



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE 1223 OF 2001

DR. JOSIAH M. KINAMA

..... **1st**

PLAINTIFF

DR. LAWRENCE N.

MASAU **2nd**

PLAINTIFF

VERSUS

**MILKA WANZA KITUNDU, JOHN MUTHUI KITUNDU & SOLMON NDUNDA
KITUNDU(Being the Personal Representatives/Administrators of the Estate of Solomon Kitundu
Munywoki (Deceased))..... DEFENDANTS**

AND

FOSTINA MUENI

KITUNDU **INTERES**

TED PARTY

**Coram : Mwera J.
Ms Guserwa for Plaintiffs
Amolo for Defendants
Njoroge court clerk**

RULING

On 26.7.10 the defendants/applicants filed a notice of motion under sections 1A, 1B, 3A, 80 of Civil Procedure Rules and the now repealed Order L rule 1 for an order:

- i) that this court orders of 12/4/10 be reviewed and the interlocutory judgement of 4.12.03 be set aside;

The grounds put forth for the above prayer were that one Kennedy Mwanzo Kutai had impersonated and then presented himself as Francis Watola Omolo and tendered false testimony regarding the circumstances surrounding the disputed service of summons to enter appearance and copy of plaint, on one Solomon Kitundu Munywoki (deceased). And that the evidence given to the court by 1st plaintiff (Dr. Josiah Kinama) to determine the chamber summons dated 17.07.09 was a perjury.

Mr. Amolo, advocate for the applicants swore a supporting affidavit. He once filed a chamber summons dated 17.7.10 seeking to set aside an interlocutory judgement entered on 4.12.03 and to do so it was necessary to examine on oath the process server, one Francis Natola Omolo, who allegedly served the summons to enter appearance, plus plaint in this cause on the deceased Solomon Kitundu, which summons was not answered by entering appearance whereupon a default judgment was entered. On the date of hearing that application, 15.3.10, the 1st plaintiff Dr. Josiah Kinama and a person who presented himself to court as Francis Watola Omolo, testified and were cross –examined.

On their part the defendants had Solomon Ndunda Kitundu, testify disputing the service of summons on the deceased Kitundu as alleged. At the end of the day the court appeared satisfied with the evidence of Dr. Kinama and “Francis Watola Omolo” that valid service was effected on the deceased, and in essence it declined to set aside the exparte judgment. But that it had since emerged and came to the attention of Mr. Amolo that the “process server Francis Watola Omolo” who was examined on oath (above) was not the genuine person but he was one Kennedy Amwanzo Kutai instead. A copy of his photograph, name and signature appearing in a L.S.K. sanctioned identification papers as the employee of J. A. Guserwa & Co. Advocates, was produced. So the orders sought ought to be granted because from his extensive inquiries Mr. Amolo had come to learn that Francis Watola Omolo was a free-lance process server who died between 2005 and 2007. In that event, Dr. Kinama and Kennedy Amwanzo perjured themselves when they gave false testimony in regard to the hearing of the chamber summons dated 17.7.09. The court was urged to make its own inquiries in the matter.

Dr. Josiah Kinama (1st plaintiff) swore a replying affidavit to the effect that when he came to be examined on oath on 15.3.10 he came along with this gentleman from the offices of their lawyers M/s J. A. Guserwa & Co. Advocate, whom he knew as Francis Watola Omolo, working at that firm. It was this gentleman, going by that name, who was given the summons to enter appearance to serve with Dr. Kinama as the plaintiff to point out the defendant (Solomon Kitundu, deceased). Service was effected. In essence Dr. Kinama was maintaining that the process server he led to a pre-arranged meeting with Solomon Kitundu to effect service was Francis Watola Omolo, and he had no knowledge of one Kennedy Amwanzo Kutai in any way.

Ms Guserwa’s own affidavit, referred to **one Kennedy Amwanzo Kutai alias Francis Watola Omollo** as a person who worked for her firm between 1995 and 2010. The document exhibited by Mr. Omolo for the identity of Kennedy Amwanzo Kutai was known to Ms Guserwa. But he left her employment on 31.3.10 on disciplinary grounds. However, he is the process server whom Dr. Kinama led to serve Solomon Kitunda with summons to enter appearance and he filed an affidavit of service. So these issues of identity need not be revisited the court having found already that service was valid, followed by a proper interlocutory judgement.

Before submissions were filed in this proceeding, there had been attempts to get Kennedy Amwanzo Kutai to appear in court, with a view to get his side of the story. Mr. Amolo was able to trace him but the court was not sitting on the day in issue. Kennedy left the employment of Ms Guserwa and so Mr. Amolo sought witness summons to bring him to court. There arose some hitch as to the issuance of that summons and apparently Kennedy went underground or, as it was reported, he expressed reluctance to come before court. This was as per Mr. Omolo’s remarks. Miss Guserwa maintained that since Kennedy left her employment she could not trace and make him available to court. Not wishing to have both Mr. Omolo and Ms Guserwa step in the witness box to say what their respective affidavits herein were for, with likelihood of cross examination, that course appeared imprudent and it did not commend itself to the court. So both counsel submitted on their respective stands on the matter.

While Mr. Omolo asserted that the court did not hear the genuine Francis Omolo, the process server when

examining him on oath, instead it had actually heard the imposter Kennedy Amwanzo, Miss Guserwa maintained that Kennedy Amwanzo also known as Francis Watola Omolo was the one the court heard.

In this court's view it has been left with serious doubts about the honesty, the persons and the whole process of saving summons on Solomon Kitundu as alleged. Dr. Kimana may be honest that he was given the process sever with whom he was examined on oath before this court. He led that officer to serve Solomon Kitundu at a prearranged meeting. That that was done and that is it. True, names or identities may not have been important or known to Dr. Kimana. And that is what emerges now in Ms Guserwa's affidavit sworn on 5/10/10.

“ THAT it is true one Kennedy Amwanzo Kutai – alias Francis Watola Omolo has worked for any firm as a court clerk cum process server since 1995 to March, 2010.”

With the foregoing, it cannot be said that the process server's identity is certain and no doubt the applicants have their doubts and particularly that the said Kennedy Amwanzo Kutai alias Francis Watola Omolo has expressed fears to appear before this court in the present proceedings and circumstances. The court can only conclude that in sum the prayers sought be granted. And in this case, the plaintiffs have not lost at all. They may begin all over by serving summonses on the defendants (on behalf of the estate of the deceased. Solomon) and have trial take place, if they cannot compromise, in the usual way. Both sides will have had their day in court.

Prayers granted with costs.

Delivered on 4.4.11.

J. W. MWERA

JUDGE