



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E252 OF 2019

BETWEEN

AGIGREEN CONSULTING CORP LIMITED.....PLAINTIFF

AND

NATIONAL IRRIGATION BOARD.....DEFENDANT

RULING

1. The Defendant seeks to set aside judgment entered against it in default of appearance and defence on 26th November 2019 by the Notice of Motion dated 2nd April 2020 made under **Order 10 rule 11** of the **Civil Procedure Rules**. The Motion is supported by the affidavit of Engineer Raphael Ogindo sworn on the same day. The application is opposed by the Plaintiff through the replying affidavit of its director, Yariv Kedar, sworn on 25th June 2020. Both parties filed extensive written submissions which their counsel highlighted orally.

2. The judgment in this case was entered on the basis of Summons to Enter Appearance (“the Summons”) dated 15th August 2019 together with the Plaint served on the Defendant as evidenced by the Affidavit of Service of Victor Odundo, a licenced Court Process Server, sworn on 25th September 2019 (“the Affidavit of Service”) in which he states, at the material part, as follows:

[2] THAT on or about 06th September 2019, at around 11.00am I received Summons to Enter Appearance (issued on 15th August, 2019) together with a Plaint (dated 9th August 2019 and filed on 15th August, 2019) from the firm of Howard, Nick and Kenneth Advocates with instructions to serve the same upon the Defendant.

[3] THAT on the same day I went to the National Irrigation Board at Unyonyuzi House within Nairobi.

[4] THAT on arrival, I went to the reception Area and upon introducing myself and stating the purpose of my visit, I tendered 2 sets of Summons to Enter Appearance and Plaint to the Receptionist who acknowledged receipt by stamping on my set of Summons.

[5] THAT I now return the duly acknowledged Summons to this Honourable Court having duly served upon the Defendant.

3. The central issue raised by the Defendant is that it was not served with the Summons. Its argument is that it is a statutory corporation established by statute and service upon it was required to be in accordance with **Order 5 rule 3** of the **Civil Procedure Rules**. This provision requires that the summons be served on the secretary, director or principal officer of the corporation. Therefore, according to the contents of the Affidavit of Service, which I have set out aforesaid, none of the principal officers were served nor attempts made to serve them with the Summons.

4. In response to the issue of service, the Plaintiff contended that whereas the Defendant disputes the service, the Summons returned to the Court bearing the Defendant’s official stamp which the Defendant has not challenged as a forgery if at all service was not properly effected. Further, that the same stamp is the one used to acknowledge correspondence exchanged before and after the judgment was entered. Counsel for the Plaintiff submitted that in light of the clear service, it was onerous and illogical to expect the Process Server to set out the details of the Defendant’s premises when in fact it is the Defendant who has been less than candid in admitting that it was served with the Summons.

5. The manner of service of summons on a Corporation is set out in **Order 5 rule 3** of the **Civil Procedure Rules** which states as follows:

3. 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 3(a) –

i. by leaving it at the registered office of the corporation;

ii. by sending it by prepaid registered post or by a licensed courier service provider approved by the court to the registered postal address of the corporation; or

iii. if there is no registered office and no registered postal address of the corporation, by leaving it at the place where the corporation carries on business; or

iv. by sending it by registered post to the last known postal address of the corporation. [Emphasis mine]

6. From the aforesaid provisions, the Summons must, in the first instance, be served, “on the secretary, director or other principal officer of the corporation”, before resorting to other modes of service. The Affidavit of Service is clear that the Summons was not effected on any of the principal officers of the Company nor was any explanation given why the Process Server resorted to serving the Summons on the receptionist who was not a principal officer of the corporation. Moreover, the Process Server does not disclose whether the “Receptionist” had authority to accept service of Summons on behalf of the principal officers of the Defendant. It must be recalled that default judgment is entered on the basis of an affidavit of service which must, on its face show, that service has been effected in accordance with the applicable rules. In this case, I find and hold that the Process Server did not comply with **Order 5 rule 3(a)** of the **Civil Procedure Rules** in effecting service on the Defendant.

7. Counsel for the Plaintiff submitted that the court should consider the fact that counsel for the Defendant did not call for the process server to be cross-examined on the contents of the affidavit of service. In **Shadrack arap Baiywo vs. Bodi Bach KSM CA Civil Appeal No. 122 of 1986 [1987]** eKLR, the Court of Appeal quoting **Chitaley and Annaji Rao; The Code of Civil Procedure Volume II page 1670** stated that:

There is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service.

8. I agree with the aforesaid position but it is not applicable to this case. An affidavit of service must prima facie disclose proper and actual service for it is on the basis of this service that judgment is entered. In this case, the manner of service set out in the Affidavit of Service is insufficient and does not comply with **Order 5 rule 3(a)** of the **Civil Procedure Rules** hence no purpose will be served by calling the process server for examination as this would give the deponent an opportunity to make a case that is not in the affidavit of service upon which the judgment was entered.

9. Under **Order 10 rule 11** of the **Civil Procedure Rules**, the court has unfettered discretion to set aside judgment on such terms as it deems fit and just (see **Shah v Mbogo and Another [1967] EA 116**). Since the service disclosed in the Affidavit of Service was not in accordance with **Order 5 rule 10** of the **Civil Procedure Rules**, it was irregular hence the court is entitled to set aside the judgment as a matter of right. In **James Kanyिता Nderitu & Another vs. Marios Philotas Ghikas & Another [2016] eKLR**, the Court of Appeal explained the nature and effect of an irregular judgment as follows:

In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.

10. It is abundantly clear that the default judgment in this matter was irregular. It ought to be set aside. It is set aside. Having reached this conclusion, it is unnecessary to deal with the other grounds proffered in support of the application

11. I allow the Notice of Motion dated 2nd April 2020. The Defendant shall file and serve its defence within 14 days from the date hereof. The Defendant shall pay thrown away costs of the application.

DATED and DELIVERED at NAIROBI this 19th day of AUGUST 2020.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Kamau instructed by Howard, Nick and Kenneth Advocates for the plaintiff.

Ms Kimani instructed by L. G. Kimani and Company Advocates for the defendant.