



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL SUIT NO. 4 OF 2005

ZEPHANIAH KHISA PAULPLAINTIFF

VERSUS

THE BOARD OF TRUSTEES KAMUSINDE

SALVATION ARMY CHURCHDEFENDANT

R U L I N G

The defendant applicant in this suit filed a notice of motion dated 8th July 2010 seeking among other prayers that the ex-parte judgement entered herein be set aside and the defendants be allowed to file their defence. The application is supported by the supporting affidavit of Bernard Shilaho Madegwa sworn on 8th July, 2013.

The applicant contends that it was not served with summons to enter appearance and that execution process against it has commenced and the process itself is irregular having failed to comply with certain mandatory provisions of the law.

The respondent opposed the application through a replying affidavit sworn on 10th July, 2013 in which he contends that the judgement was regularly obtained and that there was proper service. He further contends that the defence has no triable issues.

I have considered the applicant's application as well as the replying affidavit of the respondent. The defendant/respondent herein proceeded in this matter by way of formal proof. The formal proof proceeded on the basis that the defendant/applicant had been served with summons to enter appearance but it failed to do so. The affidavit of service was purportedly sworn by one John Wafula Simatwa who deponed that he served summons to enter appearance upon the defendant's officials on 23/1/2005.

During the hearing of this application the process server who is said to have served summons was available in court for cross-examination by the counsel for the applicant. John Wafula Simatwa who was purported to have served the summons to enter appearance swore an affidavit on 8/8/2013 denouncing the service which was purportedly done by him. He denied ever having been a process server.

The said John Wafula Simatwa was cross examined by Mr Nyamu for the applicant. He denied being a process server of this Honourable court. He denied knowledge of the summons which were purportedly served under his name. He did not even know the Plaintiff/Respondent.

When the court asked the Plaintiff/Respondent whether he knew the said John Wafula Simatwa and if he had even given him summons to serve on his behalf, the respondent was categorical that he neither knew him nor had he ever given him summons to go and serve the defendant.

It is patently clear that there was no service of summons upon the defendant. Service of court process is very cardinal to the administration of justice and once it is brought to the court's attention that there was no service, anything done thereafter cannot be allowed to stand. I do not have to go to the other points raised by the applicant's lawyer. The fact that there was no service is enough to set aside the ex-parte judgement and all consequential steps carried out in respect of the ex-parte judgement.

In this regard, I set aside the ex-parte judgement herein together with all consequential orders. The defendant is granted unconditional leave to enter appearance and file defence to the plaintiff's claim within 21 days from the date hereof. The applicant shall have costs of this application.

Dated, signed and delivered at Kitale on this 28th day of November, 2013.

E. OBAGA

JUDGE

In the presence of Mr Kiarie for defendant. Court clerk – Isabella.

E. OBAGA

JUDGE

28/11/2013

19/12/2013

Memo of appearance and defence dated 19/12/2013 drawn and filed by Kiarie & Co. Advocate for the defendant herein.

DEPUTY REGISTRAR