



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 9 of 2007

PROTEIN AND FRUITS PROCESSORS LTD..... 1ST APPELLANT

PATRICK KIRONO MWAURA. 2ND APPELLANT

VERSUS

DIAMOND TRUST BANK OFKENYA LTD. RESPONDENT

R U L I N G

The application before me is a Notice of Motion dated 20th February, 2012 and filed by the Respondent in this appeal. It seeks the setting aside of Orders of dismissal of appeal for want of prosecution dated 1st November, 2011.

The applicant/Appellant's supporting affidavit depones that they were not served with the application to dismiss the appeal, and that any return of service to that end was not correct and that the kind of service alleged to have been effected, was so defective and incompetent that it should be ruled to be amounting to no service.

The Applicants deponed that they were at all material times represented by M/s Ombachi, Moriasi & Company Advocates whose practice address is Jubilee Insurance Exchange House, 5th Floor, Room 502. They further deponed that the affidavit of service indicated that service was effected on one Mrs. Risper of Penka Services, in Room 502, 5th Floor, Jubilee Exchange Insurance House.

The Appellants on the other hand claim that service was not effected on them. They claimed that the Lady Mrs. Risper who the process-server, Donald Okonda, allegedly served, was at no time authorized to receive service on behalf of the appellants firm or any of the directors of the Appellant firm. They also stated that their firm had earlier appointed Messrs Ombachi Moriasi & Co. Advocates who partly acted for them at the lower court and was accordingly mandatorily on record in the appeal in the High Court. That any service in this matter, should have been served upon the said advocates and not the party since Counsel for Respondents had already corresponded with M/s Ombachi Moriasi & Co. Advocates long before the relevant application for dismissal was filed.

The import of the Applicant/Appellant application therefore, is this:- that the application to dismiss the appeal for want of prosecution having not been served upon them or their advocates on record for the hearing fixed on 1st November, 2012, should in law have not been dismissed and should therefore be reinstated by setting aside the orders of dismissal.

I have carefully perused the application and the material both in support and in opposition to it. The

whole matter is hinged on the said issue of service. What is clear in my mind, however, is that every party to a matter coming up for hearing should be given fair opportunity to be heard before the court can validly determine the merit of a case. Hence the need to serve every party with a Notice to a hearing of each matter except on limited occasions, when for good cause, such service is dispensed with in the first instance only. Service of notice to hearing is accordingly basic and mandatory and where the court finds that there was no service of such notice, then the lack of such notice becomes the cause for the setting aside of the proceedings thereof. Indeed, in my view, even where the court is not satisfied of a proper or effective service to a hearing, the court would readily wish to set aside the orders made ex parte with a view to give every party an opportunity to fully put up his case, sometimes with consequential costs to compensate the losing side.

I must however, point out that the Appellants herein cannot be right in the issue of representation in this case. If indeed M/s Ombachi, Moriasi & Co. Advocates were acceptably their advocates in the lower court before the matter landed in the High Court in Appeal, then, under Order 9 rule 5-9, the said advocates were the only ones authorized to file the appeal, unless the leave of the High Court was sought and obtained for any other party to do so.

In the above respect, the appeal was apparently filed by the Appellants themselves as confirmed by the Memorandum of Appeal dated 10th January, 2007. Where is the leave of this court that authorized them to do so under Order 9 of the Civil Procedure afore cited? If there is none and none was obtained, where did that leave the competency of the appeal before the appeal was dismissed?

Be the above as it may, the matter before me presently, is whether or not there was proper service of the application to dismiss this appeal which was fixed for hearing on 1st November, 2012. The process-server's affidavit sworn on 24th October, 2012 depones that when he missed the firm of the Appellants in room 201, 2nd floor of Jubilee Exchange House which had been given as their address in their Notice of Address, he got information from the new occupants therein that the former occupiers called Penka Services, had moved to the 5th Floor, Room 502 of the same building. Then he went to room 502 and served the process on a Receptionist called Mrs. Risper who signed for it. Donald Okonda does not claim that he made inquires as to who Risper was, or how she related to the Appellants. He does not say that Risper stamped the process with the stamp of the Appellants. He does not say that the information he received from Room 201 was correct and does not even say who, in particular, gave out the information.

I have considered the circumstances above. They do not create in me confidence that the service made by Donald Okonda was reliable enough to act upon to deny a party a right to be heard whose consequences may be dire.

The conclusion I reach accordingly, is that the service by Donald Okonda in principle was poor and unreliable and the benefit of doubt on its unreliability, should be given to the applicants who claim that they were not served and that they need to be given opportunity to agitate their defence to the application for the dismissal of the appeal.

The result is that this application has merit. It is allowed. The orders of dismissal of the appeal of this court dated 1st November, 2011 are hereby set aside and the appeal reinstated. Costs shall be in the cause. Orders accordingly.

Dated and delivered at Nairobi this 28th day of November, 2012.

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D A ONYANCHA

JUDGE