



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 255 of 2009

1. HUSSEIN HASSAN ALI  
2. SHUKRI MOHAMUD ALI.....PLAINTIFFS

VERSUS

1. WILSON MWONGERA VUTA  
2. ALEXANDER NGURUNGU NGARI.....DEFENDANTS

R U L I N G

1. The Plaintiffs' claims in this suit were for damages on account of negligence for injuries received in a road accident. Interlocutory judgment in default of appearance and/or defence was entered against the Defendants on 22<sup>nd</sup> February 2010. The case was subsequently heard on quantum of damages. Judgment was delivered on 14<sup>th</sup> December 2012. The Plaintiffs were awarded general damages of KShs 1.7 million and 1.4 million respectively for pain, suffering and loss of amenities. They were also awarded costs and interest.

2. The 2<sup>nd</sup> Defendant has now applied by **notice of motion dated 22<sup>nd</sup> January 2013** seeking two main orders –

(i) That the interlocutory judgment entered against him on 22<sup>nd</sup> February 2010 and the final judgment entered on 14<sup>th</sup> December 2012 be set aside.

(ii) That he be granted leave to defend the suit.

The application is stated to be brought under **Order 10, Rule 11** and **Order 12, Rule 7** of the **Civil Procedure Rules** (the **Rules**). **Sections 3** and **3A** of the **Civil Procedure Act, Cap 21** (the **Act**) are also cited.

3. The grounds for the application as stated on the face thereof include -

(i) That the 2<sup>nd</sup> Defendant was never served with summons to enter appearance and copy of the plaint in this suit.

(ii) That he was not aware of entry of the interlocutory judgment and the subsequent proceedings.

(iii) That the affidavit of service dated 10<sup>th</sup> February 2012 “purportedly that the 2<sup>nd</sup> Defendant was served...with summons is false, fictitious and fabricated, its intention being to deceive this...court”.

(iv) That the interlocutory and final judgments were “irregularly, wrongfully and fraudulently obtained on the basis of falsehoods and untrue statements”.

(v) That the application has been brought without undue delay.

(vi) That the orders sought ought to be granted in the interests of justice.

4. The application is supported by the affidavit of the 2<sup>nd</sup> Defendant. He depones, *inter alia* –

(i) That he was informed of the judgment entered against him by the Plaintiffs' advocates by letter received by him on 4<sup>th</sup> January 2013.

(ii) That he was surprised because he had never been served with process in the suit.

(iii) That he promptly informed his insurers, **Gateway Insurance Co Ltd**, who immediately instructed counsel to act for him.

(iv) That he has read the affidavit of service made by the process-server, one **Joram Mondi Atiagaga**, and that the contents of that affidavit to the effect that he had been duly served with summons to enter appearance and copy of the plaint "are completely untrue and consist of total falsehoods" as he has never met the process-server.

(v) That the further statement in the said affidavit of service to the effect that he telephoned the 1<sup>st</sup> Defendant and then accepted service of summons on his (1<sup>st</sup> Defendant's) behalf is fabricated and fictitious because –

(a) He has met the 1<sup>st</sup> Defendant only twice as a result of the accident. He does not know him personally and has never had any telephone contact with him or otherwise and does not have his telephone number.

(b) The last time he had contact with the 1<sup>st</sup> Defendant was at the hearing of his (1<sup>st</sup> Defendant's) case at Thika Law Courts where he had been summoned to testify against him on a charge of careless driving.

(iv) That he has a meritorious defence, a draft of which is annexed to the affidavit.

5. The Plaintiffs have opposed the application by **grounds of opposition** and **replying affidavit, both filed on 11<sup>th</sup> April 2013**. The replying affidavit is sworn by the 1<sup>st</sup> Plaintiff. The grounds of opposition are general and no specific point is taken. In the replying affidavit it is deponed, *inter alia* –

(i) That the 2<sup>nd</sup> Defendant was duly served with summons to enter appearance and appended his signature on a copy of the summons, which signature is similar to the signature in his supporting affidavit.

(ii) That the application is an attempt to delay justice.

(iii) That the draft statement of defence raises no triable issue.

6. I have considered the submissions of the learned counsels appearing. Nothing much was added to the material contained in the affidavits, and no authorities were cited. But the law is clear. If the court should find that the 2<sup>nd</sup> Defendant was not duly served with summons to enter appearance and copy of the plaint, the interlocutory and final judgments must be set aside as a matter of right. The court has discretion to set aside the judgments even if it were to find that the 2<sup>nd</sup> Defendant was duly served. But by insisting that he was not served when in fact he duly was served the 2<sup>nd</sup> Defendant would obviously not deserve exercise of the court's discretion in his favour.

7. I have carefully read the affidavit of service sworn by the process-server, Joram Mondi Atiagaga, on 10<sup>th</sup> and filed in court on 11<sup>th</sup> February 2010. In it he states in the material paragraphs-

**"3. That on the 15<sup>th</sup> day of June 2009 at around 11.30 am with the help of the information of the physical address from the Plaintiffs, I proceeded to the NENO Sacco Matatu Office in Embu situated at the matatu terminus with a view of locating the Defendants as directed by the Plaintiffs. Upon arrival I enquired at the aforesaid Sacco tickets offices and the attendant therein called out the name of the 2<sup>nd</sup> Defendant ALEXANDER NDURUNGU NGARI who was coincidentally standing and chatting to a driver of a matatu that was loading. The 2<sup>nd</sup> Defendant came towards the office and I introduced myself and the purpose of the visit.**

**4. That I enquired whether he can accept service for himself and the 1<sup>st</sup> Defendant who was not in the office at the time and tendered copies of the court documents aforementioned and the 2<sup>nd</sup> Defendant perused the documents and took out his cell phone and talked to a gentleman who confirmed to me through the phone to be the 1<sup>st</sup> Defendant who informed me that the 2<sup>nd</sup> Defendant has his authority and can accept service on his behalf. The 2<sup>nd</sup> Defendant willingly accepted service by signing at the back of the copies of the summons to enter appearance which I return herewith duly served.**

**5. That the 2<sup>nd</sup> Defendant was known to me at the time of service.”**

**8.** I am worried by what the process-server has stated in paragraph 5. His statement that the 2<sup>nd</sup> Defendant was known to him at the time of service is not in consonance with what he states at paragraph 3 which suggests that the 2<sup>nd</sup> Defendant was a stranger to him. That raises an issue of veracity regarding the affidavit of service.

**9.** I have also looked at the signatures on the two summons allegedly signed by the 2<sup>nd</sup> Defendant. They are annexed to the replying affidavit. I have compared them to the 2<sup>nd</sup> Defendant's signature as it appears in his supporting affidavit. Whereas the signature on one of the summons is similar to the 2<sup>nd</sup> Defendant's signature in his affidavit, the signature on the other summons is completely different. If the 2<sup>nd</sup> Defendant willingly accepted service on behalf of himself and on behalf of the 1<sup>st</sup> Defendant after consulting him, why would he sign the two summonses differently?

**10.** In his supporting affidavit the 2<sup>nd</sup> Defendant has passionately denied that he was served with summons to enter appearance and copy of the plaint, or that he accepted them for himself and for the 1<sup>st</sup> Defendant. I have pointed out the issue of veracity raised by the affidavit of the process-server. I am thus not satisfied that the 2<sup>nd</sup> Defendant, and by extension the 1<sup>st</sup> Defendant, were duly served with process.

**11.** That being my view of the matter, the interlocutory and final judgments must be and are hereby set aside. The 2<sup>nd</sup> Defendant is granted liberty to defend the suit and shall file and serve his statement of defence within fourteen (14) days of delivery of this ruling. As for the 1<sup>st</sup> Defendant, fresh summons to enter appearance shall issue for service upon him in the usual way.

**12.** The costs of the application shall be in the cause. Those shall be the orders of the court.

**DATED AND SIGNED AT NAIROBI THIS 30<sup>TH</sup> DAY OF MAY 2013**

**H. P. G. WAWERU**  
**JUDGE**

**DELIVERED AT NAIROBI THIS 31<sup>ST</sup> DAY OF MAY 2013**