



**IN THE HIGH COURT OF KENYA**

**AT MURANG'A**

**CIVIL CASE NO 24 OF 2013**

1. **PETER NJOROGE MWANGI**
2. **ANN RITA WANGECHI**

*(Legal Representatives of the estate of*

*Patrick Mwangi Njoroge, Deceased).....PLAINTIFFS*

**VERSUS**

1. **FAITH KIMEMIA**
2. **PHILIP ALEX NDEGWA.....DEFENDANTS**

**RULING**

1. The suit herein is a claim in negligence. Damages are sought on account of the death of the Deceased whose estate the Plaintiffs represent. He died from injuries received in a road accident that involved two motor vehicles, each owned by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively.
2. The 1<sup>st</sup> Defendant duly entered appearance and filed defence. In the case of the 2<sup>nd</sup> Defendant however, interlocutory judgment was obtained against him on 30<sup>th</sup> august 2012 in default of appearance and/or defence.
3. The 2<sup>nd</sup> Defendant subsequently applied by **notice of motion dated 7<sup>th</sup> May 2014** seeking the main orders that the interlocutory judgement entered against him be set aside and that he be granted unconditional leave to defend the suit. His grounds for the application as they appear on the face thereof are -
  - i. That he was never served with summons to enter appearance.
  - ii. That he has a good defence.
  - iii. That he has always been ready and willing to defend the suit, as indeed he has done in other suits arising out of the same accident.
4. There is a supporting affidavit sworn by the 2<sup>nd</sup> Defendant annexed to the application in which he has given the particulars of three other suits arising out of the same accident pending before the **Resident Magistrate's Court, Murang'a**. He has also annexed memoranda of appearance in those suits filed on 24<sup>th</sup> September 2010. No statements of defence in the suits are annexed.
5. Regarding his averment that he has a good defence to the present claim, the 2<sup>nd</sup> Defendant has

annexed a draft statement of defence. The 2<sup>nd</sup> Defendant has also categorically sworn that on the day he is alleged to have been served with process, a Monday, he would ordinarily have been at his place of work in Nakuru and not at his home at Ruiru. Finally the 2<sup>nd</sup> Defendant has argued in his affidavit that having defended the other suits arising out of the same accident, and blaming the driver of the 1<sup>st</sup> Defendant's motor vehicle for the accident, he would have had no reason at all not to defend the present suit.

6. There is a second supporting affidavit sworn by one **Linda Mukami**, a legal officer with **APA Insurance**, the insurer of the 2<sup>nd</sup> Defendant's motor vehicle. She has deponed that they were not aware of the present suit until they were served with a mention notice by post by the Plaintiffs' advocates dated 28<sup>th</sup> November 2013, upon which they instructed their advocates to peruse the court file and find out what the position was. She has also deponed that their advocates have been defending the 2<sup>nd</sup> Defendant in the other related suits before the lower court because the issue of liability is highly contentious.

7. In response to the application the Plaintiffs filed **grounds of opposition dated 24<sup>th</sup> May 2014**. Those grounds include -

(i) That the application is an afterthought, lacks merit and is made in complete misapprehension of facts.

(ii) That the process-server had previously known the 2<sup>nd</sup> Defendant and had on previous occasions served him with process; he would thus have no reason to swear a false affidavit of service.

iii. That the 2<sup>nd</sup> Defendant was duly served with summons to enter appearance, and his application ought to be refused.

No replying affidavit appears to have been filed.

8. On 11<sup>th</sup> June 2014 the court (Ngaah, J) directed that the application be canvassed by way of written submissions. The 2<sup>nd</sup> Defendant did not file his submissions until 10<sup>th</sup> October 2014. The Plaintiffs had in the meantime filed their submissions on 12<sup>th</sup> September 2014. I have considered those submissions, including the cases cited.

9. The application is brought under **Order 10, rule 11** of the **Civil Procedure Rules, 2010**. That rule is in the following terms –

**“Where judgment has been entered under this Order (in default of appearance and or defence or service) the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”**

The rule gives the court unfettered discretion to do justice; but like all judicial discretions, the same may not be exercised whimsically but must be exercised judicially upon settled principles. The court will set out to do justice between the parties depending on the circumstances of each case, including the actions or inactions of the parties. It will not be the aim of the court to assist an indolent litigant, or one who has deliberately set out, by hook or crook, to delay or otherwise sabotage the cause of justice. The mission of the court will be purely to do justice between the parties, and any orders it may make will be geared toward that end only.

10. In the present case the 2<sup>nd</sup> Defendant has sworn that he was never served with summons to enter appearance. It is however surprising that he never requested for the process-server to be summoned for cross-examination upon his **affidavit of service sworn on 12<sup>th</sup> June 2012**. In that affidavit the process-server, **Patrick Kinyua**, deponed positively that he served the 2<sup>nd</sup> Defendant with summons to enter

appearance and other documents at his home at Ruiru on 14<sup>th</sup> May 2012. He also deponed that he knew the 2<sup>nd</sup> Defendant, having previously served him with process in the other related cases.

11. The implication here is that the process-server would have no reason at all to falsely swear that he duly served the 2<sup>nd</sup> Defendant with process. But then on the other hand, if the 2<sup>nd</sup> Defendant duly entered appearance and defended those other suits where he was served with process by the same process-server, the suits having arisen out of same accident that gave rise to the present suit, what reason would he have not to defend the present suit? He says that his defence in those other suits, and his intended defence in the present suit, is that the accident was caused, or substantially caused, by the 1<sup>st</sup> Defendant's motor vehicle.

12. It is an awkward situation. But I have considered that the other related suits are before a subordinate court, and that it may well be desirable that the heavily contested issue of liability be canvassed before and decided by this court. That way justice will have been better served between the three parties - the Plaintiff, 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant. This is not to mean that I am satisfied that the 2<sup>nd</sup> Defendant was not served with summons to enter appearance. It appears more likely that he was indeed served and simply forgot about it, thus failing to inform his insurer of this particular case or defend the same. His failure to request for cross-examination of the process-server is also telling. All that notwithstanding, the interests of justice will be better served as I have already indicated above.

13. In the circumstances I will allow the application and set aside the interlocutory judgment entered against the 2<sup>nd</sup> Defendant and all consequential orders. **He shall file and serve his statement of defence within 14 days of delivery of this ruling.** The 2<sup>nd</sup> Defendant shall pay to the Plaintiffs their thrown-away costs so far incurred (including the costs of this application). Those costs are hereby assessed at KShs 20,000/00, payable within 21 days of delivery of this ruling. In default of payment the Plaintiffs may execute for the same. Those will be the orders of the court.

**DATED AND SIGNED AT MURANG'A THIS 24<sup>TH</sup> DAY OF FEBRUARY 2015**

**H.P.G.WAWERU**

**JUDGE**

**DELIVERED THIS DAY OF FEBRUARY 2015**