



REPUBLIC OF KENYA

High Court at Mombasa

Civil Suit 569 of 2011

ABDALLA BREK SAID T/A AL-AMRY DISTRIBUTORS.....PLAINTIFF

VERSUS

TELKOM KENYA LIMITED.....DEFENDANT

RULING

By this Notice of Motion dated 27th July, 2012 the defendant applicant herein seeks the following orders:

“(1) THAT this Honourable Court be pleased to set aside the interlocutory judgment entered by this Honourable Court on 2nd March, 2012 together with any consequential orders.

(2) THAT this Honourable Court be pleased to grant leave to the defendant to defend his suit.

(3) THAT in the result this Honourable Court be pleased to extend the time within when the defendant may enter appearance and file its defence.

(4) THAT costs of this application be provided for.”

The plaintiff/respondent filed his replying affidavit dated **2nd October, 2012** in which he opposed the application. It was agreed by consent that the application be disposed of by way of written submissions. Both parties duly filed their written submissions and the matter is now pending the ruling of the court.

The plaintiff/respondent on 18th October, 2011 filed a plaint in the High Court in Mombasa in which he sought damages as against the defendant/applicant. On 2nd March, 2012 one **MICHAEL THOYA MBWANA** filed in court an affidavit of service sworn on 16th January, 2012. No defence was filed and no appearance was entered on behalf of the defendant. On 2nd March, 2012 the Deputy Registrar entered interlocutory judgment against the defendant and the suit ought to have been finalized by way of formal hearing. However, before the suit was set down for hearing the defendants filed this present application.

I have perused and have carefully considered the written submissions filed by counsel. The two key issues to be determined are:

- (1) Was the defendant properly served with Notice as required by law?
- (2) Does the proposed defence raise valid and triable issues?

On the first question Order 5 rule 3 of Civil Procedure Rules apply. The Affidavit of Service filed by Mr. Thoya on 2nd March, 2012 indicates that he attempted to serve the defendants through their company offices situated along Moi Avenue in Mombasa. However, service was not accepted because as stated in paragraph 3 of the Affidavit of Service the secretary informed the process-server that service of all court documents was to be effected in their head office in Nairobi. Instead of proceeding to Nairobi to effect service or arranging for a process-server in Nairobi to effect service, the process-server decided on his own to effect service by registered post.

I have carefully perused the proceedings and I note that at no time was any application made and no order was ever granted to effect service by way of substituted service. The option of service by registered mail only becomes feasible where all attempts to serve in the normal manner fail. There is no indication that this was the case here. The process-server made no attempt to effect service as directed at the head office of the corporation in Nairobi. Instead he **unilaterally** decided to take a short-cut of posting the summons **without** the leave of the court. I find that service was **not** effected in the manner prescribed by law and was therefore defective.

On the second question I have perused the proposed defence annexed to this application. In my view it raises pertinent and triable issues which the defendant ought to be allowed an opportunity to ventilate. As such, I do allow this present application in terms of prayer (1) of the application and I hereby set aside the interlocutory judgment of 2nd March, 2012 as well as all consequential orders. I further allow prayers (2) and (3) of the application. The defendant to file and serve their defence within twenty one (21) days of today's date. The cost of this application to be met by the defendant/applicant.

Dated and delivered in Mombasa this 25th day of February, 2013.

M. ODERO

JUDGE

In the presence of:

Mr. Mutiso for Defendant

No appearance for Respondent

Court Clerk Mutisya