



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

HCC NO. 84 OF 2011

AWADH S. SAID & ANOTHER.....PLAINTIFFS

VERSUS

OMAR SALEH SAID.....DEFENDANT

RULING

1. By a notice of motion dated 17th June, 2011, Omar Saleh Said who is the defendant in this suit seeks to have the interlocutory judgment entered against him on 13th June, 2011 and all other consequential orders set aside, and leave granted to him to enter appearance and file defence. Further that appearance and defence already filed by him in court be deemed as duly filed.
2. The applicant contends that interlocutory judgment was entered against him irregularly as no proper service of summons to enter appearance was effected on him. The defendant further maintains that he has a strong defence against the plaintiff's claim including a preliminary objection on a point of law regarding the plaintiff's *locus standi* to file the suit on behalf of the estate of Mohamed Saleh Said (deceased). The application is supported by an affidavit sworn by Brenda Wambui Muthee who is an advocate in the firm appearing for the defendant.
3. The application is opposed through an affidavit sworn by Awadh Saleh Said who is the 1st plaintiff. He maintains that the defendant was duly served with the plaint and the summons to enter appearance through his wife Mrs. Nauriya Said Sherman. The 1st plaintiff maintains that the defendant was in Mombasa at the time service was effected. The court was urged not to allow the application as the defendant has failed to give any good reason for his failure to enter appearance within time.
4. I have given careful consideration to this application. An affidavit sworn by the process server Tom Odhiambo, was filed showing that he served the documents upon the defendant through his wife Nauriya Sherman. The affidavit of service indicates that only one single attempt was made to trace the defendant. Although it is alleged that the person served indicated she had authority to accept service on behalf of the defendant, it is indicated that she declined to sign acknowledging service. This is a clear indication that either the person did not have authority or the person was not served. Secondly, although the process server claims that the residence of the defendant was pointed out to him by an agent of the plaintiff, that agent has not been identified in the original affidavit of service. The subsequent attempts to identify Gilbert Mwagona Charo as the agent are suspicious.
5. Further, I have perused the defence filed by the defendant on 16th June, 2011. I am satisfied that it raises an arguable defence which includes a legal issue on *locus standi*. In the circumstances I find it fair and just that the defendant should be given an opportunity to ventilate that defence. Accordingly, I do allow the notice of motion dated 17th June, 2011 and issue orders as prayed in prayers 2, 5 and 6 of that motion.

6. Costs of the application shall be in the cause.

Dated, signed and delivered this 26th day of October, 2011.

H. M. OKWENGU

JUDGE

In the presence of:

Ms. Muthee H/B for Abeid for the Plaintiffs

Olwande H/B for Mwakireti for the Defendant

Kiponda Court Clerk