



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 399 OF 2010

PETER BUTALI SABWAMI & IDA NEKOYE

SABWAMI (Suing as the legal representatives of

Of the estate of **JENNIFER NJERI BUTALI**).....**PLAINTIFF/RESPONDENT**

VERSUS

ARCHDIOCESE OF NAIROBI OF

KENYA REGISTERED TRUSTEES.....**1ST DEFENDANT/APPLICANT**

DR. LILIAN WANGUI.....**2ND DEFENDANT**

DR. MUCHAI M GACHAGO.....**3RD DEFENDANT**

RULING

1. The background to the application at hand is that the Plaintiff herein instituted this suit against the 1st -3rd Defendants claiming damages arising from the death of the deceased who passed away during delivery. The claim was denied by the 2nd and 3rd Defendants who entered appearance and filed a Statement of Defence.
2. No Memorandum of Appearance or Statement of Defence was filed by the 1st Defendant and interlocutory judgment was entered.
3. The case proceeded to hearing in the absence of the 1st Defendant and in the absence of the 2nd and 3rd Defendants who were reflected on the record as having been served with the Hearing Notice but were absent. Subsequently judgment was entered on 6th July, 2016 for the Plaintiff against the Defendants jointly and severally for the total sum of Ksh.5,045,879/=.
4. The 1st Defendant subsequently filed the application dated 9th November 2016 and principally sought orders that this Honourable Court be pleased to set aside the interlocutory judgment, the final judgment herein and all consequential orders thereto.
5. Secondly, that this court be pleased to grant the 1st Defendant leave to file its Defence in terms of the copy of the Defence exhibited herein and that the suit be heard afresh on merit.
6. It is stated in the affidavit in support and the further affidavit that the Plaintiffs served the Summons to Enter Appearance on a tea girl at the 1st Defendant's premises. That the said worker whose name is given as Elizabeth Ng'ang'a had no authority to receive the summons and did not understand the importance of the same and the documents served were not brought to the attention of the trustees of the 1st Defendant.
7. The 1st Defendant further averred that at the time the suit herein was instituted, the 1st Defendant's registered office had moved from the Cardinal's Residence in Lavington to the Holy Family Basilica in the Central Business District. That the 1st Defendant was not served with Notice of Judgment and only came to know of the case when they were served with the Notice of Taxation dated 9th September, 2016.
8. The 2nd and 3rd Defendant in their replying affidavit supported the application. It is stated that the 2nd and 3rd Defendants were not served with the Hearing Notice.

9. In a replying affidavit filed in opposition to the application, it is stated that the Summons to Enter Appearance together with the Plaint and accompanying documents were served on them through one Elizabeth Ng'ang'a who was found by the process server at the 1st Defendant's office Reception. That the said lady informed the process server that she was authorized to accept service and received the documents and acknowledged the receipt thereof by signing and stamping the 1st Defendant's official stamp on the copies.

10. It is further deponed that there are no documents exhibited in support of the assertion that the 1st Defendant had moved office and if so, when. The Plaintiff saw the instant application as an afterthought and a delaying tactic by a party who had no tenable defence.

11. I have considered the application, the response to the same and the submissions made by the counsels for the respective parties.

12. The principles upon which a judgment can be set aside were considered by the Court of Appeal in **Pithon Waweru Maina v Thuka Mugiria [1983] eKLR** where it was held 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*.

13. The copy of the Summons to Enter Appearance exhibited herein is signed as received by one Elizabeth Ng'ang'a and duly stamped with the 1st Defendant's official stamp. The bone of contention is whether the said Elizabeth Ng'ang'a was the proper person to receive the documents in question.

14. Order 5 rule 3 Civil Procedure Rules 2010 provides as follows:

“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.”

15. The Plaintiff's side has not explained why the summons were not served on any of the principal officers of the company. That was the first option before effecting of service through any other method.

16. The Plaintiff has relied on Order 5 rule 8 (1) Civil Procedure Rules 2010 which provides as follows:

“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.”

17. There is no evidence that Elizabeth Ng'ang'a was authorized to accept service on behalf of the 1st Defendant. There is no evidence from the Plaintiff's side stating the relationship between the person being served and the person to whom the summons was directed. The Plaintiff alleges proper service. He who alleges must prove.

18. The copy of the Draft Defence exhibited herein by the 1st Defendant raises triable issues which include the question whether the 1st Defendant is to blame for the death of the patient and whether the 1st Defendant is vacariously liable for the actions of the 2nd and 3rd Defendants.

19. With the foregoing, I find merits in the application and allow the same. Costs in cause.

Date, signed and delivered at Nairobi this 31st day of Oct, 2019

B. THURANIRA JADEN

JUDGE