gets knowledge of the same, hence I decline that submissions too, in view of what I have stated herein above I allow the application with costs and order that fresh summons be taken out and served on the 1st defendant.

Afrison Import & Import Ltd v Continental Credit Finance Ltd and another

High Court, at Nairobi February 12, 2004
Emukule J

Civil Case No 899 (OS) of 2001

***Costs** – taxation – objection to the decision of the taxing officer – applicable procedure – obligation of the taxing officer upon the objection – manner in which the objector may appeal to court – rule 11 of the Advocates (Remuneration) Order – whether the High Court has discretion to enlarge time under the rule – manner in which the application to enlarge time should be made.*
***Civil Practice and Procedure** - affidavits – affidavits in support of an application – where reference to a rule procedure is made in the affidavit – whether such affidavit constitutes an application.*
***Civil Practice and Procedure** – inherent powers of the court – powers of the court under section 3A of the Civil Procedure Act – where there is a specific law governing a matter – whether recourse may be had to section 3A of the Civil Procedure Act.*

The plaintiff sought leave of the Court to appeal to the Court of Appeal against the decision of a taxing officer. The application was made *inter alia*, under rule 11 of the Advocates (Remuneration) Order and section 3A of the Civil Procedure Act. The plaintiff also sought and extension of time within which to make the application. The plaintiff acknowledged that he had not applied for an extension within the allowed period.

The defendant opposed the application on the grounds that it was bad in law, fatally defective and that the plaintiff was guilty of inordinate delay.

Held:

1. Rule 11 (1) of the Advocates (Remuneration) Order enables any party to object to the decision of the taxing officer within fourteen days after the decision by giving notice in writing to the taxing officer of the items of taxation to which it objects.
2. Under rule 11(2) of the Advocates (Remuneration) Order, the taxing officer is obliged to forthwith record and forward to the objector the reasons for his decision on the affected items.
3. Within fourteen days from the receipt of the reasons of the taxing officer,

M.A. KOINANGE v JOYCE GACHUKU & 2 OTHERS [2007] eKLR

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 1427 of 2005

1. Land and Environmental Law Division

2. Subject of main suit: Land

a) City Council of Nairobi land allocation

b) LR Jamhuri Phase II plot No.418 (LR Block 63/345.

c) Plaintiff held letters of allotment 14.2.92

d) Visited property in 2005 (13 years later) and found house constructed

e) 1st defendant proprietor and registered owner

f) Fraud

g) Unable to trace 1st defendant. Applied for substitutive service P.O. Box 41568 Nairobi.

h) Injunction granted and registered against title (Aluoch J) (8.5.06).

i) Interlocutory Judgment entered against 1st defendant

j) Applicant 20.12.06 to set aside orders withdrawn having been served without annexure.

k) New application 20.3.07 subject of ruling.

3. Ruling - application 20.3.07 to set aside Interlocutory Judgment

a) Reasons - never received the summons

b) Address known and where she physically resides.

4. By respondent/plaintiff - In reply

- Service was correct

5. Held:

a) Service may not have been effected and or received.

b) That Interlocutory Judgment be set aside

6. Advocates:-

Gikunda for Gikunda Miriti & Co. Advocates for the defendant/applicant

Simiyu for Iseme Kamau & Maema Advocates for the plaintiff/respondent

M.A. KOINANGE ..... PLAINTIFF

VERSUS

JOYCE GACHUKU ..... 1st DEFENDANT

CITY COUNCIL OF NAIROBI ..... 2ND DEFENDANT

CHIEF LAND REGISTRAR ..... 3RD DEFENDANT

RULING

I: Application to set aside Interlocutory

Judgment under order IXa r 10 Civil

Procedure Rules dated 20.3.07

A: Background

1. M.A. Koinange the plaintiff in this suit sued

Joyce Gachuku (1st defendant herein) the City Council of Nairobi (2nd defendant herein) and the Chief Land Registrar (3rd defendant herein) for fraud.

2. He alleges that he holds an allotment letter dated 14.2.92 and was allocated plot Jamhuri Phase II Plot No.418 – LR Block 63/345. He visited the suit premises in 2005 (13 years later) and was very surprised to see a building thereo already constructed. He was unable to trace the 1st defendant who is said to be in possession. He filed suit and applie serve her by way of substantive service. The court granted him this application (Aluoch J) and issued him an injunctio (Aluoch J) to restrain the defendant from having any dealings with the land. The orders were made on 8.5.06.

3. The 1st defendant was said to be served through P.O. Box 41568 Nairobi. The 1st defendant denied being served. She discovered about the case when she went to pay her land rates. There she found injunctive orders registered agai

her titles. She proceeded to court and obtained further details. She also noted an Interlocutory Judgment had been entered against her for failing to enter appearance and file defence.

B) The application 20.3.07.

4. The said plaintiff obtained Interlocutory Judgment against the 1st defendant under IVIII and Order IXa Civil Procedure Rules through the Deputy Registrar.

5. The 1st defendant seeks orders that this be set aside and defence filed.

C) Finding

6. For one to seek orders of substitutive service a history of the said litigant/defendant cannot be traced must be demonstrated. Nonetheless the Deputy Registrar is the one to ascertain this before entertaining an application for Interlocutory Judgment.

7. The said reasons given by 1st defendant is that her abode is known. She could have been traced. She therefore not receive the summons mailed to her.

8. I would accept this explanation. I accordingly set aside the Interlocutory Judgment entered against the 1st defen on 17.7.06.

9. The 1st defendant to file a defence within 15 days of to-days date and service all parties concerned.

Dated this 27th day of July 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

Gikunda for Gikunda Miriti & Co. Advocates for the defendant/applicant

Simiyu for Iseme Kamau & Maema Advocates for the plaintiff/respondent

12.

MOHAMED SULEIMA MUNYU v JOHN WACHIRA MUTANJAU & another [2008] eKLR

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

ELC Case 1924 of 2007

MOHAMED SULEIMA MUNYU

(Suing as administrator of the estate of

AMINA NJERI MOHAMED – DECEASED).....PLAINTIFF

VERSUS

JOHN WACHIRA MUTANJAU.....1ST DEFENDANT

WILFRED NJOROGE GACHUHI.....2ND DEFENDANT

RULING

The plaintiff brought this suit against the defendants by way of a plaint filed on 4th July 2006 seeking judgment against the defendants jointly and severally for

(a) A declaration that the transfer of the land **LR No RUIRU E./BLOCK 5/74** to each of the defendants were obtained fraudulently and no title passed to them or any one of them from Amina Njeri Mohamed now deceased.

(b) An order for cancellation of the transfers and titles issued to the defendants.

(c) An order reverting the title to **LR No RUIRU E/BLOCK 5/74** to the deceased of her administrator.

(d) Costs of this suit; and

(e) Any other or further relief or reliefs as this Honourable Court may deem fit to grant.

Summons were issued but the same could not be served on the defendants as the defendants could not be traced. On 20th September 2006 the plaintiff brought an application by way of a Chamber Summons seeking leave to effect service on the defendant by way of substituted service. The application was heard on 10th July 2007 and the plaintiff was granted leave to effect service upon the defendants within 21 days from the date of the order but the same was not done within the granted period. On 14th September 2007 the plaintiff filed the present application seeking orders to extend the validity of the summons to enter appearance by the defendants for a further term of 12 months. The application was based on ground that the order issued by court on 10th July 2007 for substituted service coincided with the expiry of summons to enter appearance.

The facts as gathered from the pleadings are that the 1st defendant had fraudulently transferred the suit land to himself on 23rd March 1999 and in turn transferred the same to the 2nd defendant on 25th August 2005 and currently the 2nd defendant is the registered owner of the suit land.

There are several authorities by the Court of Appeal to the effect that personal service must be effected on the defendant to the extent it is practicable. That is the ideal service. One of such cases is the case of **FILIMONA AFWANDI YALWALA v RONALD INDIMULI AND ANOTHER CA No 69 of 1987**, where the court said:

"In my opinion in the present case the first consideration is Order 5R 901 of the Civil Procedure Rules on service. Service of the summons ought to be effected on the defendant personally to the extent it is practicable. That is the ideal form of service. Before it is departed from there must be circumstances which would reasonably support the departure. The words wherever it is practicable suggest that there would be occasions when it would not be practicable to effect personal service. Process servers must however not easily resign from personal service merely because of the alternatives of substituted service."

Service of process is so crucial a matter in litigation that court including Deputy Registrars must encourage the best service ie personal service and more so where the dispute is over land.

For the above reasons I decline to grant the order sought and order that efforts be made to effect personal service.

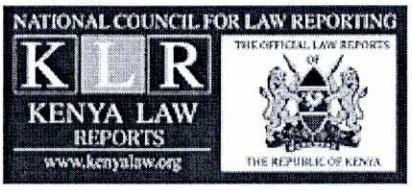
Those are the orders of this court.

Dated and delivered at Nairobi this 17th day of October 2008.

J. L. A. OSIEMO

JUDGE

ALFRED MAKHONGO & 2 others v ZABLON NTHAMBURI & another [2010] eKLR



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 133 of 2005

1. ALFRED MAKHONGO

2. LUKE WAMALWA WANYAMA

3. HENRY KIRINGOTI

(Suing as the Chairman, Secretary and

Treasurer respectively of

AFRICAN RURAL MISSION) .....**PLAINTIFFS**

V E R S U S

1. PROF BISHOP ZABLON NTHAMBURI
2. DR. REV. STEPHEN KANYARU M'IMPWI
(Being Registered Trustee of

Methodist Church) .....**DEFENDANTS**

RULING

By a **ruling dated 12th and delivered on 13th March, 2009** this court (Waweru, J) allowed an application by the Defendants (**chamber summons dated 20th November, 2009**) in which they had sought two

main orders - to discharge a temporary injunction granted to the Plaintiffs on 18th July, 2005 pending disposal of suit, and to strike out the suit under **Order 6, rule 13(1)(a) – (d)** of the **Civil Procedure Rules** (the **Rules**).

The court had heard the application *ex parte* as there was no appearance for the Plaintiffs when the application came up for hearing on 17th February, 2009, notwithstanding that the hearing date had been taken by consent at the registry.

Five issues had been canvassed for the Defendants at the hearing. The court allowed the application only upon one of those five issues. That issue was **whether or not the suit was invalid for failure to serve summons to enter appearance so long after the suit was filed**.

The Plaintiffs subsequently filed an application by **chamber summons dated 24th March, 2009**. They sought two main orders:-

"1...

2. That the *ex-parte* hearing of this suit conducted on 17th February, 2009...and ruling delivered on 13th March, 2009 and all other consequential orders/proceedings be set aside.

3. That this suit be heard on its merit in the normal way and the (Plaintiffs)...be allowed to be heard on the application dated 20th December, 2007.

4.....

5....."

The application is bought under **Order 9B, rules 3** and **8** of the Rules, and is opposed by the Defendants.

As the Defendants were overruled upon all the other issues that had been canvassed *ex parte* on their behalf on 17th February, 2009, the court directed that the parties do address it only on the one issue upon which it had allowed the Defendants' application to strike out the suit.

I have read all the affidavits sworn in support of and in opposition to the application. I have also considered the written submissions filed on behalf of the parties.

The record of the court indicates that summons to enter appearance were never issued or served upon the Defendants for all the time that this

suit has been in existence, over four years. This is a factual position that has not been seriously challenged by the Plaintiffs.

The main point that has been urged by the Plaintiffs in this application is, in effect, that notwithstanding lack of issuance and service of summons, the Defendants entered appearance and filed defence. The parties exchanged documents. Issues were framed, and the suit has been set down for hearing on several occasions. The Plaintiffs argued therefore that in these circumstances, and notwithstanding the provisions of **Order 4, rule 3** of the Rules, it was patently unjust to strike out the suit and thereby prevent the adjudication on merit of the dispute between the parties.

The Defendants on the other hand do not dispute that they entered appearance (but under protest) and filed defence, and that documents have been exchanged, issues framed, and the suit set out for hearing on a number of occasions. But they urge that issuance and service of summons upon the Defendants is a matter that goes to jurisdiction, and cannot therefore be ignored.

In its aforesaid ruling of 13th March, 2009 this court expressed itself as

follows:-

"This suit was filed on 8th February, 2005. The Defendants have stated at paragraph 32 of the supporting affidavit that they have never been served with summons to enter appearance. They filed memorandum of appearance under protest precisely for this reason. Subsequently they filed defence. On this issue of service of summons to enter appearance, the Plaintiffs have not asserted in the replying affidavit that the same were issued or served. On the contrary, at paragraph 31(g) of the affidavit there is a tacit admission that summons to enter appearance have never been issued or served. I have perused the court record. I cannot find any copy of summons to enter appearance, issued or not issued. What is the effect of all this upon the Plaintiffs' suit?

Order 4, rule 3 of the Rules sets out the law in this regard. Sub-rule (5) of that rule requires, in mandatory terms, that the plaintiff or his advocate prepare summons to enter appearance and file them with the plaint. The same are then signed and issued in accordance with sub-rule (2). Sub-rule (1) requires, again in mandatory terms, that when a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified in the summons.

Under Order 5, rule 1(1) a summons (other than a concurrent summons) shall be valid in the first instance for 12 months beginning with the date of its issue. Under sub-rule (2) of that rule, where a summons has not been served on a defendant, the court may extend the validity of the summons from time to time if satisfied that it is just to do so. And under sub-rule (7), where no application has been made to extend the validity of summons, the court may without notice dismiss the suit at the expiry of 24 months from the issue of the original summons.

It is clear that even where summons have been duly issued, there a strict regime of time within which certain events must happen for the suit to remain valid. Summons must be signed and issued without delay. Then they must be served upon the defendant within 12 months. If they are not served within that period they become invalid, but the court may extend their validity from time to time. If no application to extend validity of the summons is made within 24 months of issuance of the original summons, the summons expires. See the case of *Mobile Kitale Service Station –vs- Mobil Oil Kenya Limited & Another [2004] I KLR 1.*

"Would there be a valid suit without valid summons in place? I think not. Issuance and service of summons to enter appearance is not a mere formality. It is what brings a defendant into the suit. Without bringing a

defendant into the suit there cannot be any final determination of the plaintiffs' claim. That is why the Rules set a definite time span within which summons must be served, or extended and served, upon a defendant. It is really an issue of jurisdiction. The court would not be properly seized of the matter until the defendant has been brought into the suit by service of summons.

What is the situation in the present case? Here, summons have never been signed and issued, let alone served, more than four (4) years since the suit was filed. Had summons been issued but not served or extended, the same would have died after 24 months from the date of issue of the original summons. The suit itself would then have been liable to be dismissed without notice.

In my view, where no summons are signed or issued within 12 months of the filling of the suit, the suit is liable to be dismissed. This is because the court has jurisdiction only to extend the validity of summons that have already been signed and issued where such validity expires after 12 months of the date of issue if there is no service. Is there jurisdiction to sign and issue original summons after 12 months from the date of filing suit? It appears to me that there is none. At any rate none is specifically provided for in the Rules.

In the present suit, no summons were signed and issued within 12 months of filing the suit or at all. It is liable to be dismissed without notice. It has not been demonstrated that the Plaintiffs did all they could to have summons issued and served, or that it was not their fault that they were not signed and issued. At any rate, to file a suit and then wait for over 4 years without moving to have summons issued and served upon a defendant is gross abuse of the process of the court, especially where the plaintiff is enjoying an interlocutory injunction."

Nothing has been placed before the court in the present application that persuades me to depart from that position that I took in the ruling of 13th March, 2009.

But I have also considered the matter in light of the new sections **1A** and **1B** of the **Civil Procedure Act, Cap 21** (the **Act**) enacted by **Act No 6 of 2009** which commenced operation on 23rd July 2009 after I heard the present application. Those new sections provide as follows:-

"1A. (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

IB. For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims:-

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

c) the efficient use of the available judicial and administrative resources;

the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology."

Before enactment of these new sections of Cap 21, the courts in this country were probably spending the better part of their time and effort interpreting and enforcing rules of procedure at the expense of doing substantial justice to the parties that appeared before them. The purpose of these new provisions is to enable the courts, advocates and parties to move away from undue preoccupation with technicalities of procedure in order to facilitate **just, expeditious, proportionate and affordable resolution** of civil disputes.

The courts are now enjoined by law, in exercising their powers under the Civil Procedure Act and Rules, to seek to give effect to this overriding objective. Advocates and parties are similarly enjoined to assist the courts to further the overriding objective.

However, I must hasten to add that the new sections 1A and 1B of Cap 21 will not, and should not, be a panacea for flouting all rules of procedure. If that is allowed, litigation might become so disorderly that the overriding objective of the Act and the Rules may well be defeated. At any rate, there are certain rules of procedure that go to the root of the matter,

or to jurisdiction. These cannot be flouted with impunity.

In the ruling of 13th March, 2009 I held that issuance and service of summons to enter appearance go to jurisdiction of the court. I am still so persuaded. I am afraid that even if the present application had been filed after enactment of sections 1A and 1B of Cap 21 the Plaintiffs' application would not have been saved by those provisions.

In the event I find no merit in the chamber summons dated 24th March, 2009. The same is hereby dismissed with costs. It is so ordered.

DATED AT NAIROBI THIS 10TH DAY OF FEBRUARY, 2010

H. P. G. WAWERU

JUDGE

DELIVERED THIS 12TH DAY OF FEBRUARY, 2010

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURT

Civil Suit 201 of 2004

CO-OPERATIVE BANK OF KENYA LTD .....PLAINTIFF

VERSUS

JOHNSON NG'ANG'A MBUGUA.....1ST DEFENDANT

NAOMI WAIRIMU MBUGUA .....2ND DEFENDANT

RULING

The defendants have sought the setting aside of judgement which was entered in favour of the plaintiff, following their alleged failure to enter appearance. It is the defendants contention that they were never served with the Plaint or summons to enter appearance.

The defendants also seek unconditional leave to defend the suit.

During the hearing of the application, the applicants sought and were granted leave to cross-examine the process server who had allegedly served them with the Plaint and summons. I will therefore be making reference, not only to affidavits filed is support of or in opposition to the application, but also to the answers given during the said cross-examination of the process server.

Co-operative Bank of Kenya Ltd v Johnson Ng'ang'a Mbugua & another [2006] eKLR

The document which is at the nerve-centre of this application is the Affidavit of Service sworn by Joel Mburu Nganga on 8th July 2004. By that affidavit, Mr. Nganga deposed that he served the Plaint and summons upon the 1st defendant, on 25th May 2004, at about 3.25 pm. According to the affidavit of service, the said 1st defendant was served, not only with the Plaint and Summons meant for him, but also with the Plaint and Summons meant for the 2nd defendant.

However, the 1st defendant challenged the alleged service on the grounds that nobody had pointed him out to the process server.

Nowhere in the Affidavit of Service did the process server state that someone pointed out the 1st defendant to him. And during his cross-examination, the process server readily admitted that he had not known the 1st defendant prior to the time of service. The question that then arose is how he identified the 1st defendant. That question is vital because the process server did concede that if he had been shown someone other than the 1st defendant, he would not have known that the said person was not the correct person. That fact would suggest that the alleged service was suspect.

However, it is also noteworthy that the process server did identify the 1st defendant in court, when this application was being prosecuted. He emphatically stated that it was the said 1st defendant whom he had served on the material day.

On the other hand, the 1st defendant completely denies having been served. Notwithstanding the said denial in the 1st defendant's replying affidavit, the plaintiff did not seek to seek to cross-examine him. Therefore, I must accept the contents of the affidavit of the 1st defendant, as the same were not challenged through cross-examination. But, does that mean that I should also accept the 1st defendant's version of

events, simply because it was not challenged by way of cross-examination? The answer is in the negative, as the contents of the said affidavit must be given due consideration within the context of all other information which is available, including the affidavit of service, and the oral testimony of the process server.

For instance, there was the fact that the process server had described the 1st defendant, in the affidavit of service, as an elderly man. When he was asked the reason for the said description, the process server answered that the 1st defendant was older than himself (the process server). The process server then disclosed that he was born in 1932, whilst it also transpired that the 1st defendant was born in 1944. Furthermore, upon my own personal observation of the process server and the 1st defendant, it was obvious that the process server was older, by appearance. Then, when confronted with the information that the 1st defendant was actually younger than he, the process server said that, in that event, he would change his description of the 1st defendant.

Given those facts, I formed the considered opinion that the process server may not have been forthright in his testimony. He had sworn an affidavit, on 8th July 2004, saying that the 1st defendant was an elderly man, which to him meant that the 1st defendant was order than he. But when told that the 1st defendant was younger than him, the process server was ready to change his description of the person. That, to my mind, is indicative of someone who was not firm in his conviction.

And, as I have already indicated, the 1st defendant had the appearance of a person who was evidently younger than the process server. That leads me to the inevitable conclusion that as at 25th May 2004, when the Plaint and Summons were served, the same were served on an elderly man, who was older than the process server. As the 1st

defendant turns out to be younger than the process server, in all probability, he was not the person who was served with the Plaint and Summons.

Secondly, it was stated in the affidavit of service that the person who was served

"accepted service, but declined to sign the back

of the summons."

Yet, during his cross-examination, the process server testified as follows;

"I introduced myself to Mr. Mbogua (the 1st defendant), as a court process server. He then saw the plaint and summons. After reading it, he said that he could not accept it. He banged the table, and told me to take it to his advocates, Archer & Wilcock, as they knew his case."

Clearly, the oral testimony of the process server is at variance with the deposition in the affidavit of service. The said variance gives rise to doubts about the manner in which the 1st defendant was served. On the one had it is said that he accepted service, but when giving the details of the alleged service, it transpires that the 1st defendant declined service. In the circumstances, the court is unable to determine which of the process server's two versions of the events are to be believed.

The plaintiff's counsel sought to cast doubts on the 1st defendant's contention that he was not served with the plaint and summons. He did so by pointing out that in his considered opinion, the 1st defendant was not an honest person, as he had allegedly denied service of the Notice of Execution, whereas the facts indicated otherwise.

Counsel pointed out that the said notice had been served by way of registered post, sent to P. O. Box 74157 Nairobi. That address was the same as the one used by the 1st defendant in his supporting affidavit. I have perused the registered postal slip annexed

to the replying affidavit, as well as the 1st defendant's stated postal address, and verified that the address is P. O. Box 74157, Nairobi.

However, that would not necessarily imply that the 1st defendant is not trustworthy, for denying receipt of a notice which was dispatched to his postal address. It must be recalled that evidence cannot be whittled down by submissions. As far as I am aware, the best way to cast aspersions on evidence is by putting forward other credible evidence, which was inconsistent with the evidence earlier tendered. In this instance, the plaintiff could have either produced evidence to show that the 1st defendant was served with the Notice of Execution, or alternatively, the plaintiff could have cross-examined the 1st defendant, and hope to get him to admit the fact of such service.

On the other hand, even if the plaintiff had proved that the 1st defendant had been served with the Notice of Execution, that would not imply that he had also been served with the Plaint and Summons. At best, that could have suggested that the 1st defendant may have possibly not have been telling the truth about the service of the Plaint and Summons. That would not have been sufficient to satisfy the court that he had been served. The only manner in which the court could have been persuaded that the 1st defendant had been duly served with the Plaint and Summons is through the Affidavit of Service being proved to be an accurate record of that which had transpired. In this case, the process server's oral testimony only served to cast doubt on the fact of service. That alone is sufficient reason to set aside the judgement against the 1st defendant.

Meanwhile, as regards the 2nd defendant, the process server did not serve her personally, although he conceded to the court that he knew the rules to require each

defendant to be served personally. So, why did he not serve the 2nd defendant personally?

The process server says that the 2nd defendant was the wife to the 1st defendant, and that the two of them were residing together under the same roof.

He testified as follows;

> **"I know that I cannot server any person other than the person named in the summons, unless the said person is missing."**

The foregoing testimony indicates that the process server is generally aware of the provisions of Order 5 rule 12 of the Civil Procedure Rules, which reads as follows;

> **"Where in any suit the defendant cannot be found, service may be made on an agent of the defendant empowered to accept service or on any adult member of the family of the defendant who is residing with him."**

In this case, the process server did not make any effort in tracing the 2nd defendant. He simply left the Plaint and Summons intended for the 2nd defendant, with the 1st defendant, because the latter had told him that he would take the said documents to the defendants lawyers. That, I am afraid, is not one of the recognised instances when summons can be served on the spouse of a defendant.

An adult member of the defendant's family should only be served if the defendant cannot be found, and if the said family member was resident with the defendant. Those are matters which the process server would have to state in his affidavit of service, for the said service to be competent.

In **WAWERU** –VS- **NDIGA [1983] KLR 236**, it was held that in applications under Order 9A rule 10 of the Civil Procedure Rules, the court has an unfettered

discretion to do justice between the parties. One such instance which the court recognised as justifying the setting aside of ex parte judgements is when the court was satisfied that the summons to enter appearance were not duly served.

In **ERUKANA KAVUMA –VS- MEHTA [1960] EA 305,** Sir Audley McKisack C. J. dealt with a case in which the process server had served summons on the defendant's wife. He did so because he could not find the defendant, as he had been told that the defendant was in India. In his ruling, the Hon. Chief Justice held as follows, as page 306;

> **"All that the process server, in his affidavit, says on this point is that he went to the defendant's shop and**
>
> > ***"there I did not find the defendant; I was told that the defendant is in India."***
>
> **This seems to me a most inadequate ground for saying that the defendant could not be found. The affidavit does not reveal whether or not any inquiry was made about the defendant's address in India, or whether it was expected that the defendant would return to Uganda from India, and if so when. The attempt to find the defendant appears to me to have been most perfunctory. I cannot regard absence from Uganda, without any information about the defendant's address (if he has one) in the country to which he has gone, or whether or not he can be found there, and without information as to the expected length of his absence, or as to when he left Uganda, as being sufficient grounds for saying that the defendant 'cannot be found'."**

That finding cannot be over-emphasized. The process server may therefore only justify serving summons on an adult member of the defendant's family, and one who resides with him, after demonstrating that the defendant could not be found. As the process server herein did not even attempt to trace the 2nd defendant, leave alone

ascertaining that the two defendants resided together, the service on the 2nd defendant was definitely bad.

For all the foregoing reasons, I hold that the judgement herein was not regular. It is for that reason that I find the decision in **PHILIP K. CHEMWOLO & ANOTHER** – **VS- AUGUSTINE KUBENDE (1982 – 88) 1 KAR 1036** to be inapplicable to this case. In that case, the Hon. Platt J. A. expressed himself thus, at page 1038;

> **"But the court went on to explain that the main concern was to do justice to the parties and would not impose conditions on itself to fetter the wide discretion given it by the rules. On the other hand, where a regular judgement had been entered, the court would not usually set aside the judgement, unless it is satisfied that there were triable issues which raised a prima facie defence which should go to trial."**

Had the judgement been regular, the defendants should have been expected to satisfy the court that they had a reasonable defence, before they could have the judgement set aside.

In conclusion, I find that the alleged service of summons on the two defendants was incompetent. Accordingly, when judgement was entered against the defendants on the mistaken belief that they had been served, but had failed to enter appearance, the said judgement was irregular. Therefore, the interests of justice demand that the judgement be set aside. In the result, the judgment which was entered against the defendants herein, on 28th July 2004, is hereby set aside, together with all other consequential orders flowing therefrom. The defendants are hereby granted unconditional leave to defend the suit. And, the costs of the application dated 22nd March 2005 are awarded to the defendants.

Dated and Delivered at Nairobi this 18th day of January 2006.

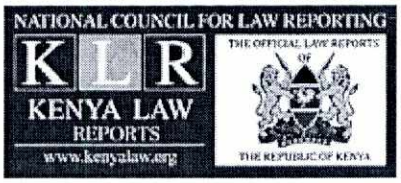
Co-operative Bank of Kenya Ltd v Johnson Ng'ang'a Mbugua & another [2006] eKLR

FRED A. OCHIENG

JUDGE

15.

THE CO-OPERATIVE BANK OF KENYA LTD V BERNARD WANJOHI KINGA [2005] eKLR



REPUBLIC OF KENYA

High Court at Nyeri

Civil Case 211 of 2001

THE CO-OPERATIVE BANK OF KENYA LTD. ..... PLAINTIFF

VERSUS

BERNARD WANJOHI KINGA ..... DEFENDANT

RULING

Bernard Wanjohi Kinga (hereinafter referred to as the applicant) has come to this court under order XXI Rule 22, Order IXA Rules 10 & 11 of the Civil Procedure Rules, and section 3A of the Civil Procedure Act, seeking an order for stay of execution of the decree herein and an order for setting aside the judgment entered against him upon such terms and conditions as the court may deem just. The applicant maintain that he was not served with summons to enter appearance. He contests the affidavit of service by the process server wherein it is alleged that service was effected upon him through his adult son, maintaining that his only son is aged 15 years and was at the material time in boarding school.

The applicant further contends that he has a good defence to the Respondent's suit as he has never taken any loan or overdraft facility from it.

Counsel for the applicant relied on the following authorities:

Filimona Agwandi Yalwala v/s Ronald Indimuli & Jared Shiundu Civil Appeal No. 69 of 1987.
Gandhi Brothers v/s H.K. Njage t/a H.K. Enterprises (Milimani Commercial Court) Civil suit No. 1330 of 2001.
National Industrial Credit Bank Ltd. v/s Githuku Ngethe Gathuka

High Court Milimani Civil Case No. 1628 of 2000

For the Respondent it was submitted that the affidavit in support of the application was defective as it does not disclose the source of facts deponed to and that the identity of the advocate whose information was relied upon was also not disclosed. The counsel relied on the case of **Noor Mohamed Jonmohamed v/s Kassamali Virji Madhani Civil Appeal No. 42 of 1951.**

It was further submitted that the applicant was truly indebted to the Respondent and was merely obstructing the course of justice as service was properly effected, and the notice of judgment served on the applicant and therefore he was not coming to this court with clean hands. Counsel further cited the case of **Civil Appeal No. 181 of 1994. Njagi Kanyunguti alias Karingi Kanyunguti & others v/s David Njeru Njogu.**

I would first wish to distinguish the case of **Njagi Kanyunguti alias Karingi Kanyunguti & others** as that was an application for setting aside a judgment under order IXA rule 10 of the Civil Procedure Rules following the ex-parte hearing of the suit after the Defendant failed to attend court. In this case the ex-parte judgment was entered under Order IXA Rule 5 of the civil Procedure Rules for failure to enter appearance and file defence.

The applicant herein contends that he was never served with any summons to enter appearance. Although an affidavit

of service was filed showing that the applicant was served through George Wambugu Wanjohi, an adult member of his family, the applicant has denied knowledge of any such person, maintaining that he has only one son who was not an adult and was away in school at the time of the alleged service. This averment has not been controverted by the Respondent. Moreover it is evident from the affidavit of service that the Process Server only visited the applicant's residence once and does not appear to have made proper inquiries as to the time when he could be found. In the circumstances I find that service on the alleged adult member of the family whose relationship with the applicant was not even established was not proper. Without proper service the applicant could not be penalized for failing to enter appearance or file a defence. In the case of **Baiyo v/s Bach [1987] KLR 89** it was held that where there is no proper service of summons then *ex debito justitiae* a judgment by default must be set aside because such a judgment can only be entered if there has been an initiating process concerning which a defendant is at fault. This is precisely the position herein.

Although the draft defence availed by the applicant is basically a blanket denial of the Respondent's claim. However, without proper service of summons it is not open to this court at this stage to go further to consider whether the applicant has a good defence to the Respondent's claim.

It was submitted that the applicant's affidavit was defective as he had not disclosed which facts are of his own knowledge and which facts are from information nor has he disclosed the source of his information. However, looking at the affidavit it is only paragraph 4 which depones to information from the applicant's advocate. Read together with paragraph 3 of the affidavit it is clear that the advocate referred to is the applicant's advocates on record. The source of information has therefore been disclosed and I would accordingly reject the contention that the affidavit is defective.

The upshot of the above is that I do allow the application dated 28th September 2005 and set aside the judgment entered against the applicant in default of appearance and defence together with all consequential orders.

The applicant shall file his defence within 15 days from the date hereof.

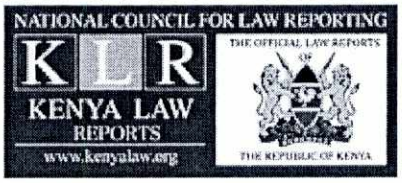
Dated signed and delivered this 23rd day of November 2005.

H. M. OKWENGU

JUDGE

16.

CHURCH COMMISSIONERS OF KENYA v JULIA AYENGO' & 4 others [2006] eKLR



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 935 of 2002

THE CHURCH COMMISSIONERS OF KENYA.....PLAINTIFF

VERSUS

JULIA AYENGO'.....1ST DEFENDANT

GORDON OKUMU WAYUMBA..... 2ND DEFENDANT

ROSE AUMA AGENDO.....3RD DEFENDANT

ERIC OPON NYAMUNGA.....4TH DEFENDANT

CITY COUNCIL OF NAIROBI.....5TH DEFENDANT

RULING

By chamber summons dated 01.11.05 and filed on 02.11.05 brought under Order IXB rule 8, Order XXI rules 22 and 91 of the Civil Procedure Rules and section 3A of the Civil Procedure Act (Cap.21), the 1st - 4th defendants prayed for the following orders:-

a) That this matter be certified urgent and in the first instance be heard *ex-parte*.

b) That the *ex-parte* interlocutory judgment of 27.10.03 and the judgment of Hon. Justice Kubo delivered on 12.10.05 and any decree arising therefrom be stayed pending the hearing and determination of this application.

c) That the interlocutory *ex-parte* judgment of this honourable court made on 27.10.03 in default of appearance together with the *ex-parte* proceedings and subsequent judgment of 12.10.05 entered in favour of the plaintiff on its plaint and the consequential orders be set aside.

d) That the costs of this application be provided for.

The grounds upon which the application is based are:-

i) The purported service of process by substituted service is and was a nullity *ab initio*.

ii) In any event failure on the part of the defendants and its counsel to enter appearance was not deliberate but was a consequence of a regrettable omission to notice an inoquously placed purported notice in the Standard Newspapers.

iii) The plaint was incurably defective and in breach of the rules of pleading.

iv) The plaintiffs and their advocates deliberately and fraudulently failed to make full disclosure of all material facts and the law to the court.

v) The plaintiffs and their advocates sought and obtained orders that were incapable of enforcement.

vi) That it would be in the interest of justice that the defendants are not denied a chance to be heard.

(a) as against immovable property that did not belong to them and

(b)over a registered public access road for the use of the entire public not only the defendants.

vii) That it would be in the interest of justice that the defendants are not denied a chance to be heard and

viii) No injustice will be caused to the plaintiff which cannot be compensated by costs by the grant of the orders sought.

The application is supported by the affidavit of Dorcas A. Nanjero and other grounds adduced at the hearing of the application.

It is noted, for the record, that the suit was withdrawn as against the 5th defendant, leaving only the 1st - 4th defendants as parties thereto.

At the hearing of the application, the 1st - 4th defendants/applicants were represented by learned counsel, Mr. J. Okwach while the plaintiff/respondent was represented by learned counsel, Mr. W. Owaga.

Applicants' counsel relied on 3 broad grounds:-

a) Service of summons preceding the interlocutory judgment. The basic point made here was that the plaintiff did not serve the requisite court process on the defendants or on the said Dorcas Nanjero whom the plaintiff knew to be the 1st - 4th defendants advocate or agent. In faulting the plaintiff in this regard, the defendants said they relied on Order V rule 2. The defendants also faulted the substituted service in that it was through a newspaper advertisement published in the East African Standard of Saturday 15.06.02 requiring the defendants to enter appearance before 19.06.02, which was less than 10 days, in violation of Order IV rule 3 (4). Defendants'/applications' counsel referred to Ceneast Airlines Ltd -vs- Kenya Shell Ltd [2000] 2 EA 364 in which the Kenya Court of Appeal, *inter alia*, held Order IV rule 3 (4) to require mandatorily that the time given for entering appearance must be at least 10 days. Counsel also referred to Yalwala -vs- Indumuli & Another [1989] KLR 373 to echo the point made by the Kenya Court of Appeal that the service of process is a crucial matter in litigation and that courts must encourage the best service, i.e. personal service, unless it is shown that personal service was not practicable despite attempts to effect such service. Counsel also cited Njoroge -vs- Kiarie [1987] KLR 38 to make the same point.

b) Counsel for 1st - 4th defendants/applicants also contended that there was no clarity given about the property, which is immovable, to facilitate its identification. For this proposition, counsel sought to rely on Order VII rule 3 contending in effect that it is such lack of clarity on the identity of the property in question which led this court to order the plaintiff to file a further affidavit to provide clarification about such identity and that the affidavit subsequently filed did not remedy the defect about the identity of the plot and that the lack of clarity about the identity of the plot could only be remedied by amendment of the plaint, which he said was not done.

c) Non-disclosure of material facts within the plaintiff's possession. Under this ground, the 1st - 4th defendants contended that the plaintiff claimed an access road to be its property while it had been notified by the Commissioner of Lands vide letter Ref. No.41445/215 dated 18.02.02 that the subject access road was a road reserve of 0.25 of an acre, details of which were marked out in Deed Plan No.66827. That letter, which Dorcas Nanjero annexed to her affidavit sworn on 02.11.05 addressed to the Vicar, St. Francis Church, Karen (a diocese of All Saints Cathedral, Nairobi which is part of the Anglican Church of Kenya of which the plaintiff is the appointed trustee), also told St. Francis Church, Karen that it was only a trustee for the said portion of the road reserve and that time had come for the road reserve to be opened up for use by the owners of the adjacent plots (including 1st - 4th defendants). Counsel for 1st - 4th

defendants/applicants contended that the letter of 18.02.02 contradicted the evidence produced to court by the plaintiff and referred to Fluid & Power Systems Limited -vs- Kalsi [1991] KLR 584 to echo the point made by the High Court (Bosire, J - as he then was) that a party who comes to court and obtains *ex-parte* orders either on the basis of a false affidavit, or having withheld from the court certain material facts disentitles himself to the orders sought.

Counsel for 1st - 4th defendants/applicants urged this court to grant the application with costs.

On the other hand, plaintiff's/respondent's counsel opposed the application and relied on the replying affidavit of Charles Victor Orodi sworn on 25.11.05. Counsel contended that Dorcas Nanjero, who swore the affidavit supporting the application, was not authorized by the plaintiff to swear the affidavit; that she is neither a party to the suit nor an advocate representing the 1st - 4th defendants in the suit. Counsel asked for Dorcas Nanjero's affidavit to be struck off and that once that was done, the 1st - 4th defendants' application had to go with it. Plaintiff's/respondent's counsel pointed out that even after the 2nd defendant, Gordon Okumu Wayumba was served by John Munsyoka (process server) with the plaint and summons to enter appearance herein on 11.06.02 and even after publication of the advertisement on 15.06.02 calling on the 1st - 4th defendants to enter appearance before 19.06.02, the said defendants slept on their right to defend the suit and only came to the picture when the court was about to deliver Judgment in 2005, i.e. some 3 years later. Counsel submitted that the defendants/applicants were to blame for not entering appearance despite service, including substituted service by a conspicuous newspaper advertisement. Counsel also submitted that the suit property was sufficiently identified in the plaint and that the clarification sought by the court regarding the suit property was confined to identification of ownership of the plaintiff's property which had already been identified in the plaint. Counsel added that the seeking of such clarification was permissible under Order XVII rule 12, which had guided the court. This rule provides that the court may at any stage of the suit recall any witness who has been examined and may, subject to the law of evidence for the time being in force, put such questions to him as the court thinks fit.

Regarding the complaint of non-disclosure of material facts, plaintiff's/respondent's counsel referred to letter of 13.12.01 from the Director of Surveys to the Vicar of St. Francis Anglican Church, Karen indicating a previous road reserve but at the same time recognizing there had been previous surveys which disregarded reservation of the purported access road. It was plaintiff's/respondent's case that the subject access road had been abandoned when the Forest Department which was using the access road left the area and that there is an alternative road to the area in question used even by the 1st - 4th defendants.

Plaintiff's/respondent's counsel urged the court to dismiss the application with costs.

I have given due consideration to the arguments and counter arguments of the parties.

Now that the question of service has been made an issue, it becomes necessary to subject it to closer scrutiny. Service of court process is a critical issue in this case and there are two aspects of it. One relates to the service alluded to by John Musyoka, process server in his affidavit of service sworn on 12.06.02. He deposed, *inter alia*, that on 11.06.02 he served the plaint together with summons to enter appearance on the 2nd defendant. There is no copy of the summons to enter appearance annexed to the affidavit of service. This court does not, therefore, have means of knowing how many days the 2nd defendant, Gordon Okumu Wayumba was given within which to enter appearance and cannot be sure if adequate notice was given to the 2nd defendant individually. Secondly, and more significantly, the process server deposed that when he went to the home of the 2nd defendant to service him on 11.06.02, he found one Mary there. After the process server introduced himself and the purpose of his visit to the home, Mary told him 'that her boss had gone on safari and they would be back that afternoon'; that Mary accepted service but refused to sign at the back of the process server's original copies, stating that she would keep the copies for her boss until he came back.

The affidavit of service sworn by John Musyoka on 12.06.02 does not establish that he gave the 2nd defendant a period of not less than 10 days within which to enter appearance as mandatorily required by Order IV rule 3 (4). Secondly, process server John Musyoka took a short cut by serving Mary in absence of the 2nd defendant who, Mary said, would be back that afternoon. I note from John Musyoka's affidavit that he served Mary at 11.00 a.m. on 11.06.02. Why could he not wait until afternoon when the 2nd defendant was reported to be due back or, alternatively, book an appointment to serve the 2nd defendant next day or on another appointed day? In this regard, I associate myself with the holding by the Court of Appeal in Yalwala's case (supra) that the service of process is a crucial matter in litigation and that the best service, i.e. personal service, must be resorted to unless it is shown that personal service was not practicable despite attempts to effect such service. In the present case, there is no evidence of any serious attempt to effect personal service

on the 2nd defendant and I hold the purported service on Mary on behalf of the 2nd defendant to be invalid.

The other aspect of service of process in this case is the substituted service by the newspaper advertisement published in the East African Standard of Saturday 15.06.02 requiring the 1st – 4th defendants to enter appearance before 19.06.02. That gave the defendants only the working days of Monday 17.06.02 and Tuesday 18.06.02, i.e. only 2 days, within which to enter appearance. That is a clear violation of Order IV rule 3 (4) requiring that the defendants should mandatorily have been given not less than 10 days to enter appearance. The substituted service too was invalid.

The plaint dated 03.06.02 and filed the same day by the plaintiff specified, at paragraph 3, L.R. 9482 situate at Karen, Nairobi as the plaintiff's subject property. That is also the plaintiff's property specifically referred to in Charles Victor Orodi's affidavit sworn on 03.06.02 in support of the suit. Plan No.72462 of 23.06.59 from the Director of Surveys shows, *inter alia*, that plot L R 9482 specified in the plaint as belonging to the plaintiff borders plot L.R. 10111 not specified in the plaint as belonging to the plaintiff but in respect of which evidence was availed showing that it too belonged to the plaintiff. Counsel for 1st – 4th defendants submitted in essence that if ownership of the two plots, i.e. L.R. 9482 and L.R. 10111, was central to the plaintiff's case, the latter plot should also have been specified in the plaint as belonging to the plaintiff. This may be a valid point ultimately but would appear to be a side issue as far as the question of identification of what seemed to be the plaintiff's property of central concern goes. Plaintiff's counsel was right in stating that the clarification sought by the court, and which was provided by Charles Victor Orodi's subsequent affidavit, was confined to identification of ownership of the plaintiff's L.R. 9482 which had already been identified in the plaint and I shall devote no more time to the issue of its identification in this Ruling.

Questions were raised by the plaintiff on whether Dorcas Nanjero had authority to swear her affidavit of 02.11.05 in support of the defendants' application herein. I note that she says she acted as advocate for the defendants previously and that she was deposing to facts which came to her knowledge during such acting. At paragraph 16 (c) of her affidavit, she refers to Order V rule 2 as a basis for urging that she should have been served with court process on behalf of the defendants. She clearly cited the wrong rule to support her proposition. The correct rule is rule 9 but I think the defect in citing the wrong rule is curable and I shall not strike out her affidavit on the basis of such error alone.

I now revert to the complaint of non-disclosure of material facts. In this regard, I note from the Director of Survey's letter Ref. CF/26/VOL.5/64 dated 13.12.01 to the Vicar of St. Francis Anglican Church, Karen that the Director acknowledged there had been recent surveys which disregarded the reservation of the access road in question and that the issue of disregarding the access road would be rectified in due course. The Survey Director's letter is copied, *inter alia*, to the Commissioner of Lands. I further note that the Commissioner of Lands wrote letter Ref. No.41445/215 dated 18.02.02 to the Vicar of St. Francis Church, Karen regarding the disputed access road to L.R. 9482, Karen and told the Vicar that he was only a trustee for a portion of the road reserve and that time had come for the road reserve to be opened up for use by owners of the adjacent plots. The Lands Commissioner's letter was not copied to the Director of Surveys and it is not immediately clear if it was or was not a follow up of the Director's letter of 13.12.01 to the effect that the previously disregarded access road/road reserve would be rectified in due course. Linkage between the two letters, if any, is left hanging. This is unsatisfactory and I am not prepared to say at this stage that non-disclosure of material facts has been satisfactorily established.

I note that the substituted service through the newspaper advertisement in the East African Standard of Saturday 15.06.02 was placed in the 'Digger Classified Sell Faster' page (20) of the newspaper. That sounds like the kind of page which would readily attract the attention of persons looking for property to sell or buy. The court case in respect of which the substituted service was being published had nothing to do with the selling or buying of property. One can be excused for not getting attracted to such a notice. A more prominently published notice would have been preferable.

I have looked at the draft defence proposed to be filed by the 1st – 4th defendants and I am of the view that it raises triable issues. I have, of course, to weigh this against the fact that it took some 3 years before the defendants sprang into action and sought to be heard in defence of the suit. The surrounding circumstances, especially the defective/invalid service of court process, however, persuade me that it would be in the wider interests of justice for the defendants to be afforded an opportunity to defend the suit. Accordingly, I grant prayer (c) in the chamber summons dated 01.11.05 and set aside the interlocutory *ex-parte* judgment entered on 27.10.03 and also set aside the subsequent judgment delivered on 12.10.05 in default of appearance. Consequential orders are similarly set aside. Costs shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 31st day of July, 2006.

B.P. KUBO
JUDGE

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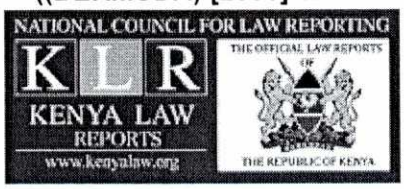
EXPORT TRADING LTD v UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCTIATION ((BERMUDA) [2006] eKLR



REPUBLIC OF KENYA

High Court at Mombasa

Civil Suit 127 of 2006

EXPORT TRADING LTD. ..... PLAINTIFF

- Versus -

THE UNITED KINGDOM MUTUAL STEAMSHIP

ASSURANCE ASSOCTIATION ((BERMUDA) ..... DEFENANDANT

Coram: Before Hon. Justice L. Njagi

Mr. Khagram for the Defendant

Court clerk – Kinyua

RULING

This application seeks orders that service of the summons to enter appearance herein upon Mitchell Cotts P & I Ltd. be set aside and that costs of the application be provided for. It is made by way of a notice of motion dated 21st June, 2006, and expressed to be brought under sections 3A and 63 of the Civil Procedure Act.

The application is supported by the annexed affidavit sworn on 21st June, 2006, by Robert Minnis, a manager in the employment of Mitchell Cotts P & I Limited. It is based on four grounds. First, it is not clear from the plaint and the summons to enter appearance who the intended defendant is as the entity sued, "The United Kingdom Mutual Steamship Assurance Association (Bermuda) (also known as UK P & I Club), does not exist. Secondly, Mitchell Cotts P & I Ltd. are only correspondents/agents for Thomas Miller P & I Ltd. (known as "UK P & I Club" who are in turn agents for Thomas Miller (Bermuda) Ltd. Thirdly the United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited do not have any manager or agent who carry on their business within the local limits of the jurisdiction of this court. Fourthly, no cause of action can, in any event, accrue as against Mitchell P & I Limited's principals in this matter.

On 4th July, 2006, the plaintiff's advocates on record filed some five grounds of opposition. These were that the application is an abuse of court process; that it is unprocedural; it is misconceived and brought in bad faith; that the defendant has no locus to bring the application; and that the application is of a nuisance value, harassing, vexatious, scandalous, frivolous and lacking in merit.

At the hearing of the application, Mr. Khagram appeared for the applicant. There was no attendance by or for the respondent. According to an affidavit of service sworn by Josephat Munika Sore, a court clerk in the firm of the applicant's advocates and an authorized process server, the respondent's advocates were served on 29th June, 2006. Accordingly they were aware that the matter was coming for hearing on 5th July, 2006. In their absence, the court elected to proceed ex parte.

P & I Ltd. who accepted the same under a misapprehension of fact and in error. I wonder as to what misapprehension Mitchell Cotts could have been when they were not the defendants and when paragraph 2 of the plaint stated clearly that the defendant has representative offices at Mitchell Cotts P & I Ltd., Mombasa. They brought it upon themselves. I therefore further order that each party will bear its own costs of this application.

Dated and delivered at Mombasa this 8th day of September, 2006.

L. NJAGI

JUDGE

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NUMBER 1490 OF 2005

JOHN KAHIU NDUNGU & OTHERS. ..... PLAINTIFFS'/RESPONDENTS'

VERSUS

NATION MEDIA GROUP LIMITED. ..... DEFENDANT/APPLICANT

R U L I N G

Before me is a Chamber Summons dated 10th May 2006 filed by M/s Mohamed Muigai Advocates for the defendant **NATION MEDIA GROUP LTD**. The application was filed under Order 6 Rule 13(1) & (9) of the Civil Procedure Rules and section 3A of the Civil Procedure Act (***Cap 21 Laws of Kenya***). The prayers in the application are as follows: -

1. ***The plaintiffs' suit herein be struck out.***
2. ***Costs of this application and those of the suit be borne by the plaintiffs.***

The application has grounds on the face of the Chamber Summons. The grounds are as follows: -

a) ***The plaint is incurably defective as it does not set out the words and/or precise words that are alleged to be defamatory.***

b) ***The plaint does not disclose any or any reasonable cause of action against the defendant.***

No affidavit was filed in support of the application, as rule 16 of Order 6 of the Civil Procedure Rules does not appear to require the filing of an affidavit with the Summons.

The application was opposed. Grounds of opposition were filed on 14th July, 2006.

The said grounds of opposition are as follows: -

a) ***The application is fatally and incurably defective.***

b) ***The application is bad in law.***

c) ***The application is frivolous and vexatious.***

On the hearing date, Mr. Mogere appeared for the defendant/applicant, while Mr. Karuga appeared for the plaintiffs/respondents.

Learned Counsel for the applicant, Mr. Mogere, submitted that the plaint discloses no cause of action. It was contended, that this being a case

for defamation, the specific words published or broadcast have to be contained in the plaint for the court to know whether a cause of action has been disclosed. It was counsel's argument that in our present case, the plaintiff did not give the alleged defamatory words in the plaint. Therefore, the plaint should be struck out for disclosing no cause of action. Reliance was placed on the case of **FRANCIS OYATSI Vs WACHIRA WARURU and THE STANDARD LTD** [2006] eKLR where it was held that the plaint in a slander case should set out verbatim in the statement of claim the very words of libel, so that the court may judge whether they constitute a ground for action. Counsel contended that, even after this application was filed in 2006, no attempt had been made by the plaintiffs to amend the plaint. It was contended that this was a proper case where the court should exercise its discretion to strike out the plaint.

Mr. Karuga for the respondents, on the other hand, submitted that the court needs to look at both the plaint and defence. Counsel submitted that there was no item of defence, alleging non disclosure of a cause of action. Counsel contended that the case of **FRANCIS OYATSI** (*supra*) was distinguishable as that case related to a publication in the print media, while the present case was a publication in the electronic media by way of

television broadcast. Counsel also argued that they had asked for particulars of the broadcast from the applicant/defendant, but had so far not been provided with the same. Counsel was of the view that the words broadcast herein were always in the knowledge and possession of the defendant/applicant. Counsel maintained that this application was an abuse of court process, and should be dismissed.

I have considered the application, documents filed and submission of counsel for the parties.

This is a defamation matter. Order 6 rule 6A (i) of the Civil Procedure Rules provides: -

> ***"6A(i) where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in an defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense."***

It is true that in the case of **OYATSI** (*supra)* the court upheld what was stated by Nyamu J, (***as he then was)*** in **HON. NICHOLAS BIWOTT vs HON. PAUL MUITE & ANOTHER** – HCCC 1369 of 2003 that in defamation cases the exact words complained of should be stated in the

plaint. That holding of the court came from a citation of a text from **GATLEY ON LIBEL AND SLANDER** section 4 paragraph 26.11.

In my view, the Kenyan position of what must be stated in a plaint in a libel or slander case is what is provided for under Order 6 Rule 6A (1) of the Civil Procedure Rules. The requirements in Kenya appear to me to be slightly different from the English position given by **GATLEY** in his text. In my view, what is required in Kenya is that the plaintiff has to give the particulars of the facts and matters on which he relies upon. This requirement, in my view, is different from the requirement to state the exact words is the case obtaining in England. There is no requirement in Kenya that the exact words be stated verbatim. With due respect therefore, I do not agree with the observations in the above cases.

Obviously, where the exact words are available, they should be given. However, in Kenya the law allows plaintiffs in libel cases, to give particulars of facts and matters which he/she relies upon for the defamation case, not the exact words. If the legislature wanted the exact words to be pleaded verbatim, nothing would be easier than to plainly state so. I hold that when particulars of facts and matters relating to the

alleged defamation are given, that is adequate under the provisions of the Civil Procedure Act in Kenya.

The plaintiff in the present case gave sufficient particulars that can sustain the plaint. Of course, the proof of the case or its success is another issue which has to be established through evidence. But, in my view, the allegations and particulars given in the plaint herein are sufficient to sustain the plaint, subject to proof of the case. I find no merits in the application. I will dismiss the application, which I hereby do. However, costs will be in the cause.

Dated and delivered at Nairobi this 7th day of December, 2010.

.....

GEORGE DULU

JUDGE

In the presence of: -

Peter Munga
Stanley Kamau
Allan Rugu
Moses Mbugua
} **Plaintiffs/respondents in person**

Catherine Muendo – court clerk