



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 247 OF 2014**

**EPHANTUS GATHUA MUIYURO.....PLAINTIFF/APPLICANT**

**VERSUS**

**KENYA POWER & LIGHTING**

**COMPANY LTD.....DEFENDANT/APPLICANT**

**RULING**

What calls for my determination in this case is whether or not there was proper service of summons upon the defendant/applicant in terms of the provisions of ***Order 5 Rule 3 of the Civil Procedure Rules***.

The plaintiff/respondent filed this suit on 18th August 2014 seeking various remedies against the defendant/applicant. By an affidavit of service dated 4th September 2014, the process server **FRANCIS KUNGA MUGI** deponed that on 3rd September 2014 within Nyeri Town, he went to the office of the defendant/applicant's regional manager where he met a lady who received the summons, stamped and signed the same.

On the basis of that affidavit of service and following an application dated 24th September 2014, the Deputy Registrar entered interlocutory judgment against the defendant/applicant on 7th October 2014 and the suit was listed for formal proof on 2nd December 2014.

The plaintiff/respondent formally proved his case and on 26th February 2016, this Court delivered a judgment in his favour and a decree followed. That decree was again served by the same process server at the defendant/applicant's regional manager's office on 26th March 2016 in Nyeri town but this time, the secretary who was served did not stamp it but retained a copy of the same.

On 6th April 2016, the defendant/applicant filed the Notice of Motion which is the subject of this ruling seeking the following orders:-

**1. Spent.**

**2. Spent.**

**3. That this Honourable Court be pleased to set aside the interlocutory judgment entered on 7th October 2014 and all consequential orders emanating therefrom and that the defendant/applicant be granted leave to defend the suit.**

**4. That costs of this application be provided for.**

The application is premised on the grounds set out therein and is supported by the affidavit of **EMILY KIRUI** the defendant/applicant's legal officer. The gist of the application is that there was really no proper service upon the defendant/applicant in terms of the provisions of **Order 5 Rule 3 of the Civil Procedure Rules**. That the service of summons was upon an undisclosed person allegedly in the defendant/applicant's Nyeri office. That the defendant/applicant has a good defence to the plaintiff/respondent's claim a draft copy of which is annexed to the said supporting affidavit.

The application is opposed and in a replying affidavit filed on 15th April 2016, the plaintiff/respondent has deponed, inter alia, that the defendant/applicant was duly served with summons on 3rd September 2014 when the said summons were received, signed and stamped. That the defendant/applicant failed to enter appearance and interlocutory judgment was entered and the matter proceeded to formal proof and a judgment was entered in his favour on 26th February 2016. That on 29th March 2016, a decree was served in a similar manner upon the defendant/applicant. That he has been without electricity since March 2014 and the reasons given for this application are not valid and he should be allowed to enjoy the fruits of his judgment.

The application was canvassed by way of written submissions which have been filed by **C.B MWONGELA advocate** for the defendant/applicant and **MAGEE WA MAGEE advocate** for the plaintiff/respondent.

I have considered the application, the rival affidavits and the submissions by counsel.

As indicated above, the issue at hand is whether there was proper service upon the defendant/applicant as required by the provision of ***Order 5 Rule 3 of the Civil Procedure Rules***. That provision 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 on a licenced 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”.***

The defendant/applicant's case is that there was no proper service of the summons as per ***Order 5 Rule 3 of the Civil Procedure Rules***. In paragraphs 7 and 8 of the supporting affidavit of **EMILY KIRUI**, she depones as follows:-

***7. “That from the return of service sworn by Francis Kunga Mugi, it is not in dispute that service of summons to enter appearance and the pleadings was allegedly effected upon a undisclosed person allegedly at the applicant's regional office in Nyeri”***

***8. “That the service alleged to have been effected upon the defendant (if at all) is not the service contemplated by Order 5 Rule 3 Civil Procedure Rules 2010”.***

On his part, the plaintiff/respondent has deponed in paragraph 5 of his replying affidavit that:-

***“The summons to enter appearance were duly received, signed and stamped”***

I have looked at the affidavit of service of the process server **FRANCIS KUNGA MUGI** dated 4th September 2014. Annexed thereto is a copy of the summons to enter appearance duly signed as received on 3rd September 2014. Most significantly, the said summons bears the stamp of the **“Regional Manager Mt Kenya”**. The said affidavit is clear in paragraph 3 that the lady who received the process server referred him to the Regional Manager’s office. The process server states in that paragraph that:-

***“That I was directed to visit regional Manager’s office where I met a lady who received the service by stamping and signing”***

In his submissions, counsel for the defendant/applicant has laid much emphasis on the fact that the lady who was served is not named and neither is her position stated. It is even suggested that the lady may have been a contracted sweeper. That may be true. However, it is not denied that the stamp on the summons is the defendant/applicant’s stamp used by its regional manager in Nyeri town. Most importantly, the said regional manager did not swear any affidavit to show that he or she did not subsequently receive the said summons left at their office in Nyeri town. It is of course the law that **Order 5 Rule 3 (a) of the Civil Procedure Rules** provides that the first option by a process server serving a Corporation is to serve the secretary, director or other principal officer of the Corporation. Only when any of those officers cannot be found is the process server allowed to exercise any of the other options of service provided for under **Order 5 Rule 3 (b) of the Civil Procedure Rules**. In this case, I am satisfied that there was service of summons received at the defendant/applicant’s Nyeri office by its Regional Manager who has not denied that the summons were received in his/her office. If they were not, nothing would have been simpler than saying so. Whoever received and stamped the said summons in that office must have been authorized to do so. If the defendant/applicant’s Regional office at Nyeri has allowed its cleaners or tea girls to receive Court summons and affix its official stamp thereon, then it cannot turn around and deny that there was proper service. The summons having been received by the defendant/applicant’s Regional Manager in Nyeri town, there was proper service upon it as contemplated by **Order 5 Rule 3 of the Civil Procedure Rules** because an officer is defined in **Section 2 of the Companies Act** as follows:-

***“Officer in relation to an association or a body corporate includes a director, manager or secretary”*** emphasis added

I am therefore satisfied that there was proper service of the summons upon the defendant/applicant’s Regional Manager in Nyeri. The judgment obtained by the plaintiff/respondent was therefore a proper judgment.

This Court nonetheless has the discretion to set aside a judgment obtained in default of the other party entering appearance or filing a defence. The principles governing the exercise of such judicial discretion are that there are no limits or restrictions on the Judge’s discretion except that it should be based on such terms as may be just because the main concern of the Court is to do justice to the parties. However, this discretion is intended to be exercised to avoid injustice or hardship resulting from accidents, inadvertence or excusable mistake or error but is not designed to assist a person who has sought, whether by evasion or otherwise, to obstruct or delay the cause of justice – **SHAH VS MBOGO 1967 E.A 116, SHABIR DIN VS PARKASH ANAND (1955) 22 E.A.C.A 48** and **MAINA VS MUGIRIA 1983 K.L.R 78**. And in **SEBEI DISTRICT ADMINISTRATION VS GASYALI & OTHERS 1968 E.A 300**, SHERIDAN J. cited with approval the words of AINLEY J. in **JAMNADAS SODHA VS GORDHANDAS HEMRAJ 1952 7 U.L.R II**, where the latter said:-

***“... The nature of the action should be considered, the defence, if one has been brought to the notice of the Court however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of a Court .....*”**

In this case, it is my finding that there was proper service of the summons upon the defendant/applicant's manager based in Nyeri on 3rd September 2014. The said manager went to sleep with the result that a default judgment was entered against the defendant. The execution process commenced and again on 29th March 2016 the same manager was served with the Decree and although this time the secretary did not stamp it with the manager's stamp, it clearly woke him up from his slumber. It was then that this application was promptly filed on 6th April 2016 to forestall any further action in the execution process. Notwithstanding my misgivings about the conduct of the defendant/applicant's manager at their Nyeri office with regard to this matter, I understand the exercise of my discretion to set aside an ex-parte judgment as designed to be exercised so that every party has the right to be heard and to have his day in Court. What persuades me to exercise such power in favour of the defendant/applicant is that it acted expeditiously the moment it learnt about the judgment. As **APALOO J.A** said in the case of **PHILIP CHEMWOLO & ANOTHER VS AUGUSTINE KUBENDE (1982-88) 1 KAR 1036:-**

***“The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure”***

In **Page 1040** of the said judgment, the Judge added:

***“I think the broad equity approach to this matter, is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline”.***

Ultimately therefore and upon considering all the issues herein, I allow the defendant/applicant's Notice of Motion dated 6th April 2016 in the following terms:-

- 1. The interlocutory judgment entered on 7th October 2014 as well as the judgment delivered on 26th February 2016 are set aside.***
- 2. The defendant/applicant to file and serve its defence within 14 days of this ruling.***
- 3. The defendant/applicant to deposit the sum of Ksh. 100,000 being the assessed general damage in Court within 14 days of this ruling.***
- 4. The defendant/applicant to pay to the plaintiff/respondent Ksh. 30,000 being thrown away costs within 14 days of this ruling.***
- 5. In default of (2), (3) and (4) above, the application dated 6th April 2016 shall stand dismissed, the interlocutory judgment dated 7th October 2014 and final judgment dated 26th February 2016 shall be re-instated and execution may proceed.***

It is so ordered.

**B.N. OLAO**

**JUDGE**

**25<sup>TH</sup> NOVEMBER, 2016**

Ruling dated, delivered and signed in open Court this 25<sup>th</sup> day of November 2016

Mr. Ashivaka for Mr. Mwongela for Defendant/Applicant present

Mr. Ngigi for Mr. Magee for Plaintiff/Respondent present.

**B.N. OLAO**

**JUDGE**

**25<sup>TH</sup> NOVEMBER, 2016**