



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Case 436 of 2011

MERCANTILE INSURANCE CO. LTD AND MOHAMMAD HASSIM PONDOR
(Suing on behalf of the International Air Transport Association IATA) **PLAINTIFF**

VERSUS

PREP SAFARIS INTERNATIONAL LIMITED

IRNE CHETAMBE REDEMPTA SUSAN CHETAMBE KEHRDEFENDANTS

RULING

1. By a Notice of Motion dated 22nd February, 2012 brought under Order 22 Rule 22, Order 10 rule 11 of the Civil Procedure rules and Sections 1A and 3A of the Civil Procedure Act, the Defendants applied for orders that there be a stay of attachment or transfer of moveable assets pending the hearing of the said application, that the ex parte judgment entered on 1st December, 2011 and all the consequential orders be set aside and the Defendants be allowed to file their Defence. That application was supported by the Affidavit of Redempta Susan Chetambe Kehr sworn on 22nd February, 2012.
2. The Defendants contended that the Plaint is incurably defective as the 2nd Plaintiff cannot purport to sue on behalf of the International Air Transport Association – IATA, that the 1st Defendant had not been sued in the proper name – its proper names were Prep Safaris International Ltd, that the 2nd and 3rd Defendants were not parties to the agreement between the 1st Defendant and the Plaintiff, that the summons and Plaint were never served upon any of the Defendants, that the 2nd Defendant is a citizen of the United States of America and was never served with any process, that there was no notice of intention to sue served upon any of the Defendants, that the Defendant’s defence raises triable issues and should be allowed to be filed and finally that according to the records kept by the 1st Defendant, the process server had never visited that office. The Defendants therefore prayed that the application be allowed.
3. The Plaintiffs opposed the application. They contended that Edward Maina Karanja did serve the summons in terms of his Affidavit of service sworn on 17th November, 2011, that since the 3rd Defendant was legally served, the 1st and 2nd Defendant were legally served through the 3rd Defendant, that the suit had been brought under the doctrine of subrogation, that the wide discretion the court has should be exercised in favour of the Plaintiffs. The Plaintiffs relied on the cases of **Shah –vs- Mbogo, Sebei District Administration –vs- Gasyalu (1968) EA 300** and **Priscilla Nyambura Njue (T/a Nairobi Moscow Airways –vs- Countryside suppliers Ltd (2005) e KLR** in support of their contentions. The Plaintiffs urged that the application be dismissed.

4. I have carefully considered the affidavits on record, the written submissions, oral hi-lights by learned counsel and the authorities relied on. The principles applicable in an application to set aside an interlocutory judgment are well known. In the case of **Njagi Kanyunguti Alias Karingi Kanyunguti & others –vs- David Njeru Karingi CA No. 181 of 1994 (UR)** the Court of Appeal held:-

“In an application brought either under OIXA Rule 10 or O.IXB Rule 8 of the Civil Procedure Rules, the court exercises discretionary jurisdiction. The discretion being judicial is exercised on the basis of evidence and sound legal principles. The court’s discretion is wide, provided it is exercised judicially (see Pithon Waweru Maina –vs- Thuku Mugiria (Civil Appeal No. 27 of 1982) (unreported), Patel V.E.A Cargo Handling Services Ltd 1974 EA 75). The court is also enjoined to consider all the circumstances of the case, both before and after the judgment being challenged, before coming to a decision whether or not to vacate the judgment.

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However, it is trite law that this or any other court will only exercise its judicial discretion in favour of setting aside a judgment in order to avoid injustice, or hardship resulting from accident, inadvertence or excusable mistake or errors and will not assist a person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.” (Emphasis mine)

Accordingly, where there has been no proper or any service of summons to enter appearance, the ex parte judgment must be set aside as a matter of right ex – debito justitiae. There is no discretion on the part of the court. However, where summons have been properly served, then the court has to exercise its discretion and in so doing it will be called upon to look at the merits of the proposed defence.

5. Although the process server Edward Maina Karanja was called and cross examined, the court was not impressed by either his cross examination or his answers. That however, does not stop this court from looking and examining whatever little the same offered to establish whether there was indeed any or any proper service of summons. The Affidavit of service of Edward Maina Karanja that was the basis of the ex parte judgment was sworn on 17th November, 2011. He stated, inter alia:-

“2. THAT on the 4th day of October, 2011, I received copies of the Plaintiff and summons to enter appearance from the law firm of Walker Kontos Advocates with instructions to serve the same upon Prep Safaris International situated at Finance House along Loita Street, Nairobi.

3. THAT on the 5th day of October, 2011 at around 10 o’clock in the morning, I proceeded to Prep Safaris International Limited offices situated at Finance House, 7th floor where upon arrival I met the secretary by the name of Margaret Wangwe and immediately explained to her the purpose of my visit. She directed me to the office of the 3rd Defendant where I served her with copies of the Plaintiff and summons to enter appearance being a director of the 1st Defendant and on behalf of the 2nd Defendant but she declined to acknowledge the receipt of the document by rubberstamping and signing on my copies.”

6. Can any exparte judgment based on such deposition stand? I stand guided. Firstly, the process server was given instructions to serve only the 1st Defendant whose place of business he was given by the instructing Advocates. He never had any instructions to effect service upon the 2nd and 3rd Defendants. Neither was he directed where to find them. The other issue is his conduct on **‘the service itself.’** He states:- **“ upon arrival I met the secretary by the name of Margaret Wangwe and immediately explained to her the purpose of my visit she directed me to the office of the 3rd Defendant where I served her.....”** He does not disclose how he knew the names of Margaret Wangwe, nor how he knew she was the secretary. He does not explain whether she was a secretary working with the 1st Defendant or the company secretary of that company. He does not even say that he made any inquiries whatsoever from her. He just **“...met a secretary by the name Margaret Wangwe and explained to her the purpose of his visit.....”** He does not state how he discovered the person he served in that office was the 3rd

Defendant whether he inquired from her, whether she was the 3rd Defendant and or how he discovered she was a director of the 3rd Defendant. All these explanations lacking, and in view of the denials in the Supporting Affidavit and the dismal performance of the process server when called to be cross-examined, I doubt if the exparte judgment can be sustained.

7. As earlier stated, the process server was called and cross examined. He stated on oath:-

“.... I served the Plaintiff and summons to the 3rd Defendant on 5th October, 2011. I served that Defendant on behalf of the other Defendants. I met a lady by the name of Margaret Wangwe. She gave me a book to write my particulars which I did. I indicated 0724-142692 my telephone number. This is the lady who took me to the 3rd Defendant. I have a copy of the visitors book where I signed. When I served the 3rd Defendant she received service for the 1st and 2nd Defendant. I did not ask the 3rd Defendant whether she was a director or secretary of the 1st Defendant.....”

8. From the foregoing, it is clear that the process server knew where the offices of the 1st Defendant were. He does not disclose how he knew the names of the lady called Margaret Wangwe and whether she was an employee of the 1st Defendant. It is clear he did not seek to confirm the names and/or particulars of the person whom he served and whom he alleges to be the 3rd Defendant, he does not say whether he had the summons to enter appearance for the 2nd and 3rd Defendant, neither does he explain why he allegedly served the 3rd Defendant for and on behalf of the other Defendants. He did not confirm whether the 3rd Defendant was a director of the 1st Defendant nor did he seek to establish the whereabouts of the 2nd Defendant. In my view, where a process server effects service and a Defendant declines to acknowledge service, it is incumbent upon the process server to file a detailed Affidavit of service that fully satisfies the requirements of Order 5 Rule 15. It is only then that even when he is examined under order 5 Rule 16 that a court can be able to satisfy itself as to the veracity of his story. The time and place of service must be stated, the names identifying the Defendant, how he discovers the names of such a person whether he did make independent inquiries as to the identity of the Defendant etc.

9. One other thing that justifies my not believing the process server is the issue of the visitors' book he allegedly signed when he went to effect service. The 3rd Defendant swore at paragraphs 6 and 7 of the Supporting Affidavit that at no time the process server visited the 1st Defendant's offices and that it is mandatory within the 1st Defendant's premises that every visitor does sign the visitor's book. She produced the 1st Defendant's visitor's book for the period 19th March, 2011 and 17th February, 2012. The process server stated on oath that he signed the visitor's book when he went to serve. He actually pointed out where he signed. I have carefully perused the visitors book. From his Affidavit of service and testimony in court, the dates which the process server allegedly visited the 1st Defendant's offices were 5th October, 2011 at 10 o'clock to serve summons and 2nd December, 2011 to serve the Notice of entry of judgment. From the visitor's book produced in court and which the process server swore and pointed out to have signed, neither the 5th October, 2011 nor 2nd December, 2011 are his names appearing in the Visitor's book. His name is entered on the 15th November, 2011 only. Since he told the court on oath that the day he visited the offices of the 1st Defendant is when he signed the visitors book, I will take the 15th November, 2011 to be the day he visited those offices and signed that visitor's book. It follows therefore that if that is the day he visited the offices of the 1st Defendant, he lied to court when he stated both in his Affidavit of service sworn on 17th November, 2011 as well as in cross examination that he visited the 1st Defendant's offices on 5th October, 2011 and effected service thereon. He testified on oath that he actually signed the visitor's book when he visited those offices. The visitors book shows that the entry before his name was entered on 24th October, 2011 and the subsequent entries were for the 15th November, 2011 and the following days. My conclusion is that, Edward Maina Karanja is a liar. He never served the Defendants on the 5th October, 2011 as alleged or at all. He must have only visited the offices of the 1st Defendant on 15th November, 2011 only to familiarize himself with the office so that once he

swears a false Affidavit, he can be able to explain the office set up. This is uncouth and unacceptable. The lesser I address the issue the better.

10. From the foregoing, it is clear that no summons were served. I need not address the merits or otherwise of the proposed defence. Accordingly, I allow the application as prayed.

DATED and **DELIVERED** at Nairobi this 28th day of September, 2012.

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A. MABEYA
JUDGE