



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 80 OF 2013

DANIEL MURITHIAPPELLANT

-V E R S U S-

BONIFACE JUMA MBATA RESPONDENT

(Being an appeal from the Ruling and Order(s) of the Honourable Ms. J. Gandani (SPM) delivered on 2nd day of July, 2013)

RULING

1. For consideration in this Ruling is Notice of Motion dated 2nd August 2013. It is for the prayer-

“THAT this Honourable Court be pleased to stay execution and any further proceedings in Mombasa SRMCC No. 2025 of 2010 – Boniface Juma Mbata –Vs- Daniel Murithi or any other suit consequential to, and or touching on the issues in dispute in the said suit pending hearing and determination of the Appeal.”

Background

2. The Respondent filed before the Chief Magistrate Court, Mombasa **Civil Case No. 2025 of 2010** against DANIEL MURITHI (MURITHI) claiming general and special damages which resulted when the Respondent was knocked by a motor vehicle registration No. KAQ 121H which was either driven by Murithi or his authorized driver.
3. Respondent sought and obtained leave to serve Summons and Plaint in respect of that action upon Murithi by substituted service through Post Office Box being P.O. Box No. 87039, Mombasa.
4. Murithi did not file an appearance nor a Defence and interlocutory judgment was entered in default.
5. Respondent proceeded to formal proof his case and by the Court’s Judgment dated 1st February 2013 he was awarded Kshs. 520,000/- as general damages and Kshs. 2,000/- as special damages.
6. Respondent’s Learned Counsel on making demand for settlement of the judgment amount from Murithi’s Insurer, namely, Kenya Orient Insurance Ltd, an application by Notice of Motion dated 20th March 2013 was filed in Chief Magistrate’s Court case by the said Insurer for setting aside judgment. The grounds the application was predicated upon are that Murithi was out of the

country and could not have been served with Summons and Plaint; that the Summons and Plaint were served through P.O. Box 87039, Mombasa whereas Murithi's correct address is P.O. Box 87311 Mombasa; and that if judgment was not set aside Respondent would seek to execute it which would lead to substantial loss to the Defendant.

7. The application was dismissed by the Learned Magistrate on 2nd July 2013.
8. The present appeal is against the said dismissal. Pending the hearing and determination of that appeal the application whose order was reproduced above was filed.

Submissions on behalf of Murithi

9. The application before this Court is premised on the same grounds that were before the Magistrate's Court. That Murithi had relocated out of Kenya at the time substituted service of Summons and Plaint was effected; that Respondent used the incorrect address to serve Murithi and that Murithi has a valid defence to Respondent's claim.
10. It is important to consider some of the depositions made in the

affidavit dated 2nd August 2013 in support of the application by the Officer of Kenya Orient Insurance are as follows-

- **THAT the Court granted the said orders and the Respondent purported to have served the Applicant with the Plaint and Summons to enter appearance by Registered Mail.**
- **THAT I know that the said Plaint and application never reached the Applicant or his insurer since the Applicant had relocated out of the country and there were discrepancies with the Postal address; since the Applicants correct Postal Address was 87311 and not 87039 as alleged on the application for substituted service.**
- **THAT the Respondent proceeded to request for Judgment, alleging the Applicant "has failed to enter appearance and file a Defence within the requisite time" Annexed hereto marked "SW 3" is a copy of the request for Judgment.**
- **THAT the Applicant's Insurer only came to know of the said Judgment after receiving a letter from the Respondent's Advocates dated 21st day of February 2013. Annexed hereto marked "SW 5" is a copy of the said letter.**

11. The deponent makes it clear in that affidavit that Kenya Orient has

received communication from Respondent's Counsel that Respondent is intent on filing a declaratory suit and that does explain why Kenya Orient now seeks to set aside the lower Court's judgment against its insured Murithi.

12. In its written submissions it was stated for the first time that if the

Respondent is paid the amount of the lower Court judgment he may not be in a position to refund the same in case this present appeal is successful. The fact that that argument was first raised in the written submissions in my view denied the Respondent the opportunity of responding to counter the argument. It is for that reason that that argument and the authorities to support it will be disregarded in this Ruling.

Respondents Submissions

13. Respondent submitted that stay of the suit does not necessary flow as a matter of course when an appeal is filed. That an Appellant needs to meet the conditions set out in Order 42 Rule 6(2) of the Civil Procedure Rules. Respondent to buttress this argument relied on the case **TERESIA**

KIMANI –Vs- GITHERE INVESTMENT LTD CIVIL APPEAL NO. 944 OF 2003 where the Court held-

“A stay order does not lie as a matter of course just because one has filed an appeal. One has to demonstrate the likelihood of suffering substantial loss if the order is refused. There is no evidence of substantial loss demonstrated in this application. The Applicant must also be willing to furnish security. There is no such offer made. Finally, the application must have been made without unreasonable delay.”

14. Respondent submitted that the Applicant had failed to discharge the conditions set out in Order 42 rule 6(2) except that the present application was filed without unreasonable delay. The conditions in that Rule are-

1. **Substantial loss may result to the Applicant unless the order is made.**
2. **The application has been made without unreasonable delay.**
3. **Such security as the Court orders for the due performance of such decree or order may ultimately be binding on him has been given by the Applicant.**

15. Further Respondent submitted that Daniel Murithi, the Appellant therein had not sworn an affidavit in support of the application nor did he file before the Magistrate’s Court. He failed to swear the affidavit yet the application before the Magistrate’s Court sought the setting aside of the judgment on the ground that he Murithi was not served with the Summons and Plaintiff.

16. Further that the present application is based on the ground that Murithi will suffer substantial loss if stay is not granted, but Murithi has not sworn an affidavit to so state.

17. To further that argument Respondent relied on the case **AMRIK SINGH KALSI –Vs- BHUPINDER SINGH KALSI (2012)eKLR** where the Court stated-

“In this case, deponent states that the applicant was outside jurisdiction of this country. That is the same reason that is advanced for the delay in bringing the present application. One would have expected that after such a delay counsel would have secured an affidavit from the applicant from whatever part of the globe he was residing. In this age and era to expect one to do so is not to ask for too much. Such affidavits can easily be sworn before a notary public and transmitted for use in the proceedings locally rather than counsel subjecting himself to an uncomfortable risk of having to take the witness stand on matters he may very well be very unfamiliar with.”

Analysis and Determination

18. The affidavit dated 2nd August 2013 of Sarah Weru in support of the application has deponed to facts which she fails to state their source and thereby violates the provisions of Order 19 Rule 3 of the Civil Procedure Rules which provides-

1. **Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.**
2. **The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies of or extracts from documents, shall (unless the court otherwise directs) be paid by the party filing the same.”**

19. It will be seen that the deponent Weru ought to have confined her deposition to facts that she could prove. In stating that Murithi was not served with Summons and Plaintiff without stating the

source of that information, implies, in my view, that such deposition cannot be relied upon. Similarly deposition that Murithi's address is Box 87311 and not 87039 is for rejection on the same basis.

20. In respect of Murithi's address I have noted that Box 87039 Mombasa was the address noted in the Police abstract relating to the accident involving the Respondent. Further it was also the address in the copy of record of Kenya Revenue Authority of vehicle KAQ 121H, which is registered in the name of Murithi.

21. What I find strange is that Weru deponed that Murithi relocated out of this country but she is deliberately silent on where Murithi relocated to. The question then that arises is, did Murithi indeed relocate from this country? And if he relocated out of this country, then whose draft defence was filed when the application to set aside judgment was filed before the Magistrates Court. One gets the idea that Kenya Orient is hoodwinking this Court in making this present application. Who shall suffer substantial loss if stay is not granted?

22. There are just too many questions without answers.

23. Kenya Orient were served with the letter before action by the Advocates of the Respondent. When the plaint was filed, they were served with it together with the Summons. This service is evidenced by the copies of Certificate of Registered Post. Kenya Orient did not rebut that evidence and yet the burden of proof in the light of those Certificates of Registration was upon them. That is what Section 107 of The Evidence Act Cap 80. That Section provides-

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

24. The Kenya Orient had an obligation to disprove that service by making inquiries with the Post Master General and disprove, if possible, that such service was not received by it.

25. On the whole I find that the Notice of Motion dated 2nd August 2013 has no merit and is dismissed with costs to the Respondent.

DATED and DELIVERED at MOMBASA this 26TH day of JUNE, 2014.

MARY KASANGO

JUDGE