



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL SUIT 344 OF 2011

GEORGE K. NDOGO.....PLAINTIFF/RESPONDENT

VERSUS

ATHMAN MUSTAFA MOHAMMED

T/A VANGA EXPRESS.....1ST DEFENDANT/APPLICANT

ALUIYA OMARI MOHAMMED

T/A VANGA EXPRESS.....2ND DEFENDANT/APPLICANT

RULING

Before me is the amended Notice of Motion dated 23/2/2012 in which the two applicants Athman Mustafa Mohammed and Aluiya Omari Mohammed t/a Vanga Express seek the following orders:-

- 2) That the ex-parte judgment entered by the court against the defendant/judgment debtor on 17/1/2012 be and is hereby set aside;**
- 3) That there be a temporary stay of execution of the decree of the court issued on 19/1/2012 pending the hearing and determination of this application;**
- 4) That motor vehicles registration No. KBK 059J and KBM 843P UD Buses which had been attached/impounded by Igare Auctioneers on 16/2/2012 and 21/2/2012 be released to the 2nd applicant and that the sale of motor vehicle be stayed;**
- 5) That the applicant be granted leave to defend the suit.**

The Notice of Motion is premised on grounds found in the body of the application and two affidavits sworn by Aluiya Omari Ahmed on 20/2/2012 and 7/3/2012. A replying affidavit was sworn by George Kiratu Ndogo, the plaintiff/respondent, in opposition.

The issues arising in this application are:-

- 1. Whether the plaintiff/respondent was served with the plaint/summons;**
- 2. Whether there are sufficient grounds to warrant stay of execution;**

3. Should the defendants/applicants be allowed to defend the suit or is there an arguable defence?

Briefly the applicant's case is that although the 1st applicant entered into an agreement with the respondent for sale of a Mercedes Benz for Kshs.6,000,000/-, the sum was to be paid in instalments with the last instalment of Kshs.2,000,000/- being paid upon registration of the vehicle; That the 1st applicant had some technicalities in importation and change in price of the vehicle and the respondent never paid any more money until last instalment; that the 1st applicant sought to refund the Kshs.2 million paid to him but the respondent resorted to threats as a result of which the 1st applicant was coerced to write postdated cheques 'AOA3'. The 2nd applicant denied having issued the cheque. The applicant deponed that the impounded vehicles belong to her and CMC Motors, the financiers of the vehicles. She is a director of Vanga Express but the 1st applicant is not and that she was not party to the sale agreement between the 1st applicant and the respondent and will suffer greatly if the stay of execution is not granted. The applicants also deny that they were ever served with summons at their offices in Kisumu, Mombasa, Busia and Nairobi because being respecters of the law, they would not have ignored court summons. The applicant has also deponed that the respondent has concealed material facts and not disclosed that he was with his co-creditor, one Mungai Ndogo when they entered into the sale agreement. It is the applicant's contention that the application raises triable issues that should be heard on merit. Mr. Morara, counsel for the applicant urged that the process server purported to serve the applicants in Bondeni area of Mombasa and yet the applicants' offices are at Plot 209 off, Harambee Avenue, in Mombasa. Counsel also raised issue with the service of notice of entry of judgment for failure to comply with the provisions of the **Civil Procedure Rules**. Counsel relied on the case of **Arthur Apungu v Justnice Ltd, HCC 738 of 2003** where the court found the respondent's claim to be so intertwined with the counter claim that it set aside an interlocutory judgment.

The application was opposed and Mr. Cheche, counsel for the respondent urged that the applicants have not demonstrated that they have a defence that raises triable issues; that the 1st applicant who was party to the agreement has not filed any reply nor has he denied that he was served on behalf of the 2nd applicant; that the 2nd applicant had not denied that post dated cheques were issued and if indeed the 1st applicant was coerced into signing the cheque, counsel asked why there was no complaint to the police. As regards service, it was counsel's contention that service can be effected anywhere, not restricted to the office and that the applicants were served in their individual capacities. As regards the failure by the respondent to include Mungai Ndogo in the claim, counsel urged that he cannot force the said co-creditor to pursue his claim.

I have now considered the rival submissions, the pleadings filed by both parties to this application. The court is being called upon to exercise its discretion to set aside the court's judgment and decree. In the case of **Jackson Biegon v Charles Too & Others (2005) KLR**, J Kimaru relied on the decision of the court in **Mwalia v Kenya Bureau of Standards (2007)1 EA 155** where the court said:-

"I think it is now convenient to state the law applicable to applications to set aside judgment in default of appearance or defence. It is indisputable that the discretion of the court is unfettered except that if the judgment is set aside, it must be done on terms that are just. That is what order IXA Rule 10 itself ordains. It reads: 'where judgment has been entered under this order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.'"

In **Sebei District Administration v Gasyali (1968)EA 200**, the court added that the courts should always remember that to deny a party a hearing should be the last resort of the court.

Bearing the above in my mind, the first issue I will consider is whether the 2nd applicant was served. I have considered the affidavit of service sworn by the process service, Vincent Maiga, dated 20/2/2012 in which he depones to the manner in which he served the 1st applicant. At paragraph 4 of the affidavit, he depones that he found a cashier in the offices of Vanga Express from whom he enquired to see the 1st

applicant. At paragraph 5 he depones that the cashier pointed out the 1st applicant to him. It means that the process server did not know the 1st applicant before. **Order 5 Rule 15(1)** provides on how what the contents of an affidavit should be:-

“Order 5 Rule15(1) The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No.4 of Appendix A with such variations as circumstances may require.”

The rule requires that a process server do disclose the name and address of the person (if any), identifying the person served. In this case a ‘cashier’ identified the person to be served, but the process server has not disclosed the full names and address of the said cashier if indeed he existed. I find that failure to name the person who identified the 1st applicant put into question whether or not the 1st applicant was served. The affidavit of service does not comply with the requirements of **Order 5 Rule 15(1)** on service and the court is in doubt whether proper service was effected on the applicant or at all. In the case of **Maina v Mugiria (1983)KLR pg78**, the court held that the court has no discretion where it appears that there has been no proper service.

The applicants did not exhibit any draft defence. The applicant has deposed that the respondent failed to disclose that he is not the only signatory to the agreement (AOA1) between the 1st applicant and the respondent. It seems that the 1st applicant agreed to supply the respondent and one Mungai Ndogo with two Mercedes Benz vehicles at a cost of Kshs.6,000,000/-. Both purchasers having signed the agreement, the question is whether the full sum of Kshs.6,000,000/- belongs to the respondent or only part of it. That is a triable issue. Although the applicants allege that the cheques issued to the respondent were signed under coercion, there was no complaint lodged that the respondent had done so. But the issuance of the cheques is evidence of the indebtedness of the 1st applicants to the respondent. The only question is how does the 2nd applicant get entangled in the dispute because the cheques are hers. She has also readily deposed to matters that the 1st applicant should be the one responding to. What seems clear in my mind is that it seems the 1st applicant is indebted to the respondent but it is not yet clear how much is owed. In any event having found that no proper service was effected on the applicants, the applicants would not have been expected to file a draft defence to what they were not aware of. The court has no discretion but to set aside the interlocutory judgment for the reason that there was no proper service of the summons (see **Maina v Mugiria**) (supra).

The applicants have exhibited a letter from Kenya Revenue Authority which shows that the attached vehicles are owned by the 2nd applicant and CMC Motors who are the Financiers. CMC Motors is not a party to these proceedings and its property cannot be the subject of attachment for the 1st and 2nd applicants’ debts. The vehicles held by the auctioneers should be released forthwith and the respondent to meet the auctioneers’ costs.

Having found that the service of summons was in doubt, I found it unnecessary to consider whether or not the applicants have demonstrated that they have an arguable defence. This court has no discretion but to set aside the judgment which was irregularly entered. Had the same been proper, then the court would consider whether or not the applicants have an arguable defence.

In the end, I hereby grant prayer 2 of the Notice of Motion, and the ex-parte judgment herein on 17/1/2012 is hereby set aside plus all its consequential orders. The applicants have 14 days within which to file and serve their defence. The result is that the attached vehicles are released forthwith and the respondent to bear the auctioneer’s costs. Costs of the application to abide the hearing of the suit.

DATED and DELIVERED this 20th day of July, 2012.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr Ombati holding brief for Mr. Cheche for the plaintiff/respondent

N/A for the /defendants/applicants
Kennedy – Court Clerk