



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 65 OF 2013

ARTHUR MUNYAO MUO.....1ST PLAINTIFF

LILIAN GETURO.....2ND PLAINTIFF

BEATRICE CHELENGAT.....3RD PLAINTIFF

CHRISTOPHER MAINA.....4TH PLAINTIFF

PAULA RUBY INVESTMENT LIMITED.....5TH PLAINTIFF

SERICAN RUBY INVESTMENT LIMITED.....6TH PLAINTIFF

VERSUS

ROSEMARY WANGUI KIMAKU.....1ST DEFENDANT

NELSON ASEKA MUNYASA.....2ND DEFENDANT

Both trading as

SIMPLE FX ONLINE.....3RD DEFENDANT

RULING

1. The Law Firm of **NUNGO, ODUOR & WAIGWA ADVOCATES** have sought leave of the court, to enable then come on record, to act as the advocates for the 1st Defendant, **ROSEMARY WANGUI KIMAKU**.
2. The 1st Defendant also sought the setting aside of the judgement which had been entered against her on 4th July 2014.
3. Pending the determination of the application to set aside the judgement, the 1st Defendant sought a stay of execution of the Decree.
4. According to the applicant, she had never been served with either the Plaint or Summons to Enter Appearance. She also said that she had never been served with any Hearing Notice, which would have

alerted her to the fact that the case was coming up for hearing.

5. The first time when the applicant became aware of the case was when she was served with a Notice To Show Cause.

6. Immediately after being served with the Notice To Show Cause (**N T S C**), the applicant instructed the Law Firm of Nungo, Oduor & Waigwa Advocates.

7. A perusal of the court records showed that there was an Affidavit of Service which had been sworn by **ELVIS I. MUTHOKA**. The said Mr. Muthoka deponed that he served the applicant on 27th February 2013.

8. The Process Server stated, in his affidavit of service, that the applicant was pointed out to him by the 5th plaintiff, **PAUL NYAGUTHIE NJUGUNA**. He further explained that the **service was effected at the NAIROBI MILIMANI LAW COURTS**.

9. Why was service being effected at the Law Courts?

10. The process server said that on 27th February 2013, the Defendants were to attend Court for the hearing of a Criminal Case against them.

11. The process server identified the case as being **NAIROBI MILIMANI CHIEF MAGISTRATES COURT, CASE No. 462 of 2009**.

12. However, the applicant faults the affidavit of the process server for failing to name the person who was served.

13. The process server is also faulted for not disclosing the names and address of the person who identified the applicant.

14. Thirdly, the process server was faulted for not disclosing the names of the persons who witnessed the process when the process server effected service.

15. The affidavit of service explicitly names the person who identified the applicant. That person is the 5th plaintiff.

16. In this case there are two defendants, Rosemary Wangui Kimaku and Nelson Aseka Munyasa. The applicant has confirmed that she is a female. Whilst from his name, Nelson, the 2nd defendant is a man. In effect, the defendants are a man and a woman. The process server has described them as a lady and a gentleman.

17. And they were not just any lady or any gentleman. They were the two persons who were attending Criminal Case No. 462 of 2009, which was at the Nairobi, before Milimani Chief Magistrate's Court.

18. To my mind, the process server could not have been more precise than he was already.

19. If the applicant was not one of the two persons who were attending the criminal case, I would have expected her to say so. She did not deny that she was one of the 2 accused persons in the specified criminal case. Therefore, I find that the applicant did not controvert the essential part of the affidavit of service, which had identified her.

20. The 5th plaintiff was able to not only identify the applicant but to also know that both defendants would in court on 27th February 2013, because the said plaintiff was one of the complainants in the criminal case.

21. I note that whilst service of the Complaint and Summons to Enter Appearance was effected upon the applicant on 27th February 2013, the Law Firm of **SOSPETER & COMPANY ADVOCATES** entered appearance for both defendants on 12th March 2013.
22. The applicant denies having given instructions to the Law Firm of Sospeter & Company Advocates.
23. Once an advocate comes on record on behalf of any party, it is the said advocate who is thereafter served with any Notices which are intended to notify his client about any steps which are to be taken in the case.
24. Therefore, although the applicant was not served with Notices after an advocate had come on record for her, I find that service upon the advocate who was on record was a good service upon the applicant.
25. No person is required to serve both a party and the advocate who is on record for that party.
26. Indeed, once an advocate comes on record, it is wrong to serve his client directly.
27. Having interrogated the issue of the alleged non-service of the Complaint and the Summons to Enter Appearance, I find that the applicant was duly served.
28. Therefore, when she failed to file a Defence after her advocate had entered appearance, I find that the Interlocutory Judgement which was entered by the court, was regular.
29. If the judgement was irregular, the court would have set it aside, unconditionally.
30. However, I acknowledge that even when a default judgement was regular, the court retained an unfettered discretion to determine whether or not to set it aside.
31. In the exercise of the court's said unfettered discretion, I find that the plaintiffs will not be prejudiced if the Interlocutory Judgement was set aside. I so find because the plaintiffs would still have another opportunity to prove their case against the applicant.
32. However, I also find that because the applicant had been duly served with both the Complaint and Summons to Enter Appearance, she had been accorded an opportunity to file her defence.
33. Thereafter, the advocates who were then on record for the applicant were duly served with a Hearing Notice. The said Notice gave to the applicant an opportunity to be heard.
34. If the applicant failed to file a Defence and also failed to attend court during the Formal Proof, the said failure cannot be construed as a denial or a deprivation of a right to be heard.
35. Neither the plaintiff nor the Court had an obligation to compel the applicant to either file a defence or to attend court during the Formal Proof. Once the court was satisfied that the applicant had been duly served, the court was entitled to presume that the applicant had made a conscious choice to not file her defence, and to not attend court for the Formal Proof.
36. In these circumstances, even though the court has decided to give the applicant another opportunity to canvass her Defence, the said opportunity cannot be unconditional.
37. The plaintiffs had served the applicant and had called witnesses who helped them prove their case. If the judgement was set aside unconditionally, the plaintiffs would be prejudiced.
38. Secondly, as the plaintiffs went through Formal Proof, they tendered evidence which was deemed sufficient to prove their case.

39. In the circumstances, I order the applicant to pay the costs of the applications dated 20th September 2016; 22nd September 2016 and 25th July 2017.

40. I further order the applicant to pay all the thrown-away costs. Those costs include the costs of the Formal Proof and all orders subsequent thereto.

41. The Thrown-away costs also include costs incurred when the applicants applied for Interlocutory Judgement and costs incidental thereto.

42. Finally, the applicant is ordered to deposit the sum of USD 15,375.00 in a joint interest-earning Account, which account shall be operated by the advocates for the plaintiff and the applicant's advocates. The applicant has 30 days to raise the funds which are to be held as a deposit.

43. In the event that the sum of USD 15,375.00 is not made available within the period of 30 days, the order setting aside the Interlocutory Judgement herein shall stand vacated.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 22nd day of January 2018.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiffs

Miss Nyambura for the 1st Defendant

No appearance for 2nd Defendant

No appearance for 3rd Defendant

Collins Odhiambo – Court clerk.