



**REPUBLIC OF KENYA**

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

**COMMERCIAL & ADMIRALTY DIVISION**

**MISC.CIVIL APPLICATION NO. 645 OF 2008**

**FRANCIS KIGO NJENGA.....PLAINTIFF**

**VERSUS**

**BODYMASTERS AUTOTECH LIMITED..... DEFENDANT**

**RULING**

1. The application for determination is the Notice of Motion dated 4<sup>th</sup> December, 2015. The Defendant seeks the following orders :
  - a. *Spent*
  - b. ***THAT the summons to the Defendant directors to attend court on the 9<sup>th</sup> December 2015 for oral examination be stayed pending the hearing inter parties of the application herein.***
  - c. ***THAT there is a stay of execution herein until the hearing and determination of this application and the suit against the Defendant by the Plaintiff/Respondent.***
  - d. ***THAT the judgement entered herein on 8<sup>th</sup> December 2011 be set aside.***
  - e. ***THAT the defendant be granted unconditional leave to file its statement of Defence.***
  - f. ***THAT the person who allegedly effected services of the court process in this matter be ordered to attend court for purposes for his cross examination.***
  - g. ***THAT the cost of this application be provided for.***
2. The application is based on the grounds contained in the face of the application and supported by the affidavit of Patrick WahomeKamangu and Easton David Kariuki, director to the Defendant Company, sworn on 4<sup>th</sup> December, 2015. The deponent among other things, that the defendant was never served with summons to enter appearance as alluded to by one Salome Apiyo, process server, in her affidavit of service dated 27<sup>th</sup> November, 2008.
3. According to the Mr. Wahome, the Defendant only came to know of the suit on or around 30<sup>th</sup> November 2015 following a newspaper advert requiring the attendance of the Defendant's Directors to court on 9<sup>th</sup> December, 2015. That in the circumstances, the Plaintiff and his agents is not entitled to execute the judgement which was entered without the knowledge of the Defendant on the existing suit.
4. The Defendant also claimed that it has a reasonable defence with regard to the breach of contract suit initiated by the plaintiff. According to the Deponent, it would be against the rules of natural justice to be condemned unheard. Easton David Kariuki also dismissed the claims of Salome Apiyo's dispositions with regard to serving him with court process.
5. According to him, the affidavit of service contained untruths. He insisted that he never met the said process server within the Central Business District of Nairobi as alleged. The Defendant

therefore urged the court to set aside the default judgement entered on 8th December, 2011 and be granted leave to defend the suit.

6. The application was opposed by Plaintiff, through the replying affidavit of Maina Njuguna, advocate, sworn on 14<sup>th</sup> December, 2015. He deposed that the instant application was an attempt by the judgement debtor to delay the fair and expeditious conclusion of the matter. That further the defendant's affidavit did not meet the threshold required for setting aside the judgement as the same is deponed in a very general manner.
7. Further to this, the deponent contended that he was aware that effective service of summons to enter appearance was done as per the affidavit of service filed by Salome Apiyo.
8. That the same contained details such as the place where the process server started tracing the defendant; location of the defendant company; person who the process server spoke to; the telephone number she used to call the director; the time, date and place where the process server met the judgement debtor's director; the motor vehicle registration number and make of the motor vehicle and the fact that the Director, a Mr. Engineer Kariuki, spoke to a lawyer via his cell phone and the fact that he declined to sign the said summons.
9. The Deponent asserted that the draft defence annexed was shallow, which was a strong indication that the defendant of seeking to obstruct the cause of justice and engage in unnecessary litigation.
10. When parties appeared before the court on 9<sup>th</sup> December, 2015, they agreed to dispose of the application by way of written submissions. However, from the court's record, none of the parties have filed their written submissions despite the Court's orders to do so within 14 days from 28<sup>th</sup> January, 2016. The court shall therefore consider the application based on the averments on the Parties respective affidavits.
11. I have carefully considered the application by the defendant. In my view, the following emerge as key issues to be determined;

- a. ***Whether there was service of summons to enter appearance upon the 2nd defendant.***
- b. ***Whether the ex parte interlocutory judgement was regular.***
- c. ***Whether the defendant is entitled to the orders sought and if so, on what premises.***

12. Before delving into each of the above issues, it is worth noting that the application herein is brought under the provisions of Order 10 Rule 11, Order 5 Rule 16 and Order 22 Rule 52 of the Civil Procedure Rules together with Sections 3A and 3B of the Civil Procedure Act and any other enabling provisions of the law.
13. It seeks various orders including stay of execution of the decree issued in favour of the Plaintiff issued on 15<sup>th</sup> February 2015. It also seeks for the interlocutory judgement entered on 8<sup>th</sup> December 2011 to be set aside, as well as the cross examination of the process server, who allegedly effected court process of the summons in the instant case.
14. It is also noteworthy that the prayers are not made in alternative of each and are governed by different rules which are adjudicated by different judicial principles.
15. It is instructive to note that Courts have frowned upon an application of this kind and nature as elaborated in the case of **PYARALAL MHAND BHERU RAJPUT vs BARCLAYS BANK AND OTHERS Civil Case No. 38 of 2004** stated as follows;

***“There is no doubt the application is an all-cure, omnibus application. It is a wide net cast over a large body of water, and out of all the lake or sea, creatures caught in it, there will be one or two edible crabs or fish. It is not quite so. An omnibus application is incapable of proper adjudication by the court for each of the reliefs sought apart from being governed by different rules, is also subject to long established and different judicial principles which counsel need to bring to the attention of, and the court needs to consider before granting the entire relief sought. This alone makes the plaintiff's application incurably defective, and a candidate for striking out.”***

16. From the foregoing case it is clear that the application before this court is a prime candidate for striking out. Be that as it may, I am still of the opinion that though the instant application may not be the epitome of elegant drafting, the Court still has the discretion to examine the arguments brought forth by learned Counsel to the Defendant and determine whether or not they are merited.

17. I thus propose to examine the first issue, which in my view will determine whether or not it is necessary to stay the execution of the decree in favour of the Plaintiff and also set aside the interlocutory judgement.
18. The record shows that interlocutory judgment was entered against the defendant on 8<sup>th</sup> December, 2011 for non-appearance and or filing of defence, based on the process server's affidavit of service, under Order 10 Rule 6 & 10 of the Civil Procedure Rules. The defendant has invoked the provisions of Order 10 Rule 11 seeking setting aside of the interlocutory judgment as having been improperly entered as there was no service of summons to enter appearance. Order 6 Rule 1 (1) of the Civil Procedure Rules provides that when a suit has been filed, a summons shall issue to the defendant ordering him to appear within the specified time.
19. Under Rule (3) (a) of the said Order, where the suit is against a corporation, the summons may be served on the secretary, director or other principal officer of the corporation or if the process server is unable to find any of the officers of the corporation mentioned herein, (i) leave it at the registered office of the corporation.
20. With the above provisions in mind, I have carefully perused the affidavit of service by Salome Apiyo the process server who allegedly effected service of the summons on one of the directors of the Defendant Company, an Engineer Kariuki, whom I presume is Eston David Kariuki.
21. In paragraph 3 of the said affidavit, it is stated that the process server proceeded to the Defendant's premises located in Baricho Plaza, along Hola Road off Baricho Road, industrial area. However, the Deponent averred that she was denied entry to the premises by the Defendant's security agents.
22. However, the said process server was able to reach Mr. Kariuki on phone through a phone number supplied by the Plaintiff. That thereafter the process server and Engineer Kariuki agreed to meet the following day, that is on 12<sup>th</sup> November, 2008. At this point, I find it useful to reproduce the contents of paragraph 7 to 10 hereunder;
7. ***THAT around 12.15 p.m on that day, Engineer Kariuki whom I had also given him my cell phone number telephoned me and said he was in the parking outside Electricity in a white Toyota Carib registration number KAX 764D and that I could meet him there.***
  8. ***THAT I left the office which is adjacent to Electricity House and met Engineer Kariuki in the car and he recognized me at once.***
  9. ***THAT after greeting, I tendered him a copy of the summons to enter appearance attached to a plaint thereof to which he accepted service, read through the pages and even talked to a lawyer via his phone about the contents of the plaint but on asking him to acknowledge receipt on my extra copy declined but was quick it say that he was to keep a copy on behalf of the defendant company since he was one of the directors.***
  10. ***THAT having duly served the summons to enter appearance and a Plaint thereof to the Engineer Kariuki on behalf of the defendant, I return to this Honourable Court duly served court summons but un-acknowledged.***
23. My first observation of the dispositions of the above affidavit is that it contains very specific averments as to how the process server attempted to serve court process on a director of the Defendant of the Company. If the applicant's story is accepted, it would obviously follow that there was proper service on the company. However, from the affidavit of Eston David Kariuki sworn on 4<sup>th</sup> December, 2015, the Defendant vehemently refutes the contents of the affidavit of service by Salome Apiyo calling them unfounded and untruths. In essence, the Defendant accuses the said process server of perjury and lying to the court.
24. In the circumstances I find that the court has two contending stories, based on affidavits whose deponents have not been cross examined. It is rather difficult in the circumstances to dismiss one version just on the basis of another version of what happened.
25. As the Defendant in this case has chosen to challenge the plaintiff's version of events by cross examining Ms. Salome Apiyo and thus discredit the version of events she put forth with regard to the service of summons, I am inclined to grant to grant prayer (f) of the application.
26. This court therefore directs that the process server Salome Apiyo who swore the affidavit of service of 27<sup>th</sup> November, 2008 that was the basis of the judgment in default appear in court for cross-examination within 14 days from the date of this ruling.
27. After cross examination of the said process server, the court will then determine the two pending issues. For the avoidance of doubt, the issues are whether or not the interlocutory judgement

entered against the Defendant was proper and whether the orders sought are merited and on what premise.

28. The court hereby issues a stay of execution of the decree issued on 15<sup>th</sup> February, 2012 until further orders from the court. The summons issued to the Directors to attend court is also stayed until further orders.

29. I shall not make any orders as to costs.

30. It is so ordered.

**Dated, signed and delivered in court at Nairobi this 11<sup>th</sup> day of March, 2016.**

**C. KARIUKI**

**JUDGE**