



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL SUIT NO. 91 OF 2002

GEORGE P. B. OGEMBO PLAINTIFF/RESPONDENT

VERSUS

JAMES NANDASABA 1ST DEFENDANT

MARTIN WANYONYIAPPLICANT/2ND DEFENDANT

KENNEDY WEPUKHULU 3RD DEFENDANT

THE STANDARD LTD. 4TH DEFENDANT

GENDER OF HUMAN RIGHTS AND DEMOCRACY 5TH DEFENDANT

R U L I N G

The application dated 9th November, 2010 seeks orders that the ex-parte judgment entered against the 2nd Defendant herein be set aside together with all its consequential orders.

The Application is supported by the affidavits of the applicant sworn on 9.11.10 and on 20.1.11. In the said affidavits, the applicant contends that he was not served with the summons to enter appearance. He stated that he never signed any summons as alleged in the affidavits of the process server. The applicant also stated that he did not know or deal with one BAKARI JUMA MUSIMA, the process server who purportedly served him. The applicant has annexed a copy of the draft defence which he stated raised triable issues.

The application is opposed to as per the affidavits sworn by the Respondent on 15.11.10 and on 1.4.11. The Respondent deponed that the Applicant was served with the Summons to enter appearance and the Plaint on 23.1.03 by one BAKARI JUMA MUSIMA, a court process server. That the said affidavit of service by Bakari was rejected by the court and service was effected afresh on the Applicant on 7.3.05 by a process server known as LEONARD SONGOI, who served the applicant with the summons to enter appearance, the Plaint and verifying affidavit. That the Respondent failed to enter appearance or file defence and interlocutory judgment was entered on 18.7.05. The applicant stated that the draft defence filed is a sham and a false defence. The Respondent further stated that the applicant is guilty of laches.

At the hearing of the application, the court heard oral submissions by Mr. Momanyi for the applicant and by Mr. Nyongesa for the respondent. The counsels had also filed written submissions. I have considered the said submissions and also perused the pleadings filed herein by the parties.

On the issue of service of summons, it is clear from the record of the court that the affidavit of service relied on when interlocutory judgment was entered was the affidavit of service sworn by Leonard Songoi on 12.4.05. The said affidavit of service states that the applicant was served with the summons to enter appearance, copy of the plaint and verifying affidavit on 7.3.05 at about 1.40 p.m. while the applicant was at the offices of Bulimo & Co. Advocates in Bungoma town. According to the said process server, the applicant was well known to him. It is noteworthy that there is no affidavit evidence by the applicant denying service by the said Leonard. The applicant has concentrated on the affidavit of Bakari Juma Musima which affidavit was not relied upon by the court.

Taking into account that the present application was filed more than one year after the final judgment had been entered and execution process commenced, this court's view is that the applicant has not dealt with the issue of service with the seriousness it deserves. I arrive at the conclusion that the applicant was properly served. The service and the entry of judgment cannot be faulted.

I have considered the draft defence by the applicant. The same raises the following issues:-

(a) Whether the words complained of were true in substance and hence justified.

(b) Whether the words complained of were uttered in public interest.

In my view, these are triable issues which ought to be determined on merits. This court is therefore inclined to set aside the judgment entered against the applicant. Any inconvenience to the Respondent can be addressed by an appropriate order for costs. (see **TREE SHADE MOTORS LTD. v D.T. DOBIE & CO. (K) LTD & ANO. NBI. CA 38/98**)

With the foregoing, the judgment against the Applicant is set aside. The Applicant to file appearance and defence within 21 days from the date hereof.

As to costs, the applicant shall pay Kshs.20,000/= thrown away costs to the Respondent within 21 days from today. In default, execution to issue.

Delivered, dated and signed in open court at Kakamega this 16th day of February, 2012

B. THURANIRA JADEN
J U D G E