



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 123 OF 2010

ATIENO OKELLO.....1ST PLAINTIFF
DENNING JUSTUS OLOUCH.....2ND PLAINTIFF

- VERSUS -

KIAMBERE FLATS.....DEFENDANT

RULING

1. I have before me a notice of motion dated 3rd August 2010 by the defendant praying that the injunction granted by the court on 24th May 2010 be discharged or set aside. It is expressed to be brought under Order L and XXXIX of the former Civil Procedure Rules and grounded on the annexed affidavit of Avitar Bahra of even date.

2. In a nutshell, the defendant avers that it was never served with the plaintiffs' application dated 2nd March 2010 for hearing *inter parties* on 24th May 2010. It avers that instead, a 3rd party known as Property World Limited was the one served. The latter, the applicant says, was not authorized to accept service on behalf of the defendant and that it is a separate and distinct legal entity. The applicant thus avers that the affidavit of service of Andrew Odongo sworn on 20th May 2010 is a false affidavit.

3. The plaintiffs contest the application. Reliance was placed on the affidavit of Atieno Okello sworn on 13th October 2010 and the annexures thereto. An affidavit sworn later by the 2nd plaintiff Justus Denning Olouch on 7th November 2010, was, by consent of the parties, expunged from the record at the hearing of this application. The plaintiffs, in sum, aver that Property World Limited were the agents of the defendant and the defendant cannot now be heard to say that it had not authorized the agent to accept service.

The plaintiffs further aver that the present application has been brought after inordinate delay. As the property the subject matter of the suit involved finance from a bank, the plaintiffs contend they would suffer irreparable harm if the order of injunction is vacated as the defendant may then dispose of the suit property. The plaintiffs assert that the orders of court of 24th May 2010 were thus regular in the circumstances and should not be set aside.

4. I have formed the following view of the matter. 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.

5. At its heart is whether the defendant, a company, was properly served. There is no doubt that Property World Limited was the defendant’s agent in the sale of the suit property. That seems clear from the letter of offer dated 6th April 2009 by Property World Limited to the two plaintiffs for purchase of the suit property for and on behalf of the vendors, Kiambere Flats Limited, the defendant herein.

6. On 3rd March 2010 the plaintiffs appeared *ex-parte* for their application dated 2nd March 2010 which was ordered to be served for hearing inter-parties on 5th March 2010. On that day, the court was not satisfied with service on the defendant and ordered that fresh service be effected for hearing on 24th May 2010. The defendant did not attend. The court, relying on an affidavit of service sworn on 20th May 2010 by Andrew Odongo, proceeded to hear the matter *ex parte* and, in a brief ruling, granted the plaintiffs an order of injunction in terms of prayer 1 of their application dated 2nd March 2010.

7. But were the defendants served? At paragraph 3 of that affidavit of service the process server says he went to the offices of Kiambere Flats Limited and was instructed to go to Property World Limited situated at Jetro Chambers, Mpaka Road. The hearing notice was received and was endorsed with a stamp for Property World Limited.

8. In my view, order 5 of the Civil Procedure Rules is express that service on a company should be effected at its offices and on a principal officer or director or other person authorized to receive service. See Kingsway Tyres & Automart Ltd Vs Rafiki Enterprises Ltd Civil Appeal No 220 of 1995 [1996] eKLR. The entity served is not the defendant company but another distinct company known as Property World Limited and I have not seen sufficient evidence at any rate indicating the latter was so authorized. On that score I am of the considered opinion that the defendant was not properly served for the hearing date of 24th May 2010.

9. The defendant’s application was filed on 11th August 2010, two and a half months or thereabout of the order of 24th May 2010. I would not say that is an inordinate delay or that in those circumstances the defendant has ran afoul of the parameters set out in Shah vs Mbogo (Supra).

10. For all the above reasons I would vacate and set aside the *ex parte* order of 24th May 2010. I thus order as follows;

1. **THAT** the interlocutory injunction granted by the honourable court on 24th May 2010 pending the hearing and determination of this suit including the award of costs thereof be and is hereby vacated and set aside in its entirety.

2. **THAT** the plaintiffs’ application by way of chamber summons dated 2nd March 2010 be heard *de*

novo inter parties. The defendant is granted 15 days to file any replying affidavit. The plaintiffs shall have corresponding leave to respond.

3. **THAT** the costs of the application dated 3rd August 2010 are awarded to the defendant in any event.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 15th day of November 2011.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiffs.

Mr. Ayoo holding brief for Olubayi for the Defendant.