



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 188 OF 2008

ANN ATIENO OBADE & ANRPLAINTIFFS

VERSUS

KICHANA PHILIP DEFENDANT

RULING

**Coram: Mwera J.
 Odawa for Plaintiff
 Ms Michuki Defendant
 Court clerk Njoroge**

On 13.4.11, the defendant filed a notice of motion under Order 10 rule 11, Order 51 rule 1 of Civil Procedure Rules and sections 1A, 1B, 3A of Civil Procedure Act for the main prayers:

- i) that the judgement entered herein in default of failure to enter appearance together with all *ex parte* orders be set aside; and
- ii) the defendant be granted unconditional leave to defend the suit out of time.

The main ground was that the default by the defendant to enter appearance and file a defence was not intentional. The application had been lodged without delay and if the prayers are granted the plaintiff will not suffer prejudice. The defendant had a good defence.

In the supporting affidavit it was stated *inter alia* that the cause followed a traffic accident in which Bernard Onyando Ochieng died. The defendant was charged in Kibera TR. CASE No. 1404/07 and was acquitted. He was never served with the summons to enter appearance as alleged by a process server herein. In essence the defendant was pleading that at no time did he know of this case in order to respond/act appropriately. The process server never contacted or met the applicant at any time to serve him or at any place. As for ownership of m/v reg. no. KAV 133T, it was deponed that it was involved in an accident, written off and his insurer paid him sh. 1.02 m in January 2008. So the said process server could not find him standing near it on 17.5.08. Due documents were exhibited.

Affidavits were filed back and forth. With interim orders in place, then the hearing was set with the order that the process server, Benedict C. Osore, be present to be examined on oath on 21.6.11 about this disputed service. Thereafter the parties would submit.

Come 21.6.11 and Mr. Odawa for the plaintiff informed court that he could not get that process sever to appear in court for examination because he was asking for sh. 10,000/= first – to cover his expenses. The

plaintiff apparently could not afford such a sum. Counsel then proposed that the presence of the process server be dispensed with while a decision was taken on the basis of affidavits and submissions.

Ms Michuki would have wanted the court to exercise its power to have the process server come before it. But in the circumstances she urged the court to take into account the reluctance of that process server to be examined on oath as a pointer to what, very likely, he did not do. But then the court would proceed as Mr. Odawa had proposed.

On considering the whole matter and the state of affairs obtaining, this court is minded to grant the orders sought by the defendant. The judgement herein with all the consequential proceedings, orders etc are set aside. The defendant has now to be served with summons to enter appearance plus a copy of the plaint. He should then proceed to do the needful as per procedure required. As soon as all is in place, and in default of settlement, the suit should be prepared for trial in accordance with Civil Procedure Rules, 2010 for trial. All the foregoing is based on the court's impression that Benedict C. Osore, did not serve the defendant with the papers. No party will be prejudiced by the course proposed above.

Costs to the defendant.

Delivered on 7.7.11

J. W. MWERA
JUDGE