



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 600 OF 2016

JOSEPH GIKONYO T/A

GARAM INVESTMENTS.....APPLICANT

VERSUS

STEPHEN K. KIBUNJA T/A

KIBUNJA & ASSOCIATES ADVOCATES.....RESPONDENT

RULING

1. The application dated 23rd September, 2020 seeks orders that:

“1. Spent.

2.Spent.

3.That the honourable court be pleased to order Respondent’s process server to appear before court for cross-examination on the contents of his affidavit of service filed in this matter.

4.That the honourable court be pleased to set aside the judgment delivered on 9th October, 2019, the resultant decree and all other consequential orders arising therefrom.

5.That the Applicant be given unconditional leave to defend the Appeal herein and the same to be heard on merit.

6.That the costs be provided for.”

2. The application is premised on the grounds set out therein and the supporting affidavit. It is stated that the Applicant was not served with the Appeal herein. That the Process Server filed a false affidavit of service and the Appeal proceeded and the judgment was delivered without the Applicant’s participation. It is further stated that the Respondent has already extracted warrants of attachment and has proclaimed the Applicant’s tools of trade.

3. The application is opposed. It is stated in the replying affidavit that the suit herein is in respect of enforcement of taxed costs as per the Certificate of Taxation which remains unchallenged. It is contended that the Applicant was duly served with the Record of Appeal and subsequently served with the Hearing Notice by way of substituted service by way of registered post as per the court orders herein.

4. I have considered the application, the response and the submissions filed by the parties herein.

5. The application herein dated 24th April, 2018 for substituted service was allowed on 30th May, 2018. The affidavit of service sworn by Angelo Njue Nthia, a Court Process Server reflects that he proceeded to the Applicant’s Offices on 20th December, 2017 and found the premises at Dhanjay Apartment 6th Floor Suit 603 locked and that inquiries made revealed that the Applicant no longer occupied the premises and that the Applicant’s whereabouts were unknown. That the Applicant was subsequently served through his postal address which was reflected at the Law Society of Kenya Website as P.O. Box 59588-00200. The supporting affidavit further reflects that the Applicant was telephoned through telephone No. 0722 875894 which was reflected on the Law Society of Kenya website and asked for details for service but failed to divulge his location.

6. The affidavits of service subsequently filed herein for hearing on 17th July, 2018, 27th November, 2015 and 28th March, 2019 reflect service through the same postal address.

7. The Applicant has deponed that his telephone number and his postal address appear on the Law Society of Kenya Website. The telephone number is reflected as 0722514471 and the postal address as P.O. Box 59588-00200 Nairobi. These are the same contacts referred to by the Respondent. Although one of the orders sought by the Applicant was for the Process Server to appear in court for cross-examination on the contents of the affidavit of service, this prayer appears to have been abandoned as it was not pursued in court during the hearing of the application. Without the cross-examination of the Process Server, the contents of the affidavit of service remain unchallenged. Consequently, I hold that the Applicant was duly served.

8. The principles applicable in determining whether to set aside an *ex-parte* judgment were laid out by the Court of Appeal in the case of **Pithon Waweru Maina v Thuka Mugiria [1983] eKLR** as follows:

“a) Firstly, there are no limits or restrictions 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 court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. *Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76C and E b*). Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. *Shah v Mbogo [1967]EA 116at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48.c*). Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. *Mbogo v Shah [1968]EA 93*.

9. In the case at hand, it is noted that the issue of the Certificate of Taxation which has lead to this case has not been mentioned by the Applicant in his affidavit. According to the Respondent, the Certificate of Taxation for Ksh.448,479/= which was issued on 18th April, 2014 still stands. Although the Applicant’s complaint herein is that the Appeal herein was heard without his participation, there is the lingering question of the issue of certificate of Taxation which has remained undisturbed for over six years.

10. In the upshot, I find no merits in the application and dismiss the same with costs.

DATE, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF MAY, 2021

B. THURANIRA JADEN

JUDGE