



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NUMBER 174 OF 2013

1. **N W N**

(Minor suing through next friend, the 2nd Plaintiff)

2. **P N M. PLAINTIFFS**

VERSUS

1. **SYNOHYDRO CO. LTD**

2. **MOSES NDUNGU NJOROGE**

3. **JAMES NJUHO. DEFENDANTS**

R U L I N G

1. Before me is the Notice of Motion dated the 18th day of December, 2015 brought under Sections 3 and 3A of the Civil Procedure Act, order 10 Rule 11, Order 7 Rule 1, Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules. The Application seeks for orders that: -

- i. Spent
- ii. There be a stay of execution of interlocutory judgment entered on 23rd July, 2013 against the 3rd Defendant/applicant pending the hearing and determination of this application.
- iii. The Interlocutory Judgment entered on 23rd July, 2013 herein against the 3rd Defendant/Applicant be set aside and the 3rd Defendant/Applicant be granted a chance to file their Defence out of time.
- iv. The proposed Defence, list of witnesses and documents accompanying Defence attached hereto be deemed duly filed and served upon payment of requisite court fees.
- v. This Application be served on the Plaintiff/Respondent and heard inter parties on such date and time as this Honourable court may direct.
- vi. The costs of this Application be in the cause.

2. The Application is premised on the grounds set out on the body of the same and on the annexed Affidavit of **SANDRA NYAKWEBWA** wherein she depones that she is the Claims Director at Directline Assurance Company Limited who are the insurers of Motor Vehicle Registration No. KBA 531H and at whose instance the claim is being defended.

3. She depones that on the 14th day of July, 2015, they issued instructions to the firm of M/S Kairu & McCourt Advocates, to enter appearance and defend the company's interest by dint of its rights of subrogation under the relevant policy of insurance at common and the right to defend, settle or prosecute any claims. That upon receiving the instructions, the 3rd Defendant's Advocate on record sent their court clerk one Everlyne Muthoni Waithira to file a memorandum of appearance on the 14th day of July, 2015 when she discovered that an interlocutory judgment has been

entered.

4. She further depones that she has been advised by her advocate on record which advise she verily belief to be true that summons should be served in person and that such proper service was not done on the 3rd Defendant and that there is no evidence of service upon the 3rd Defendant. That unless the interlocutory judgment is set aside, the 3rd Defendant/Applicant will have been condemned unheard and will suffer irreparable loss and they will not have been awarded a fair opportunity to defend themselves.
5. She further depones that the 3rd Defendant has a good defence and in the interest of justice prays that the interlocutory judgment be set aside and the 3rd Defendant be granted leave to defend the suit. That the application will not occasion any prejudice to the Plaintiff that cannot in any event be compensated by way of costs.
6. The Plaintiff has opposed the Application by way of grounds of opposition filed on the 15th day of January, 2016 as hereunder: -

1. The 3rd Defendant's application is misconceived and incompetent.
2. That the instant application is brought in bad faith as the 3rd Defendant has blatantly disobeyed the orders of this Honourable Court and as such the instant application should be countenanced by this Honourable Court.
3. The 3rd Defendant's application is time barred and the delay in filing the same is inordinate and inexcusable.
4. In view of the foregoing, the application is an abuse of the court process and should be dismissed with costs.
7. The application proceeded by way of oral submissions on the 4th day of February, 2016 and the submissions by the learned counsels reiterated the contents of the Affidavit in support and the grounds of opposition. In addition to the facts covered in the supporting affidavit, counsel for the Applicant submitted that the Application was filed out of time because they could not trace the insured to provide them with the facts relating to the suit and to give them proper instructions. According to him the delay of two months is not inordinate and that the same is explained. That he had already drafted the defence which is annexed to the Affidavit and prays for more time to file the defence so that the case could be heard on merits.
8. On his part, counsel for the Plaintiff submitted that the 3rd Defendant/Applicant did not file the Application within the 14 days granted by the court on the 12th October, 2015 and that no explanation has been given for the delay in filing the same. He further submitted that though the 3rd Defendant told the court that service of summons was improper, he did not tell the court how he came to know about the existence of the suit and they also did not tell the court how the service was improper. It was his further submission that the Affidavit in support of the Application was sworn by an officer of the insurance company and not by the Defendant. According to him, the 3rd Defendant has not come to court with clean hands and that he has not sworn an affidavit to say that he was not served.
9. I have carefully considered the depositions on record and the submissions made by the learned counsels for the respective parties. In my view, the issue that the court has to decide is whether summons to enter appearance was effected upon the 3rd Defendant? Though it is averred that the 3rd Defendant was not served with the summons, the court has not been told how he got to know about the existence of the suit and when. The instructions to defend the suit were issued to the firm of Kairu & McCourt on the 14th day of July, 2015 yet the suit herein was filed in the year 2013. The question is, who gave them instructions yet the 3rd Defendant was not aware of the suit?
10. It is also important to note that the 3rd Defendant did not swear an affidavit in support of the application. He ought to have been the right person to do so to confirm to the court whether he was served with the summons or not as the facts are within his knowledge. It is not enough for a Claims Director with the Insurance Company to merely state in an affidavit that the 3rd Defendant was not served with the summons to enter appearance.
11. The issue of delay has also been raised by the counsel for the Plaintiff/Respondent. The

Application was filed late by two months and no explanation has been given for the delay. Though counsel for the 3rd Defendant offered an explanation in his submissions, those facts are not contained in an affidavit and therefore, this Honourable court cannot consider them as they are not made under oath and do not form part of evidence. I need to point out that submissions are not evidence.

12. The 3rd Defendant seeks to set aside the interlocutory judgment for the reason that he was not served with summons to enter appearance and therefore, he was not aware of the existence of the suit all along. In fact in his grounds in support of the Application, that is the only ground that he relies on. I have taken the liberty to peruse the Affidavit of service sworn on the 27th June, 2013 by Micheni Gilbert Nkari, a process server. The same was filed in court on the 28th day of June, 2013.

13. In the said Affidavit in paragraphs 5, 6 and 7 he depones as follows: -

***“That on the 24th day of June, 2013, with directions from the 2nd Plaintiff, I went to Thika matatu stage where I had been informed by the 2nd Plaintiff P N M that James Njuho the 3rd Defendant carries on matatu business near Thika Arcade where upon arrival I enquired from a Manchester Sacco staff who did not disclose his name to me, and who informed me that Mr. James Njuho usually makes appearances at the stage to check on his vehicles and therefore I decided to wait for him.*”**

In paragraph 6 he states: -

***That at around 3.45 p.m. he appeared at the stage and the Manchester Sacco Staff abovementioned led me to where he had parked his vehicle Registration Number KBL 026E. I introduced myself to him and explained the purpose of my visit and tendered to him a set of the above-mentioned documents, service of which he accepted by signing on my copies returned to this honourable court duly served.*”**

In paragraph 7 he states: -

The said Mr. James Njuho was known to me at the time of service having been introduced to me by the above-said Sacco Staff member.”

14. As pointed out earlier, the 3rd Defendant has not sworn an Affidavit denying those facts. The deponent casually states that the 3rd Defendant was not served, which in my view, cannot be true in view of the contents of the Affidavit of service which he never denied.

15. In the premises foregoing, I am persuaded that the 3rd Defendant was served with the summons to enter appearance but chose not to take any action. The deponent is not being truthful in stating that the 3rd Defendant was not served. In the premises, this court is left with no option but to dismiss the Application with costs of the Plaintiffs.

Dated, signed and delivered at Nairobi this 24th day of March, 2016.

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L NJUGUNA

JUDGE

In the presence of

..... **for the Plaintiffs**

..... **For the 1st Defendant**

..... *For the 2nd Defendant*

..... *For the 3rd Defendant*