



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 580 OF 2007

FELICINA MUTHONI WANG'ONDU (Suing as the Administratrix of the Estate of

JOHN CHARLES WANG'ONDU) PLAINTIFF/RESPONDENT

VERSUS

MOSES AMADI1ST DEFENDANT/APPLICANT

JOHN MASINDE MAKOMERE2ND DEFENDANT

RULING

1. The Application dated 17/2/2021 principally seeks orders that: -

Judgment delivered on 14th April 2016 and the decree issued on 4th October 2019 against the 1st Defendant and all other consequential orders be set aside and the 1st Defendant be granted unconditional leave to defend this suit.

2. Secondly: -

That upon granting prayers 2 and 3, the draft Defence annexed herein be deemed as properly filed out of time and be admitted as part of the court's documents.

3. The application is premised on the grounds set out in the application and the supporting affidavit. It is stated that the 1st Defendant/Applicant was never served with the Summons to Enter Appearance or any other documents herein. That the Applicant only came to learn about this suit when his housegirl was served with the Warrants of Attachment and Sale of his property which is his matrimonial home. It is asserted that there is a good defence to the claim which raises triable issues and that the Applicant stands to suffer irreparable loss if the application herein is not allowed.

4. The application is opposed. It is stated in the replying affidavit that the Applicant was served with Summons to Enter Appearance in accordance with the Civil Procedure Rules. That the Applicant deliberately failed to enter appearance or file a defence and now seeks to reverse the position herein after 14 years. It is further stated that the proposed defence consists of mere denials and does not raise any reasonable cause of action, is frivolous and cannot stand the test of time.

5. The Applicant filed a response and reiterated the contents of his supporting affidavit and stated that he only became aware of this case on 1/2/2021 and filed the instant application without any delay. He denied having found any summons affixed to his door or any service of subsequent documents by way of registered post.

6. I have considered the application, the response to the same and the rival submissions filed.

7. Order 5 Rule 8 (1) of the Civil Procedure Rules states that: -

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.

8. Order 5 rule 14 of the Civil Procedure Rules states that: -

Where the serving officer, after using all due and reasonable diligence, cannot find the defendant, or any person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the court from which it was issued, together with an affidavit of service.

9. 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*.

10. In the case at hand, the affidavit of service which was relied on by the court when the Interlocutory Judgment was entered against the Applicant is the one sworn on 30/11/2007 by Joseph Opany Otieno, a Court Process Server. The said affidavit reflects that service was effected on the Applicant by affixing the summons together with the plaint on the door of the Applicant’s house at Umoja Innercore near Fountain Fall Pre-School and Primary School In Nairobi. It is averred in the said affidavit that the said house was pointed out to the Process Server by the Plaintiff/Respondent, the caretaker and a neighbor to the Applicant.

11. Turning back to Order 5 rule 14 Civil Procedure Rules, the same provides for affixing a copy of the summons at the door after all due and reasonable diligence. The affidavit of service reflects two visits to the house on 13/9/2007 and on 16/10/2007. It is also reflected that there was reliance on the information given by the caretaker that the Applicant normally left the house at 5.30 a.m. and returned at 9.30 p.m. That further information was given by the neighbor, that the Applicant lived alone. I am not satisfied from this scenario that all due diligence was used before affixing the summons on the Applicant’s door. The Process Server could have tried to personally locate the Applicant. We are not told for example whether the Process Server tried to find out where the Applicant worked or where the Applicant could be found during the day.

12. The Applicant has denied service of any court documents other subsequent service by way of Registered Post. It is noted that there was no application made before the court for leave to serve any documents by way of substituted service. It is not known how the postal address in question came to be known to the Respondent as the Applicant’s address. The proper service of other documents after the delivery of the Judgment may have probably hastened the filing of any intended applications without prolonged delay.

13. The proposed defence is not a mere denial. The defence alleges, *inter alia*, that the Respondent willingly or substantially contributed to the accident the subject of this suit. This is a triable issue.

14. As stated in the case of **Delphis Bank Limited – vs – Samwel O. Balla & 3 others [2005] eKLR**;

“It is trite law that where the proposed defence raises even a single triable issue, the defendant should be given leave to defend the suit otherwise there would be no need to set aside a default judgment”. Further in the case of *George Maina Macharia & 2 Others – vs – East Africa Development Bank [2004] eKLR* relying on the case of *Kenya Commercial Bank Ltd – vs – Baraka Ochungu & another. Nairobi HCCC No. 3815/94 (Milimani)* it was held that;

“The law is now well settled that a defendant who shows that he has in his defence at least one triable issue, must be allowed to proceed unconditionally and be heard in his defence at a full hearing”.

15. With the foregoing, in the upshot I allow the application with costs in cause. The requisite court fees for the filing of the defence to be paid within 14 days from the date hereof.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE, 2021

B.THURANIRA JADEN

JUDGE