

COPY

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC NO. 124 OF 2012

JUMA ABDALLA VITU PLAINTIFF

- V E R S U S -

KWALE WATER AND SEWERAGE CO. LTD. DEFENDANT

RULING

[1] By a notice of motion dated 21st August, 2013 the applicant herein applied for a stay of execution of the decree in this case. He also prays for an order that the judgment delivered on 23rd May, 2013 be set aside and the decree with all consequential orders be set aside and the defendant be granted leave to defend this suit.

[2] The applicant avers that he was not served with the summons and the plaint herein. He states that he has a good defence in this case. The respondent by a sworn affidavit states that he served the applicant with summons to enter appearance. Further that he proceeded to fix the case down for hearing on 26th February, 2013. That he served the applicant with the hearing notice. That he had not filed an affidavit of service and the court directed that he takes another hearing date and serve the applicant. That he took another date for hearing on 16th May, 2013 and served the applicant with a hearing notice dated 28th February, 2013. That the applicant received the hearing notice but failed to attend the court.

[3] The respondent attached a letter the applicant wrote to Coast Water Services Board referring to this case marked JAV 1.

[4] The respondent avers that the applicant is an agent of Coast Water Services Board and that it takes the responsibility in Kwale including repairs and payment of bills and services. The respondent avers that the applicant was given a chance to defend this suit and he abused it.

[5] I have perused the application and its annexures. I have equally perused the replying affidavit and all its annexures. I am convinced that the applicant was served with the plaint and summons to enter appearance. I am also convinced that the applicant was served with the hearing notice for hearing on 16th May, 2013. As a matter of fact the applicant was aware of this suit as early as 16th July, 2012 when he wrote his letter Ref. No. Kwawasco/legal matters/1/Vol.1/39 to Chief Executive Coast Water Services Board and he quoted Reference Civil Suit No. 24 of 2012. The letter was signed by Nyundo Katemboh the applicants Managing Director. The said Managing Director is the same person who has sworn the supporting affidavit for this application. In paragraph 4 of the said affidavit he states;

"We have never been served with the plaint or claim in this matter."

This cannot be true and it is a lie under oath. I find that after service the applicant did not come to court, the case was heard and judgment entered. I see no reason to disturb that judgment at all. This application is dismissed with costs to the respondent.

Dated and delivered at Mombasa in open court this 20th day of June, 2014.

S. MUKUNYA

JUDGE

20.6.2014

In the presence of:

Wachira advocate for the respondent

Magollo advocate for the defendant/applicant