

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 932 OF 2000

JULIANA NJERI MURIITHI.....PLAINTIFF

VERSUS

VERONICA NJERI KARANJA.....1ST DEFENANT

DAVID NJOROGE.....2ND DEFENDANT

RULING

The plaintiff sued the defendants following a road traffic accident that took place on 10th July, 1997. The accident involved motor vehicle registration No. KAE 821K in which one Stephen Mureithi Warama (now deceased) was travelling and motor vehicle registration No. KAA 916L registered in the name of Peter Karanja Chege (also now deceased). The plaintiff is the administrator of the estate of the late Stephen Mureithi Warama while the defendants are the administrators of the estate of Peter Karanja Chege. The plaintiff blamed the accident on the negligence of Peter Karanja Chege. The record shows summons to enter appearance were served but defendants did not enter appearance or file any defence.

Upon request for judgment, interlocutory judgment was entered in favour of the plaintiff and the suit listed for formal proof. Thereafter the court in a judgment delivered on 29th July, 2015 gave judgment in favour of the plaintiff in the total sum of Kshs. 9,920,050/= with costs and interest.

There is now before an application by way of Notice of Motion under Order 10 rule 11, Order 51 Rule 15 of the Civil Procedure Rules and Section 3 A of the Civil Procedure Act for orders, that there be a stay of execution of the judgment and decree issued on 29th July, 2015 and that the *ex parte* judgment entered against the defendants be set aside, and they be allowed to file a defence to this suit.

The grounds advanced by the defendants are that, they were never served with summons and plaint as alleged in the affidavit of service and that, even after the entry of the interlocutory judgment they were not served with the mandatory 10 days notice. It is their case that they have a good defence as disclosed in the draft annexed to the application, and should not be denied the right to be heard on merit. There is a supporting affidavit sworn by the 2nd defendant herein. The application is opposed and there is a replying affidavit sworn by the plaintiff. Both parties have also filed submissions and cited some authorities.

I have read the affidavit of service sworn by Martin Muia Mutua relating to the service upon the defendants, which the 2nd defendant has denied in his affidavit in support of the application. The 1st defendant has not denied service of the said summons. The affidavits of service are so detailed in material particulars with regard to the date, the place and identities of the defendants, that they leave no doubt service was properly effected and the defendants cannot deny the same. In fact, the area Assistant Chief countersigned service upon the 2nd defendant.

Where a party denies service of court process and there is an affidavit of service to that effect, such a party has the right to demand the attendance of the process server to be cross examined relating to the disputed service. In this case, the defendants herein did not take that step and the failure to do so may be construed to mean they feared the confirmation by the process server in that regard. The material presented by both sides leaves me with no doubt that the summons to enter appearance were properly served but the defendants ignored, neglected or refused to comply with the requirements. The default judgment was therefore in order.

That notwithstanding, the defendants have expressed the wish to be heard and in fact annexed a draft defence to advance their case. Any party who wishes to be heard should be given that opportunity, provided that no prejudice shall be occasioned to the other party.

I recognize the fact that the plaintiff has a valid judgment entered as a result of the defendants' failure to enter appearance and file a defence. At the same time I have to balance that with the right to be heard.

That being the case, I am persuaded to allow the application on the following terms. The defendants shall deposit the entire decretal sum in an interest earning account in the names of both advocates for the parties within 30 days from the date hereof. Upon compliance, they shall regularise their position by entering appearance and filing a defence within 15 days from the date of such compliance. The costs of this application shall be paid to the plaintiff by the defendants.

Dated, signed and delivered at Nairobi this 19th Day of December, 2019.

A. MBOGHOLI MSAGHA

JUDGE