



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**COMMERCIAL AND ADMIRALTY DIVISION**

**COMMERCIAL SUIT NO. 1 OF 2018**

**FANUEL ONYANGO**

**T/A URANIA TECHNOLOGIES.....PLAINTIFF**

**VERSUS**

**DOMINION FARMS LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

1. The application before me was brought by the Defendant, **DOMINION FARMS LIMITED**, seeking to set aside the exparte judgment which had been entered against it on 2<sup>nd</sup> February 2018.
2. The Primary reason cited by the Applicant, for seeking the setting aside of the exparte judgment is that the Defendant was never served with Summons to Enter Appearance.
3. The Defendant also faults the Court Broker, **VICTORIA BLUE AUCTIONEERS**, for carrying away the attached goods without having issued a Proclamation prior to such removal of goods.
4. The Defendant pointed out that it had a good Defence to the claim which the Plaintiff had based his suit on. In principle, the Defendant says that it neither ordered for nor received the goods which the Plaintiff allegedly sold to the Defendant.
5. It is common ground that the process server, **DAN ACHANDO** had sworn an affidavit of service, showing that he effected service on 16<sup>th</sup> January 2018.
6. The person who was served was not named by the process server. However, the said process server said that he did serve the “Human Resource Manager” of the Defendant.
7. According to the process server, it is the gentleman who introduced himself as the Human Resource Manager. By necessary implication, it means that the process server was not familiar with the said gentleman, prior to 16<sup>th</sup> January 2018.
8. It therefore also follows that until the time when the gentleman described himself as the Human Resource Manager, the process server did not know whether or not the gentleman was or was not the holder of the office he claimed to have at the Defendant company.
9. As the Defendant has said, its Human Resource Manager is named **MOSES OTIENO ODUOR**.
10. The said **Oduor** deponed that on the date when the process server allegedly served the Human Resource Manager, he was not at the Defendant’s offices in Siaya.
11. Obviously, if **Moses Otieno Oduor** is the Human Resource Manager of **Dominion Farms Limited**, and if he was not at the place where the process server effected service, he cannot be the person who was served.
12. But the Plaintiff insists that the law is very clear, concerning a third party who was dealing with a company; the said person is not required to inquire into the internal workings of the company.
13. Therefore, as far as the Plaintiff was concerned, if the person who was served did not have authority to accept service, the person could

have declined service.

14. In my considered opinion, the fact that a person who has been served with Summons or other court process, does not decline service, cannot, of itself render valid a service which was otherwise invalid.

15. To suggest otherwise would imply that if a house-help were served with Summons intended for the Employer, the law would presume that the Employer had been served, regardless of whether or not the person effecting service had tried to first serve the said Employer.

16. The law stipulates that, in the first instance, the person who is a Defendant should be served personally.

17. **Order 5 Rule 8** of the **Civil Procedure Rules** stipulates thus;

***“(1) 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.”***

18. The onus therefore rests on the Plaintiff who had served a person other than the Defendant to demonstrate that the person so served was an agent of the Defendant.

19. Meanwhile, when the Defendant is a corporation like the Defendant in this case, **Order 5 Rule 3** of the **Civil Procedure Rules** provides that service be effected on the Secretary, Director or other Principal Officer of the Corporation.

20. If any of those persons were not found, service can be effected by leaving the Summons at the Corporation’s registered office or by sending it to the Corporation’s registered postal address, or by leaving it at the place where the corporation carries on business.

21. If the Summons are served at the registered postal address, it should be sent either by pre-paid registered post or by a licenced courier service provider who had been approved by the court.

22. When the law stipulates the manner in which a Corporation is to be served, and when the law provides specific alternative modes of effecting service, parties are required to comply.

23. In this case, I find that the Plaintiff did not comply with the rules that govern the service of summons upon a Corporation.

24. If he had complied, he would not have needed to inquire into the internal organization or workings of the Defendant company.

25. In effect, the exparte judgment was entered irregularly, and must therefore be set aside.

26. I also find that the draft Defence raises serious issues, which the Defendant ought to be given an opportunity to canvass.

27. There is absolutely no evidence that the Defendant was seeking to obstruct the course of justice, either through the present application or in any other way.

28. What I understand the Defendant to be doing, is seeking an opportunity to have a fair determination of the case between the parties, as fairness can only be attained when each party to a dispute is served and is thus enabled to respond to the case put up against him/her.

29. If a Plaintiff was permitted to enjoy the fruits of an exparte judgment which had been obtained irregularly, that would constitute a negation of justice.

30. As the judgment is irregular, it follows that the execution process which was founded upon it was also irregular. Therefore, the Court Broker is directed to return to the Defendant any property which may have been carted away during the process of execution.

31. I find that the Defendant cannot be liable for the costs incurred by the Court Broker, as the execution process was irregular.

32. The person, if any, who should meet the costs of the execution process is the Plaintiff, who asked the Court to issue the Warrants of Attachment.

33. The costs of the application dated 9<sup>th</sup> April 2018 are awarded to the Defendant.

**DATED, SIGNED and DELIVERED at KISUMU this 13<sup>th</sup> day of June 2018.**

**FRED A. OCHIENG**

**JUDGE**