



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 728 OF 2007

REGINA MWIKALI WILSON PLAINTIFF

VERSUS

STEPHEN MWANGI GICHUHI 1ST DEFENDANT

PETER MWAU MUINDE.....2ND DEFENDANT

RULING

1) Peter Mwaura Muinde the 2nd Defendant herein took out the motion dated 20.05.2015 in which he sought for the following orders:

i. **THAT** this matter be certified as urgent and be heard *ex parte* in the first instance.

ii. **THAT** pending the hearing and determination of this application *inter-partes*, this Honourable Court be pleased to grant interim stay of execution of default judgement entered on 28th January 2015.

iii. **THAT** pending the hearing and determination of this application *inter-partes*, this Honourable Court be pleased to set aside the interlocutory judgment entered on 28th January 2015 against the Defendant/Applicant and all its consequential orders.

iv. **THAT** further, upon hearing and determination of this application *inter-partes*, this Honourable court be pleased to grant the Defendant leave to enter appearance and file his defence out of time as per the annexed draft defence and that the memorandum of appearance together with the draft defence herein be deemed as duly filed upon payment of requisite fees.

v. **THAT** costs of this application be in the cause.

2) The motion is supported by the 2nd Defendant's affidavit of service. When the motion came up for interpartes hearing, learned counsels appearing in the matter recorded a consent order to have the process server and the 2nd Defendant summoned to be cross-examined over the dispute over service.

3) In the motion, the 2nd Defendant claimed he was never served with the summons to enter appearance hence the default judgement should be set aside. He further averred that he has a good defence which raises triable issues. When the process server appeared for cross-examination he explained in detail how

he managed to trace the 2nd Defendant. He stated that he visited Machakos Police station where he had been told by the Plaintiff that the 2nd Defendant works as a police officer. Upon reaching Machakos the process server said he was directed to go to Kakamega where the 2nd Defendant has been transferred to. Upon reaching Kakamega Police Station the process server said he was told the 2nd Defendant had been transferred to Kiganjo police college. Upon reaching Kiganjo, the process server said he was directed to the office of the 2nd Defendant by a lady by the name Wambui. He averred that he personally served the 2nd Defendant with the summons to enter appearance. The process server denied falsifying his affidavit. The 2nd Defendant on the other hand is adamant that he was not served with the summons to enter appearance. He however admitted that he served in Kakamega police station before being transferred to serve in Kiganjo as a training officer. He claimed that this was not the first case arising from the same accident. He stated that when he was previously served with the pleadings in respect of other suits he handed over the papers to the insurance company. He argued that it would not make sense for him to deny service of summons in this case yet in a series of similar cases he did not do so. He even acknowledged receipt of the Defendant's demand letter. He denied knowledge of Wambui, a lady whom the process server alleged had directed him to the 2nd Defendant's office. The 2nd Defendant also denied the cell phone number allegedly given to the process server by the lady officer.

4) I have considered and weighed the oral evidence tendered by the parties to this motion. I observed the demeanor exhibited by Alexander Ochwa Alela, the process server. He was consistent and emphatic that he actually served the 2nd Defendant. He appeared to be genuine and honest. I am convinced the 2nd Defendant was actually served. The 2nd Defendant's denial of service cannot stand.

5) The defence put forward by the 2nd Defendant appears to deny the occurrence of the accident. He has however admitted before this court that indeed his motor vehicle was actually involved in the accident. He has of course not admitted negligence. He was served but he neglected to file an appearance. His defence cannot assist him because he blatantly refused to file an appearance despite having been served with summons.

6) In the end, I see no merit in the motion dated 20th May 2015.

The same is ordered dismissed.

Dated, Signed and Delivered in open court this 11th day of December, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

.....for the Defendant