



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 104 of 2010

JOSEPHAT NYINGI PETER..... PLAINTIFF

VERSUS

AFRICAN BANKING CORPORATION LTD.....DEFENDANT

RULING

This suit was commenced by a Plaint filed on 19th February, 2010. The Plaint was accompanied by a Chamber Summons of the same date brought under a certificate of urgency. The matter was certified urgent on 24th February, 2010 and given a date for hearing inter parties on 4th March, 2010.

An affidavit of service on record shows that the Defendants were served on 26th February, 2010. However, when the matter came for hearing on 4th March, 2010 Mr. Kamwendwa appeared for the Plaintiff/Applicant but there was no attendance by or representation for the defendants. In the absence of the Respondents who had been duly served but had filed no documents, the court granted prayers 2, 3, and 4 of the application. The effect of those orders was to bar the Defendants from representing, impounding or selling the Registration No. KAW 963X Axor Truck and 4 Axle Semi Trailer which was offered as security pending the hearing of the suit, and to release to the Plaintiff the aforesaid motor vehicle.

The matter came for a mention on 16th March for recording a consent but none of the parties attended. It was therefore stood over generally. The Defendant then filed the present application by Notice of Motion dated 24th March, 2010 seeking an order that the orders issued on 4th March, 2010 be discharged or varied.

With leave of the court, the parties filed skeleton submissions. After considering the pleadings and those submissions, I find that there are two main issues to determine. The first one is whether service of the Plaintiffs documents on 26th February, 201 was effective; and secondly whether an order selling the motor vehicle to the Plaintiff should be rescinded.

Order V Rule 2 of the **Old Civil Procedure Rules** provides that where a suit is against a corporation, service should be effected on the secretary, director or other principal officer of the corporation. If any of these officers cannot be found, any court documents may be left at the registered office of the corporation or by sending it by prepaid registered post to the registered postal address of the corporation, or if there is no registered office and or registered postal address of the corporation, by leaving it at the place where the corporation carries on business or by registered post to the last known

postal address of the corporation. The process server in this case states frankly that the security officer whom he found at the Defendant's premises directed him to the legal department, and in particular to a lady who introduced herself to him as Hawa. Whereas the Defendants now claim that Hawa was only a receptionist, it is not certain whether the process server knew that the person he was serving was a receptionist. It would be fairer to cross examine him to determine whether he knew the standing of Hawa in the organization. His reaction to that would pave the way for the determination of whether the service was effective or not. Otherwise, the Defendant concedes that Hawa forwarded the documents to the legal officer and if we go by the substantive receipt of the documents by that officer, the rest is academic.

With regard to the 2nd issue, there is a dispute as to whether the Plaintiff/Respondent has repaid the sums of money owing to the Defendant/Applicant. The Plaintiff states that he has repaid the full loan amount, inclusive of interest, to the Defendant. It is his further contention that the procedure for repossession and sale of the motor vehicle was not followed and that in any case no chattels mortgage was obtained and registered. He also alleges that the Defendant has unilaterally changed the rate of interest and other charges in violation of the Banking Act.

On the other hand, the Defendant/Applicant's case is that the Respondent still owes the bank more than Kshs. 1,500,000/= as of 15th March, 2010, and this sum continues to attract interest.

It is clear to me that one of the parties is not being candid with the court. This fortifies my earlier view that this matter calls for oral evidence before it can be brought to a conclusion one way or the other. Being of that opinion, I direct that the parties prepare this suit for hearing as early as possible, and a hearing date be given on priority basis.

Costs in the cause.

L. NJAGI
JUDGE

DATED and DELIVERED at NAIROBI this 16th day of November, 2012

OGOLA
JUDGE