



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 73 OF 2018

GROHE DAWN WATERTECH

FITTING PTY LTD.....PLAINTIFF/ APPLICANT

VERSUS

IDEAL CERAMICS.....DEFENDANT/RESPONDENT

RULING

1. This ruling relates to a Notice of Motion Application dated 12th March 2018, brought under the provisions of Order 5 Rule 17 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 whereby the Applicant is seeking leave to effect service of the summons upon the Defendant by affixing a copy thereof in “some conspicuous place in the Courthouse and part of the premises in which the Defendant is known to have last carried on business, or in such other manner as the Court thinks fit”. The costs of this Application be provided for.
2. The Application is premised on the grounds on the face of it and supported by an Affidavit dated 12th march 2018, sworn by Morara Omoke an Advocate of the High Court of Kenya. He deposed that despite all reasonable and diligent efforts by the Plaintiff and his Advocates to effect service of the Plaintiff filed herein on 16th February 2018 and Summons upon the Defendant, they have been unable to do so as the Defendant and/or his agents have rejected and/or refused to accept service thereof.
3. The Applicant has relied on the Affidavit of service dated 27th February 2018, sworn by Nichols Kiso, a Process server, who avers that on 20th February he received instructions from the firm of Ogetto, Otachi and Company Advocates to effect service of the Plaintiff in Civil Suit No. 73 of 2018, filed on 16th February 2018, and Summons upon the Defendant Company. On the same day, he went to the Company’s head office located on Mombasa road opposite Sameer business park and upon arrival, he went to the Reception area, introduced himself to the Receptionist and explained the purpose of his visit. He then gave her a copy of the Plaintiff and Summons but she refused to receive them, arguing that she is not authorized to receive such documents without the Director’s permission. That he allegedly tried to convince her to receive them and forward them to the Director but she refused. He then left a copy of the documents.
4. However he was instructed to go back and try serving the documents a second time. He went back on 22nd February 2018 at about 11.30 am to make a follow up and for the Receptionist to sign his copies of the summons but she maintained that she is not authorized to do so and refused to stamp the documents as required and/or provide her name.
5. The Applicant thus argues that it is only just, fair and equitable that the Application be allowed and service be effect upon the Defendants through substituted service.
6. I have considered the Application, the grounds and the Affidavit in support. I found the issue for determination is whether the Applicant has made out a case for orders sought. The procedural provisions that govern service of Summons are provided for under Order 5 of the Civil Procedure Rules, 2010.
7. The provisions of Order 5 Rule 3 that deals with service on a Corporation states that:-

“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.”

8. The provisions of Order 5 Rule 6 of the Civil Procedure Rules on the other hand deals with the mode of service and states that:-

“Service of the summons shall be made by delivering or tendering a duplicate thereof signed by the judge, or such officer as he appoints”

9. Order 5 Rule 17 of the Civil Procedure Rules provides for substituted Service as follows:-

“(1) Where the court is satisfied that for any reason the summons cannot be served in accordance with any of the preceding rules of this Order, the court may on application order the summons to be served by affixing a copy thereof in some conspicuous place in the court-house, and also upon some conspicuous part of the house, if any, in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the court thinks fit.

(2) Substituted service under an order of the court shall be as effectual as if it had been made on the defendant personally.

(3) Where the court makes an order for substituted service it shall fix such time for the appearance of the defendant as the case may require”

10. The Applicant has deposed as stated herein the difficult experienced in serving the Defendant. The affidavit by the process server gives details of how he could not effectively serve the Defendant. If the content of that affidavit is true as expected to be then the Applicant is entitled to either apply for judgment, as the Plaintiff and summons were left at the Defendant’s place of business. However for avoidance of doubt and to avoid any application to set aside any judgment that may be entered for improper service, I think it will be in order to grant the prayers as stated herein.

11. The upshot of all this is that the Notice of Motion Application dated 12th March 2018 is allowed in terms of prayer 2 and 3 and therefore leave is granted for service of summons upon the Defendant by affixing a copy thereof in some conspicuous place in the Courthouse and part of the premises in which the Defendant is known to have last carried on business. The costs of this Application shall be borne by the Defendant/Respondent.

12. That is the order of the Court.

Dated, delivered and signed in open court this 18th day of March 2018.

G.L.NZIOKA

JUDGE

In the presence of:-

Mr. King’ara for the Applicant

No Appearance for the Respondent

Mr Langa’t -----Court Assistant