



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 756 OF 2010**

**G A INSURANCE LIMITED.....PLAINTIFF**  
**- VERSUS -**  
**PAWS AFRICA SAFARIS LIMITED .....DEFENDANT**

**RULING**

1. I have before me a notice of motion by the defendant dated 18<sup>th</sup> April 2011. The motion seeks to set aside the interlocutory judgment entered herein in default of appearance or defence. The principal grounds enumerated in the affidavit of Tolbert Murimi sworn on 18<sup>th</sup> April 2011 are that the defendant was not served with the summons to enter appearance and that the affidavit of service of 21<sup>st</sup> January 2011 is contradictory in its dates, a fact noted by the Deputy Registrar of the court. It was thus irregular to enter judgment on the basis of a supplementary affidavit of service without leave. The defendant also states that it has no employee named Peter Njau who was allegedly served with the summons. Lastly, the defendant avers that it has a good defence to the claim and should be reinstated to the seat of justice so that the matter can be heard on its merits.
2. At the hearing of the application leave was granted to the defendant to cross-examine the process server. The process server, Armstone Vihaki, testified that he served the defendant company at its offices on 9<sup>th</sup> December 2010 along Bogani Road, off Magadi road Langata Nairobi. He said the company has a sign on the road. He went to the reception and after introduction, the receptionist referred him to a Mr. Peter Njau who accepted service by signing the original summons. No company stamp was affixed on the summons. The process server also explained in detail the location of the defendant's offices, lay out of the compound and the big signpost for PAWS Africa at the entrance. He was emphatic that service was effected inside the offices of the defendant. He said he had served the same company before.
3. I have heard the rival arguments. I have also studied the two affidavits of service that are material, sworn on 21<sup>st</sup> January 2011 and the supplementary affidavit of 9<sup>th</sup> February 2011 as well as the sworn viva voce evidence of the process server under cross-examination. I have also studied the affidavit in support of the motion, the replying affidavit of Mukesh Shah sworn on 3<sup>rd</sup> May 2011 and the submissions by counsel. I have formed the following opinion. As an affidavit is incapable of amendment the only cure for an insufficient one is to file a supplementary affidavit of service. No leave was required at that stage as it was not an affidavit in the course of proceedings.
4. On the totality of the evidence, I am of the view that the process server, even under cross-examination, was firm that he undertook service on the defendants operations officer Peter Njau on 9<sup>th</sup>

December 2010 at Old Turrac Club Building, Bogani East Road in Langata, Karen Nairobi. The description of the place of service has left no doubt in my mind about that fact. He had also served the same company before. What is doubtful is whether Peter Njau was authorized to accept service.

The defendant says it has no such employee. But that could be self-serving. And the defendant only enclosed a list generated by itself listing employees with the name of Peter Njau conspicuously absent. So who then signed the summons on their reverse on 9<sup>th</sup> December 2010?

5. Under order 5 of the Civil Procedure Rules service on a corporation should be effected at its registered offices or on a director, secretary or other authorized officer. See *Kingsway Tyres & Automart Ltd Vs Rafiki Enterprises Limited* [1996] eKLR. The defendant has not denied that it trades at the Old Turrac Club Building along Bogani East Road in Langata Nairobi. It has not provided a list of its current directors or who is authorized to accept such service. But I do accept that where there is a challenge on service, the duty is on the plaintiff to show that the service was effected. It has done so in the two affidavits aforementioned and by the sworn oral evidence of the process server.

Granted all of those circumstances, particularly the sworn evidence under cross-examination of the process server, I would declare as required by order 5 rule 16 that service was effected on the defendant judgment debtor.

6. The court has wide and unfettered discretion to set aside an *ex parte* order. As held in *Shah vs Mbogo* [1967] E.A 116, at 123, that discretion “is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is otherwise not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice”. See also *Maina Vs Mugiria* [1983] KLR 79. Those are the clear parameters for the court in a matter of this nature.

7. The only salient question then would be if there is a draft defence raising a triable issue. The draft defence marked “TCM 6” at paragraph 4 admits that the defendant took out various insurance policies with General Accident Insurance Company. The plaintiff states that the plaintiff was formerly known as such. This the defendant says it takes issues with. The replying affidavit of Mukesh Shah has attached copies of the insurance contract finance and exhibited payments paid on behalf of the defendant as insurance premium finance. The defence after that is a general traverse denying indebtedness to the plaintiff. It is also contradictory because on the one hand it denies indebtedness then at paragraphs 9 and 10, it states that the reason for non-payment is the plaintiff's failure to satisfy various claims it had lodged under the policies or failing to credit it with monies for medical claims. That to me is not a good defence that would persuade me to reinstate it to the seat of justice. In *Magunga General Stores Vs Pepco Distributors Ltd* [1987] 2 KAR 89 it was held as follows;

“First of all a mere denial is not a sufficient defence in this type of case. There must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given”.

I would say the defendant has not come within the threshold of the cited authorities to enable me exercise my discretion in its favour.

8. For all the above reasons I find the defendant's notice of motion dated 18<sup>th</sup> April 2011 lacks merit. I dismiss it with costs to the plaintiff decree holder.

It is so ordered.

**DATED and DELIVERED at NAIROBI this 25<sup>th</sup> day of November, 2011.**

**G.K. KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of**

Ms Amboko for Ondari for the Plaintiff/Decree Holder.

Mr. Ndolo for Simiyu for the Defendant/Judgment Debtor.