



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NUMBER 309 OF 2011

WANYIRI KIHORO & 2 OTHERS..... PLAINTIFF

VERSUS

BRITISH AIRWAYS TRAVEL INSURANCE & ANOTHER..... DEFENDANT

RULING

Coram : Mwera J

Court Clerk Njoroge
Kihoro for plaintiffs
M/s Babu for 2nd defendant

On 15.11.11 this court was poised to hear formal proof in respect of the claim herein; when it was informed by Ms Babu for the 2nd Defendant that an application dated 14.11.11 had been filed and served. The court decided to dispose of that application in the first place.

The 2nd defendant's motion under sub section 1A, 1B of the CPA, and Order IV rule 11 of CPR sought orders:

- (i) that the interlocutory judgment entered against it and in favour of the plaintiffs on 24.6.2011 be set aside;
- (ii) the applicant do have leave to file a defence in 14 days as per the annexed draft.

There was another prayer, to stay proceedings against the applicant pending the determination of the present motion.

The grounds stated that formal proof against both defendants had been scheduled for 15.11.11. The 2nd defendant was never summoned to enter appearance together with a copy of the plaint. That such were allegedly served on the 2nd defendant through M/S Shapley Barret & Co. Advocates on 20.12.2010 whom the applicant had not authorized to accept court processes on its behalf. So all the time including the entry of the said interlocutory judgment the applicant was not aware of the cause. It only came to know of it through a letter dated 2.8.2011 by the 1st defendant informing the 2nd defendant of the transfer of the suit to the Civil division. With that the 2nd promptly instructed M/S Hamilton, Harrison & Mathews Advocates to represent it. The last communication to M/S Shapley Barret had been to file a notice of appointment only. Then the matter was adjourned on 26.11.10. The applicant put forth at least three points it wishes canvassed at the trial.

The application carried an affidavit sworn by James Reuben in the UK in his capacity as the Company Secretary and General Counsel (Europe) for the 2nd defendant/applicant. He had been advised as per the court record that one Richard Otieno, a process server, served the summons to enter appearance with a copy of this plaint herein on M/s Shapley Barret & Co. Advocates on 20.12.2010. That firm had no instructions to receive such processes on behalf of the defendant and it did not inform the 2nd defendant of the processes served. The deponent impeached the service in question as being improper in the light of the provisions of CPR 2010. And then he went into the aspects that the intended defence stands to be canvassed on merits.

The 1st plaintiff acting on his behalf and on behalf of the other plaintiffs filed grounds of opposition to the present motion, that the interlocutory judgment was entered herein according to due process. The 2nd defendant initially appointed M/S Shapley Barret & Co. to act for it and that firm still remains on record. Allowing a second firm of lawyers to represent the applicant before instructions to the initial firm are withdrawn, would mean that the litigant has 2 sets of lawyers in the same matter. The interlocutory judgment still holds good as against the 1st defendant and so it should not be set aside and that makes no difference at all when it comes to paying benefits. And then there was something about the payments and the intended defence which was not quite clear to the court at the stage of filing the grounds.

One Nisa Kanwar, a solicitor and partner in the firm of Plexus Law, UK filed a supplementary affidavit in this matter. He said that the 2nd defendant had retained him in this cause. He supported the present application to set aside the default judgment in question. The 1st plaintiff had been in communication with the deponent regarding the claim herein which he was about to lodge. The 2nd defendant made it clear that the claim lacked merit and denied liability to indemnify under its policy. After further correspondence, with the 2nd defendant still of the view that it was not liable it lead to giving instructions to the law firm of Plexus Law to defend it together with the 2nd defendants' local agents and M/s Shapley Barret & Co. Advocates with whom they had dealt with before. The deponent drafted brief instructions to that firm on 23.11.2010 to protect the 2nd defendant's interests in respect of a chamber summons dated 21.10.10 by which the 1st plaintiff sought to transfer the suit from the Chief Magistrate's court to the High Court, and also to avoid a default judgment and deny jurisdiction. Mr. Oyatsi of M/s Shapley Barret got an adjournment on 26.11.10 to enable him to come on record. The deponent said that at that stage, and before he spoke with Mr. Oyatsi, the main point was that Mr. Oyatsi does not come on record until the two had resolved the issue of jurisdiction. So after further communication on 2.12.2010 M/S Shapley Barret & Co. Advocates were authorized by the deponent to file a notice of appointment and address the court to ensure that a judgment was not entered against the 2nd defendant who reserved the right to address the court on jurisdictional issues. The last communication from M/s Shapley Barret was on 30.11.10. Apparently that firm then filed a memorandum of appearance without authority from the 2nd defendant yet it did not revert to the 2nd defendant again. That on 21.12.10 the deponent faxed a letter to this court notifying it that his firm was acting for the 2nd defendant to defend the claim, only that he had been unable to contact their local agent – Ms Shapley Barret & Co. Advocates. The deponent then spoke of further contacts with the court and attempts to get M/s Shapley to update him. Apparently not much came out of it until Mr. Kanwar, the deponent received a notification on 28/8/11 of the entry of the default judgement. So it was agreed that M/s Hamilton, Harrison & Mathews Advocates do represent the 2nd defendant and due instructions were given to Ms Anne Babu. She found that M/s Shapley Barret & Co Advocate had entered appearance on behalf of the 2nd defendant on 30.11.10. The 2nd defendant was not served with summons to enter appearance plus a copy of the plaint. When that process was served on M/s Shapley Barret, it had no instructions to receive the same and to enter appearance - hence this application to set aside the default judgment. The 2nd defendant had no office in Kenya and does not operate here through an agent either. All the documents/letters/faxes etc alluded to in the affidavit were exhibited. There was another affidavit sworn by James Rember filed in court on 5.12.11 with further annexures to the effect that M/s Shapely Barret did not have instructions to accept processes in this matter on behalf of the 2nd defendant and even when that firm did receive the processes from Richard Otieno, it did not inform the 2nd defendant. The 2nd defendant had a good defence to raise based on the claim being statute - barred lack of jurisdiction and that terms necessary for payments under the insurance

policy had not been met.

Both sides submitted.

The 2nd defendant applicant cited Order 10 rule 11 Civil Procedure Rules regarding this court's power to set aside or vary a judgment as the case is here. Then went on to place before the court authorities to the effect that where there was no proper service, it had no option but to set aside the judgment, nonetheless bearing in mind that no injustice or hardship is occasioned to the opposing party. The person seeking to set aside an *ex parte* judgement should not do so to evade, obstruct or delay the course of justice and the defendant should have a good defence (see **Collection House Ltd Vs Shankat Farooq** [2009] eKLR. Also referred to was the case of **Housing Finance Co of Kenya Ltd Vs Richard Ndere & 3 Ors** [2010] eKLR.

The court was then taken through what the 2nd defendant had to satisfactorily contend with in order to obtain the orders to set aside – beginning with whether it was properly served, whether it deserved the court to exercise its discretion in its favour and whether its defence had merits.

On their part, the plaintiffs maintained that M/s Shapely Barret & Co. Advocate entered appearance on behalf of the 2nd defendant, but then failed to file a defence wherein the subject default judgement was entered.

To begin with the question is: Was the 2nd defendant properly served with summons to enter appearance plus a copy of the plaint? To answer this, the court perused the record. The suit was first brought by filing a plaint in CMCC 6418/10 on 13.10.2010.

An affidavit of service sworn by Richard Otieno and filed in court on 27.12.10, followed an order by Njagi J on 8.12.10 to transfer the suit from the lower court to this court. The process server said, inter alia:

“2. That on the 20th day of December 2010 I received from the plaintiffs copies of the notice of appointment of advocate dated 12.10.2010, copies of summons to enter appearance dated 17th December 2010, plaint dated 7th October 2010, verifying affidavit attached together with a copy of authority to sue on behalf of a minor dated 7th October 2010 with instructions to serve the same upon the defendants herein.

3. That I proceeded to Prudential Assurance House, 2nd Floor where the 2nd defendant's advocates had their offices and affected service upon Shapely Barret Advocates at 10.18 Am who stamped and signed (sic) on the face of my copy which I now return to this court duly served and signed.”

The other service was on the 1st defendant at a place called Citadol House, Muthithi Rd, Westlands. That does not concern us here.

The folder of the file CMCC 6418/10 has a minute:

“Memorandum of Appearance filed by Shapely & Co. Advocate/party this 30th November 2010.

Checked by (signed), 30.11.10

Chief Magistrate's Courts – Milimani.”

The process server's affidavit of service just referred to bore the title:

“HIGH COURT OF KENYA AT NAIROBI MILIMANI COMMERCIAL COURT CIVIL SUIT NO.

871/2010”

On the same lower court file there is a memorandum of appearance by M/s Shapely Barret & Co., as advocates for the 2nd defendant. It was dated 29.11.2010 and filed in court on 30.11.10.

As at this point what appears intriguing is that the process server took the papers to serve on the 2nd defendant on **20th December 2010**. They were served on M/s Shapely Barret on the same day. Then that firm entered appearance on **30th November 2010** and a minute to that effect was entered on the file. Can it be presumed that here was an error in the dates? Quite probably because there cannot be service of summons to enter appearance on 20.12.10 and then have the appearance entered some twenty or so days earlier on 30.11.10. But be that as it may.

Again if it may be asked: Would this constitute having the summonses served twice over if we have the affidavit of service filed in court on 22.12.10 in mind? It appears so.

The record has another letter dated 14.4.11, again referring to HCCC 871/2010 wherein the 1st plaintiff had addressed the deputy registrar:

“We write in connection with the above case where the suit papers were served separately on the two defendants late last year and a return of service done thereafter to court.

The first defendant has not entered appearance at all or filed and served defence on ourselves while the second defendant entered appearance but has not filed any defence.

This is to request that you enter an interlocutory judgement against the two defendants and set the matter down for formal proof as soon as possible.

**Signed
Wanyiri Kihoro”**

On this letter, remarks were made to the Executive officer (EC) on 25.5.11 something to the effect that the EO had to obtain:

“a) the process servers licence

b) Original summons

c) copy of the stamped (summons) N/A as indicated in the AOS

**(affidavit of service?)
Signed”**

So as the 1st plaintiff had asked for interlocutory judgement on 14.4.11 to be entered against the 1st defendant for not entering appearance or filing defence, the request that against the 2nd defendant was in default of filing a defence, and it was noted by the registry that stamped original summonses to enter appearance were not on the file, and for sure none appear on the lower court file or in HCCC 871/2010. Then the request to execute new sets was made by the 1st plaintiff on 23.5.11.

HCC 871/10 has copies of **undated** and **unsealed** sets of summons to enter appearance. There is no evidence that they were served. But once more a copy of Richard Otieno’s affidavit of service filed in court on 22.12.10 is on this file.

And on 24.06.11, on HCCC 871/10 (when it was still in the Commercial Division) it was entered thus:

“ Judgement.

1. British Airways Travel Insurance

2. Financial Insurance Co. Ltd defendants having been duly served and having failed to enter appearance and on the application of the advocate of the plaintiff I enter judgement as to costs which shall be party and party interest thereon.

**Signed
Deputy Registrar
24.06.11.”**

The interlocutory judgement immediately referred to above was by way of a stamp, not quite clear in some parts. But then all this seen from CMCC 6418/10 and HCCC 871/10, there are two default judgements entered against the 2nd defendant and **both without any** original sets of summonses on either file. Can it be said that those judgements were valid? This court need not answer that question because that’s not what it is asked to deal with here. The court therefore reserves its view at this point on the service of summons in the matter.

When the suit first came before Mugo J in the Commercial Division of this court on 05.07.11, the learned Judge noted that the matter appeared to suit to be finally heard and determined in the Civil Division. The file was duly moved and given the number HCCC 309/11. So it is here with us.

Even with all the foregoing the court must now dispose of the motion of 14.11.11 to set aside or not to set aside the judgement of 24.6.2011.

It is not in dispute that M/s Shapely Barret & Co. Advocates filed a memorandum of appearance on behalf of the 2nd defendant on 30.11.10 in the lower court file. Even without a request to enter judgement against it, one was entered against it, on the same day. Had this court been concerned with the entry of that judgement, it could have found it invalid. There was no original copy of the summons stamped, signed and filed regarding service on the 2nd defendant. Then 15 days had not expired before one could ask for and get a judgment in default of appearance/defence.

What about the judgement of 24.6.11? The court has reserved its view as to the validity of that judgment in the light of absence of original summons signed/stamped from the file. Or that even had a new set been executed as had been requested, the same had validity, for again no originals were returned or were found on the court file. But most importantly, was service on the law firm of M/s Shapely Barret on behalf of the 2nd defendant proper? The 2nd defendant maintains that that entering appearance by that firm was without instructions. Its instructions were to appear on record to avoid a default judgement and raise the issue of jurisdiction. But as far as the Civil Procedure Rules are concerned an advocate can only enter appearance for the whole proceeding. Perhaps he can file a notice of appointment and urge the court to note that his instructions are limited to this or that aspect only. But still that will pose a problem as to what extent. In this case the plaintiff correctly insists that the 2nd defendant’s appearance was by its lawyers. The 2nd defendant urges the court to find that that appearance was without instructions. There is not affidavit from Mr. Oyatsi of M/s Shapely Barret on this subject. However, having the totality of this case in mind, the orders sought are granted. No party will suffer prejudice except for some delay before the trial gets under way. The plaintiffs will still have an opportunity to wage their claim at a trial while at the same venue the 2nd defendant will argue the merits of its defence. Arguments about jurisdiction and whether the suit is time – barred cannot be taken lightly by any measure. They deserve to be argued fully in a trial.

In the result the prayers are granted. The 2nd defendant to file pay for and serve its defence. The parties to move to close the pleadings without delay and then prepare the suit for hearing as per Civil Procedure Rules 2010. Costs of this application go to the plaintiffs.

Delivered on 26.1.12.

J. W. MWERA

JUDGE