



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL CASE NO. 107 OF 2011

SIMON GICHANGI MUGO.....PLAINTIFF

VERSUS

DR. PIERRE ASABI MISAMBI.....1ST DEFENDANT

DIOCESE OF EMBU, TRUSTEE REGISTERED.....2ND DEFENDANT

ADMINISTRATOR, CONSOLATA HOSPITAL KYENI.....3RD DEFENDANT

RULING

This is the Notice of Motion dated 17/10/2011 and filed on 28/10/2011 by the Plaintiff/Applicant. Its brought under Order 5 Rule 17 and Order 51 Rule 1 of the Civil Procedure Rules seeking an order for substituted service upon the 1st Defendant/Respondent Dr. Pierre Asabi Misambo, by an advertisement in the Daily Nation Newspaper.

The application is supported by the grounds on the face of the record and supporting and supplementary affidavits by the plaintiffs counsel and an affidavit by a process server Geoffrey Mburugu.

Mr. Njage for the 2nd and 3rd Defendants/Respondents filed grounds of opposition to the application saying Order 5 Rule 17 of the Civil Procedure Rules had not been complied with, in that no sufficient reasons for non-service have been complied with.

Both counsels who are members of the bar agreed to file written submissions, which they did. Mr. Njage appearing for the 2nd and 3rd defendants has vehemently opposed the application. The record shows that the 1st Defendant/ Respondent was employed by the 2nd & 3rd Defendants. The Plaintiff has not been able to trace the 1st Defendant for service. The process server who served the 2nd and 3rd Defendants has sworn an affidavit of how he was not able to get any assistance from the 3rd Defendant's employees on the whereabouts of the 1st Defendant.

Mr. Njage in opposing the application has cited several authorities. I have had the chance to read through the affidavits, authorities and the submissions. My perusal of the record shows that the summons issued on 5/9/2011 were extended as from 2/9/2012 by the Deputy Registrar. They therefore expire on 3/9/2013 (after 12 months). An affidavit and a request for extension was filed on 26/11/2012 by Ms. Rimita Advocates.

On the issue of the request for substituted service the courts have in a number of authorities held that the primary consideration in such an application is to bring the suit instituted to the personal attention of the defendant. And the defendant in this instant is the 1st Defendant as the 2nd and 3rd Defendants have entered appearance and filed their defences.

The authorities cited herein by Mr. Njage save for **RANCHODBHAI S. PATEL VS ARUSHA CYCLE MART Civil Case No. 10/1954** relate to cases where *ex parte* judgments and interlocutory orders had been made on the assumption that service had been properly effected on other persons other than the defendant.

This case is different because no service has been effected at all on the 1st defendant and its the plaintiff's desire to have him served. In the RANCHODBHAI case the court held that an order for substituted service would be made upon a detailed statement being filed explaining the non service. Order 5 Rule 17 of the Civil Procedure Rules provides

- 1. where the court is satisfied that for any reason the summons cannot be served in accordance with any of the preceding rules of this Order, the court may on application order the summons to be served by affixing a copy thereof in some conspicuous place in the court house, and also upon some conspicuous part of the house, if any in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the court thinks fit.**
- 2. Substituted service under an order of the court shall be as effectual as if it had been made on the defendant personally.**
- 3. Where the court makes an order for substituted service it shall fix such time for the appearance of the defendant as the case may require.**
- 4. Unless otherwise directed, where substituted service of a summons is ordered under this rule to be by advertisement, the advertisement shall be in form No. e of Appendix A with such variations as the circumstances require.**

The Rules provide for the court to be satisfied for any reason that the summons cannot be served. There are real parameters set. In this case the process server has filed an affidavit of what he did. The Bishop who received service on behalf of the other defendants told him he did not know the whereabouts of the 1st defendant. His receipt of summons for the 2nd and 3rd defendants only shows he did not wish to be engaged further on the 1st defendant's issues.

Paragraph 3 of Mr. Mburugu's affidavit states that he went to the 3rd defendant. At the said facility nobody wanted to say anything about the 1st defendant. From the record the plaintiff's wife (now deceased) had been a patient at the hospital before she met her death. She may have known nothing more beyond the patient – doctor relationship.

There is an issue raised by Mr. Njage for an affidavit by Mr. Rimita. Mr. Rimita has filed 2 affidavits one dated 17/10/2011 which supported the application. There is a 2nd affidavit which is a supplementary one dated 23/11/2012.

I have read through these affidavits. In the first affidavit I do find paragraph 4 and 5 is on information or actions not undertaken by Mr. Rimita himself. And in the supplementary affidavit paragraphs 3 is information which the plaintiff ought to have deponed to. Paragraph 5, 6 & 9 were also not for counsel to depon to them as they are matters not within his personal knowledge. Guided by the holding in **E.A. FOUADARY WORKS (K) LTD VS KCB LTD [2002] 1 KLR 443** I proceed to strike out paragraph 4 & 5 of the affidavit dated 17/10/2011 and paragraph 6 & 9 of supplementary affidavit dated 23/11/2012.

In spite of the striking out of those four paragraphs there remains material in the affidavits and the affidavit of Mr. Mburugu to support the application. Since the most important consideration is to bring this suit to the attention of the 1st defendant I do find that substituted service would be the better option. And in any event if the 2nd and 3rd defendants have any information that would assist the plaintiff trace

the 1st defendant the court urges them to offer that assistance.

The application for substituted service is therefore allowed. The plaintiff to publish by way of an advert the summons to the 1st defendant herein in the prescribed form in the Daily Nation at a conspicuous place. The 1st defendant to enter appearance within 15 days of such advert in the Daily Nation.

Cost in cause.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF JUNE 2013.

H.I. ONG'UDI

JUDGE

In the presence of:-

Ms. Muthoni for Rimita for Plaintiff

Njue CC