



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO 1251 OF 2006

ALEC ASUTSA.....PLAINTIFF

V E R S U S

SAMMY MAINA NDEI.....DEFENDANT

RULING

1. The claim in this suit is in negligence for damages on account of personal injuries received in a road accident. On 5th May, 2008 interlocutory judgment in default of appearance was entered against the Defendant. On 27th March, 2009 final Judgment was entered for the Plaintiff after an *ex parte* hearing for assessment of damages. The Plaintiff was awarded general damages of KShs 3,000,000/00, special damages of KShs 2,000,000/00 and costs of the suit.
2. The Defendant has now applied by **notice of motion dated 15th January, 2013** seeking the main orders that the interlocutory and final judgments be set aside and the Defendant be granted unconditional leave to defend. The application is made under **Order 10, rule 11** of the **Civil Procedure Rules, 2010** (the **Rules**). The inherent power of the Court has also been invoked.
3. The main grounds for the application are-
 - i. That the Defendant was never served with summons to enter appearance.
 - ii. That he has a “viable” defence to the Plaintiff’s claim.
 - iii. That it only fair and just that he be allowed to defend.
 - iv. There is a supporting affidavit sworn by the Defendant. He has deponed, *inter alia* -
 - a. That it came to light that interlocutory judgment was entered against him upon the strength of an affidavit of service sworn by a process server by the name **Benson M. Shichoro**, which affidavit indicated that summons to enter appearance and copy of the plaint were served by registered post on **26th January, 2007** and that the same had not been returned unclaimed.
 - b. That he never received any such documents purportedly sent by registered post.
 - c. That in any event service by registered post would have been irregular as there was no leave of Court for the same.
 - d. That he has come to Court as soon as he could after learning of this suit and judgment herein.
 - e. That he has a good defence to the claim as evidenced by the draft statement of defence annexed to the supporting affidavit.

5. The Plaintiff has opposed the application by his **replying affidavit filed on 4th February, 2013**. Grounds of opposition emerging therefrom include -
 - i. That indeed service of summons to enter appearance was by registered post, but after application to Court was made and leave for substituted service granted.
 - ii. That the service was thus proper.
 - iii. That the draft statement of defence does not raise any “defence in law” and is a mere denial.
 - iv. That it would not be just to grant the orders sought.
 - v. That should the Court be inclined to grant the orders sought, it ought to be conditional upon the Defendant depositing the decretal sum in Court.
6. At the hearing of the application there was no appearance for the Plaintiff despite service of hearing notice.
7. I have considered the submissions of the learned counsel for the Defendant alongside the supporting and replying affidavits. No authorities were cited. I have also perused the Court record.
8. The Court record discloses that the Plaintiff applied by chamber summons dated 24th July, 2007 for leave to serve the summons to enter appearance and copy of the plaint by way of registered post. The application was allowed by an order entered on 28th September, 2007 (Osiero, J). So, it is not true that there was no leave of the Court for substituted service; there was.
9. The Defendant has not stated that **P.O BOX 1320, Kikuyu** was not his address. That was the postal address to which the summons and copy of the plaint were sent by registered post. That address is disclosed by the **affidavit of service** sworn by the process server, Benson M. Shichoro and **filed in Court on 28th April, 2008**. The affidavit of service referred to by the Defendant was actually an affidavit by the process server in support of the application for leave for substituted service in which he showed the unsuccessful efforts he had made to trace the Defendant for personal service. That was the affidavit he had sworn on **1st August, 2007** in which he stated, inter alia, that after failing to trace the Defendant he “**tried sending the summons and plaint by registered post on 26th January, 2007 which were not returned...unclaimed...**”. Substituted service after leave was effected was on **3rd October, 2007**.
10. I therefore hold that the Defendant was duly served with summons to enter appearance and copy of the plaint by way of registered post at his last known address with leave of the Court. The interlocutory judgment entered on 5th May, 2008 was thus regular and proper.
11. I must now consider whether the Defendant deserves leave to defend the suit, conditionally or otherwise. I am aware that my discretion in this regard is unfettered and subject only to the need to do justice.
12. It is to be noted that at paragraph 4 of the supporting affidavit the Defendant has admitted that he was the owner of motor vehicle **KAT 870Q**, the accident motor vehicle, which he had insured with **Gateway Insurance Company Limited**. He has not at all qualified his ownership in terms of the date of the accident. Yet in his draft statement of defence he has denied being the registered owner of the motor vehicle “**at any time material to this suit**”.
13. This approbation and reprobation, coupled with the Defendant’s efforts in his supporting affidavit to mislead the Court as to the proper affidavit of service, renders him totally undeserving of the discretion of this Court. I am also not satisfied that the draft defence raises any triable issues. They are mere denials.
14. In the event I will refuse the application by notice of motion dated 15th January, 2013. It is dismissed with costs to the Plaintiff. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF MAY 2014

H.P.G.WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 30TH DAY OF MAY 2014