



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 170 OF 2006

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

DAVID ONSARE ROGITO.....1ST DEFENDANT

OGALO NGARE OWAGA.....2ND DEFENDANT

LAWRENCE OYUGI NDEGE.....3RD DEFENDANT

TOM ODHIAMBO MWONYA ODERO.....4TH DEFENDANT

R U L I N G

On 7th October 2011 the 1st defendant moved the court by way of a Notice of Motion dated the same day seeking the following orders:

- “1. THAT this Application be certified as urgent and its service be dispensed with in the first instance.**
- 2. THAT there be stay of execution of Default judgment entered on the 23rd January 2008 and all other consequential Orders pending the hearing and determination of the instant Application.**
- 3. THAT the Honourable Court be pleased to set aside the default judgment entered on the 23rd January 2008 against the 1st Defendant and the consequential Decree or Orders.**
- 4. THAT the Honourable Court be pleased to grant the 1st Defendant unconditional leave to Defend the suit and the defence struck out on 23rd January 2008 be deemed as duly filed and served, upon payment of the requisite Court filing fees or as the Honourable Court may direct.**
- 5. THAT the costs of this Application be in the cause”.**

In support of the said application the applicant, **David Onsare Rogito**, swore an affidavit on 7th October 2011 in which he states on being served with the suit papers herein on 12th April 2006, he forwarded the same to his advocates M/s Kerosi Ondieki & Co. Advocates to file appropriate pleadings. According to him his advocates entered appearance and filed a defence but failed to serve the same. As a result of the said non-service, the plaintiff applied to have the said defence struck out and when the said application came up for hearing on 5th November 2007 the same proceeded in the absence of the applicant's advocates and upon hearing the same, Waweru, J ordered that the defence be served within ten (10) in default of which the same to stand struck out. Pursuant thereto the plaintiff requested for and obtained a judgement against the 1st and 3rd Defendants on 28th November 2007 which request was acceded to and a decree extracted therefrom in the sum of Kshs. 7,224,612.70. According to the deponent, whereas the orders made on 5th November 2007 are alleged to have been served 14th November 2007 upon his then advocates Kerosi Ondieki & Co. Advocates at Barclays Bank Building within Kisii Town, from his personal knowledge the said advocates operated from Masaba Building 3rd Floor. He accordingly gave notice of his intention to have the said process server cross-examined on the affidavit sworn on 28th November 2007. The orders made by **Waweru, J**, according to the deponent, were explicit that they were to be served on him personally and on his advocate but this was not done. According to him the affidavit of service sworn on 11th December 2006 by one Joel Samoei, a legal clerk with the plaintiff is at variance with that sworn by the said Ben Murei. Accordingly, it is the applicant's belief that the said process servers never effected service on his advocates but merely filed affidavits of service. Despite being a regular visitor to the plaintiff's offices in obedience to the plaintiff's summons, the applicant contends that he was never informed of the existence of the decree. According to him no notice of entry of judgement has been served on him and that unlike the plaintiff he stands to suffer irreparable loss, damage and gross injustice if the judgement is executed. He denies that he knowingly and fraudulently failed to act on the Council's Resolutions alleged in paragraph 8 of the plaint hence according to him no money was lost through him or in connivance or at all as alleged by the plaintiff. He therefore beseeches the court to allow him ventilate his defence and expresses his willingness to comply with the court's conditions. According to him, the sins of his advocates should not be visited on him.

On its part, the plaintiff filed a replying affidavit sworn by **Stephen Radido**, who described himself as its Attorney. In the said affidavit, the deponent states that following the filing of the suit and failure by the applicant to serve its defence within the period stipulated under the Civil Procedure Rules, the plaintiff applied to strike out the defence which application together with a hearing notice were duly served on the applicant's advocates M/s Kerosi Ondieki & Co. Advocates who acknowledged receipt thereof. However, the matter could not proceed on the scheduled date 15th January 2007 and the plaintiff invited the applicant to a fixing a fresh date an invitation the applicant did not heed. The matter was then fixed for hearing on 19th July 2007 and hearing notice served. Once again the matter could not proceed and a new hearing date was set for 5th November 2007 and a hearing notice served. The matter accordingly proceeded and the court ordered that the applicant should serve the plaintiff with a copy of the said defence within 10 days of service of the court's order and in default the defence to stand struck out. That order, according to the deponent was served by a Mr. Ben Murei on the defendant's advocates, M/s Kerosi Ondieki & Co. Advocates on 14th November 2007 but the applicant failed to comply therewith paving way to the plaintiff to request for judgement which request was acceded and a decree issued on 23rd January 2008 in the sum of Kshs. 7,224,612.70. It is deposed that the applicant's advocates purported to serve a copy of the Statement of defence via post on 9th October 2008 but was received by the plaintiff on 22nd October 2008 long after the said decree had been issued. Accordingly, it is contended that the applicant is guilty of laches and inordinate unexplained delay. Since the applicant's defence was struck out, the applicant's contention that he has a strong defence does not hold.

The application was canvassed by way of written submissions which were highlighted. According to the applicant, through his learned counsel **Mr. Omboga**, the judgement against the applicant was erroneously entered since the applicant was not served with both the application and the order emanating therefrom since the place where the applicant's advocates were purportedly served is not their offices. This coupled with the fact that the error was a mistake of the advocate, it is submitted, should lead the court in exercising its discretion in the applicant's favour and reliance is placed on *Nairobi HCCC No. 2231 of*

1999 – Firenze Investments Limited vs. Kenya Way Limited; Eldoret HCCC No. 22 of 2001 - Dr. Boniface Ooko Ganda vs. Stanley Maina & Another; Nairobi HCCS No. 604 of 1998 – Joseph Gitau Waweru vs. Francis Muchai Karera; and Ngua vs. Agip (Kenya) Ltd [1981] KLR 319.

On its part the plaintiff submitted, through its learned counsel **Mr. Omondi**, that after several adjournments the application was eventually heard on 5th November 2007 following a proper service of the hearing notice. Similarly orders emanating from the said application were properly served under **Order 5 rule 8** of the *Civil Procedure Rules* on the applicant's advocates on record, M/s Kerosi Ondieki. Counsel submits that the applicant's conduct in not serving the defence at the first instance, failing to appear in court for the application, failing to comply with the court order emanating therefrom and purporting to transmit the defence long after the decree had been passed militate against the exercise of the court's discretion in his favour since it is a manifestation of the conduct of a party intent at delaying and obstructing the course of justice. It is further submitted that in exercising the court's discretion, the court must consider whether or not the defendant has a defence that raises triable issues and in the plaintiff's view, none is disclosed and support for that submission is gathered from **Chemwolo & Another vs. Kubende [1986] KLR 492** and **Mwalia vs. Kenya Bureau of Standards [2001] 1 EA at 155**. It is further submitted that the application is incompetent since it is filed by advocates who are not on record contrary to the provisions of **Order 9 rule 9** of the *Civil Procedure Rules* with respect to change of advocates after judgement.

I have now considered the application, the affidavits both in support of and in opposition to the application, the submissions and the authorities cited and this is the view I form of the matter.

First it is important to deal with the competency of the application. It is true that the advocates on record for the applicant at the time of the judgement was M/s Kerosi Ondieki & Co. Advocates. However, it is clear from the record that **Mwera, J** on 4th October 2011 granted leave to the present advocates to replace the former firm. Nothing, accordingly, turns on that issue.

The more important issue is whether service was effected on the applicant. There is an affidavit on record sworn by Isaac Nyangena Kemari on 3rd April 2007 and filed in court on 8th June 2007 in which it is indicated that the hearing notice for 19th June 2007 was served on Kerosi Ondieki & Co. Advocates. However, the stamp is that of a firm known as Maroro Kerosi Ondieki & Associates. That day (19th June 2007) the matter did not proceed. The next affidavit of service is sworn by Dedan Okwama on 2nd November 2007 in respect of hearing notice for 5th November 2007. According to the affidavit, service was effected on the firm of Kerosi Ondieki & Co. Advocates at Masaba Building in Kisii Town on one Edna Kwamboka. In his submissions Mr. Omboga admitted that the applicant's erstwhile advocates' offices were situated at the said place. There is no averment that the person named as Edna Kwamboka is not an employee of the said firm. Accordingly, I am unable to find as the applicant would wish me to do that the hearing notice for the application dated 15th November 2006 notifying the applicant's advocates of the hearing date of 5th November 2007 was never served.

With respect to the service of the order issued on 5th November 2007, the learned Judge explicitly directed that the 1st defendant do serve plaintiff with a copy of his defence dated 29th June 2006 within ten (10) days of service upon him of the order and that in default the said defence to stand struck out. The applicant contends that the said order was never served. There is, however, an affidavit of service sworn by one **Ben Murei** on 28th November 2007 in which he deposes that he served the order issued on 5th November 2007 on Kerosi Ondieki & Company Advocates located at Barclays Bank Building within Kisii town. Annexed to the affidavit is a photocopy of the stamped notice which bears the stamp of Maroro, Omariba Kerosi Ondieki & Associates. The applicant's case is that his advocates were neither located at Barclays Bank Building nor were they Maroro, Omariba Kerosi Ondieki & Associates.

In light of such conflicting versions one would have expected the parties to call the deponent of the affidavits of service to shed light on the service as is indicated in the application. They, however, chose not to do so with the result that the Court is unable to find one way or the other that the two firms are one

and the same firm as alleged by the plaintiff. Confronted with a similar matter, Ringera, J (as he then was) in Gandhi Brothers Vs. H K Njage T/A H K Enterprises Nairobi (Milimani) HCCC No. 1330 of 2001 enumerated the principles guiding the setting aside of ex parte judgements as follows:

“If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgement is an irregular one, which the Court must set aside *ex debito justitiae* (as a matter of right) on the application by the defendant and such a Judgement is not set-aside in the exercise of discretion but as a matter of judicial duty to in order to uphold the integrity of the judicial process itself. If the default judgement is a regular one, the Court has an unfettered discretion to set aside such judgement and any consequential decree or order upon such terms as are just as ordained by Order 9A rule 10 of the Civil Procedure Rules. The conduct of an officer of the Court who looks the Judge in the eye and makes submissions which find no support from the record of the Court must be deprecated in very strong terms. Where service of summons is asserted by one party and denied by the other, both the assertion and the denial being on solemn oath taken before a Commissioner for Oaths the Court cannot but be left in a quandary in the absence of cross-examination of the deponents to the contradictory affidavits. In those circumstances the Court is constrained to decide the matter on the basis of fundamental rule of evidence, which is codified in Section 3 of the Evidence Act Cap. 80 Laws of Kenya that a fact is not proved if it is neither proved nor disproved. It is therefore not proved”.

Accordingly, I find that since the fact of service is neither proved nor disproved, it is therefore not proved.

The right to a hearing is a fundamental constitutional right that should not be lightly denied and in my view where there are conflicting versions as to whether or not a party has been afforded an opportunity to a hearing and the Court cannot find with certainty as to which version is correct, the benefit of doubt should be given to the applicant if the delay to be occasioned can be remedied by an award of costs.

In the foregoing premises I am inclined to allow the application dated 7th October 2011 and grant leave to the 1st defendant to file and serve a defence within a period of seven days from the date hereof. The defendant is not purely blameless in this saga. In fact it is his inaction that has led to this application and since I have found that he was served with an application seeking to strike out the defence and he never cared to attend court to oppose the same, I direct that the applicant do pay the costs of this application assessed at Kshs. 10,000.00. This order is to be complied with within the next 7 days in default of which judgement shall stand reinstated.

Ruling read, signed and delivered in court this 28th day of May 2012

G.V. ODUNGA
JUDGE

In the presence of:

Mr. Omondi for the plaintiff

No appearance for the defendant