REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL SUIT 310 OF 2008

JOHN MUKUHA MAINA……..........….......…………PLAINTIFF
VS

PENINAH NYAMBURA MAINA...…......……1STDEFENDANT

PETSUN LIMITED………………………..2ND DEFENDANT

<u>RULING</u>

1. By way of a Notice of Motion application dated 21st December 2010, the Plaintiff/Applicant applied to this court for two substantive orders, namely:

1) That summons be issued for cross-examination of the Process Server who served an application dated 21st September 2010 which resulted in the suit being dismissed on 10th November 2010;

2) That the court do reinstate the suit for hearing and disposal in the regular manner.

2. The grounds upon which the application is based are set out on the face of the application as follows:

1) The application dated 21st September 2010 which resulted in the court's orders of 10thNovember 2010 dismissing the suit was brought prematurely and without due cause or justification in law;

2) The 2nd Defendant acted fallaciously without compliance of the rules of service and notice to parties as required in law;

3) The Plaintiff was within his time to prosecute the suit;

4) There was no inordinate delay and the Plaintiff acted in a manner contrary to the duty to assist the court to further the overrding objectives of a just judicial process and determination of the suit.

5) Suit should be reinstated in the interest of justice.

3. The application is further supported by the affidavit of Njeru Robison Ngari, counsel for the Plaintiff sworn on21st December 2010 in which he states, *inter alia*, that the 2nd Defendant's advocates never served his firm with a Notice of Appointment indicating that they had come on record for the said party; that his firm served summons to the 2nd Defendant by registered post having failed to locate their offices; that when he eventually went to fie a request for judgment he was informed that the suit had been dismissed on 10th November 2010 for want of prosecution; that the application for dismissal of the suit was brought irregularly and without legal basis; that once summons were validated on 4th December 2009 for service for a period of 12 months, there was no cause for any Defendant to take any steps to have the suit dismissed; that although service of summons upon the 2nd Defendant were served by registered post on 30th November 2010; that the court was misled into dismissing the suit as it was clear that steps were being taken to prosecute the suit given the validation of the summons; that the 2nd Defendant never served the Plaintiff with its Defence filed on 15th December 2009; that the 2ndDefendant's process server swore a false affidavit of service in that by the time of the alleged service on 4th October 2010, his firm's address was Uchumi House and not Queensway House; that the errors on record due to misrepresentation of facts led to the dismissal of the suit; and that in the interest of justice, the suit should be reinstated.

4. The application is opposed through a replying affidavit of Karen Mate, counsel for the 2nd Defendant. In the affidavit, Ms. Mate avers that her firmIsemeKamau&Maema Advocates came on record for the 2nd Defendant on 1st July 2008 and Notice of their appointment was served upon the Plaintiff/Applicant's Advocates through their secretary who accepted the Notice but declined to sign the original; that matter came up for hearing on 1st July 2008 but was stood over generally as Applicant was not present in court; that on 17th December 2009, they filed Defence for the 2nd Defendanton 17th December 2009 which Defence was again served upon the Advocates for the Applicant who however declined to accept service and further refused to endorse the Defence; that a year lapsed without any action being taken constraining her firm to file the application dated 21st December 2010 seeking dismissal of the suit due to the Applicant's inaction; that the applicantion was served upon the Applicant's Advocates by Mr. VihakiVidonyi but the Applicant's advocates were unwilling to accept service on the grounds that they had no instructions from the Application; that the application was thereafter heard and suit dismissed; that the Applicant had lost interest in the suit as demonstrated bythe fact that the application for extension of validity of summons was made on 22nd October 2009 which was more than one year after summons had expired and, in any event extension was sought only in respect of the 1st Defendant; the Applicant was well aware that the firm of IsemeKamau&Maema was on record for the 2nd Defendant as demonstrated in paragraph 3 of the Affidavit in support of the application for extension of validity of summons and; that the application to cross-examine the process server and to seek reinstatement of the suit was an afterthought and an abuse of the court process.

5. On 18th April 2012, the court allowed counsel for the Plaintiff/Applicant to cross-examine Mr. VidonyiVihaki in relation to service of process upon his firm. In his evidence, Mr. Vidonyi confirmed the contents of his affidavit of 8th November 2010 and stated that he served the Notice of Motion of 10th September 2010 on the secretary of M/s Njeru R. Ngari situate at Queensway House, 3rd Floor Kaunda Street Nairobi but that the secretary who received the application went into an inner chamber of the office and returned the original copy unacknowledged stating that they had no instructions from their client. He testified that the pleadings indicated that the Applicant's Advocates were based in Queensway House. Shown the affidavit of Robinson Ngari sworn on 21st December 2010 to which the application for extension of validity of summons was annexed indicating that the address of the firm of advocates was Uchumi House 10thFloor, Suite 1, Mr. Vidonyi told the court that he had visited Uchumi House 10th Floor but had not found the firm at the stated premises. Only in the year 2012 had he managed to serve the Plaintiff's advocates at Uchumi House. On re-examination, Mr. Vidonyi confirmed that the Plaint gave the Plaintiff's Advocates' address as Queensway House and there had been no notice that the firm had relocated to another address.

6. Counsel for both parties filed written submissions to buttress their respective cases and these have been

considered in the determination of the application before the court.

7. I have considered the application, the affidavit and oral evidence adduced and the rival arguments by counsel for the parties.

8. The key ground upon which reinstatement of suit is sought is that the 2nd Defendant never served Notice of Appointment of Advocates, its Defence filed on 17th December 2009 as well as the application dated 21st September 2010 and which resulted in the suit being dismissed for want of prosecution. The Plaintiff contends that failure of service of the said process resulted in the court being misled into dismissing the suit and unless the suit is reinstated, the Plaintiff will be prejudiced due to the manner in which the suit will have been determined.

9. From the affidavit and oral evidence placed before me, it is evident that although Mr. Vidonyi the Process Server involved in the service of process on every occasion aforesaid insists that he effected service upon the offices of the Plaintiff's counsel, there is consistently no acknowledgement from the recipient of such process. In addition, the Notice of Motion application dated 21st September 2010 appears to have been served at the old address of the Plaintiff's advocates although Mr. Vidonyi claims that he had visited Uchumi House and established that the said advocates had no offices within that building.

10. On the other hand, the court record of 10th November 2010 indicates that the orders for dismissal of the suit were issued by the court on the basis of submissions by counsel for the 2nd Defendant that the application had been served and that the Plaintiff had upon such service failed to file grounds of opposition or a replying affidavit had been filed by the Plaintiff.

11. While strong submissions have been made by counsel for the Plaintiff that the orders sought for reinstatement of the suit would amount to this court sitting on appeal in respect of a decision of a court of concurrent jurisdiction, my view is that if the decision of the court was made on the basis that proper service had been effected and the Respondent having been so served failed to reply to the application, and if it now turns out that indeed no such service was made or, if any service was made the same cannot be ascertained to the satisfaction of the court, such development must act to render the said court orders irregular, as the court was not properly guided in reaching its decision to dismiss the suit.

12. A review by this court made on the basis that the court would not have made the orders had it been aware that no proper service had been effected in my view is merited under Section 80 of the Civil Procedure Act, Order 45 Rule 2(2) of the Civil Procedure Rules and under the overriding objective and inherent power of this court under Section 1A and 3B of the Civil Procedure Act. Such review in my view is not tantamount to an appeal as the orders being reviewed are not overturned on the merits that the previous court ought to have considered had service been regular and had it been moved substantively by the parties.

13. For these reasons, I am inclined to allow the Plaintiff's Notice of Motion dated 21st December 2010 by vacating the orders of 10th November 2010 dismissing the suit and by forthwith reinstating the suit for hearing and determination.

14. I further direct that the parties do prepare the suit for hearing by complying with Order 11 of the Civil Procedure Rules within 30 days from today and that the suit be fixed for hearing at the registry within 14 days thereafter.

IT IS SO ORDERED

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22nd DAY OF MAY 2012.

J. M. MUTAVA

JUDGE