

compliance with the provisions of order V. Service should have been by registered post.

That the physical address of the offices of J.K. Bosek & Co Advocates is in the plaint originating the action (see paragraph 1 of the plaint and also indication that the plaint was drawn and filed by J.K. Bosek & Co Advocates). Matters could be different if the defendant had not been served at all. In this connection counsel called in aid the authority of BAT (K) LTD TARANGANYA LEAF CENTRE & BOKOBORA CHACHA NYANGWI (C.A) CIVIL APPEAL NO.128/92. In that case the Court of Appeal held that failure to serve the appellants renders the whole exercise a nullity in law.

That the plaintiff has unduly suffered prejudice in that the defendant is in unlawful possession of the subject matter since 2003.

The respondent last and final position is that the applicant has not come to court with clean hands. The applicant's delivery books claim that the respondent acknowledged receipt of the Memorandum of Appearance and defence in Nairobi. Yet in the application the applicant's counsel and his clerk claim that the Memorandum of Appearance and defence was sent vide ordinary post. In any event the application was made after the plaintiff had moved the court to strike out the defence. In which case the application was meant to scuttle the motion seeking to strike out the plaint.

In conclusion, the respondent's advocate urged me to strike out the supplementary affidavit of Peter Macharia sworn on 16th September 2009 having been filed out of time and without leave of the court.

I have fully set out the rival arguments of both parties. Having done so, I have noted that the delivery note exhibit "PKN2" is the substantive evidence that service on J.K. Bosek & Co Advocates was effected in Nairobi on 12th May 2009. This is at variance with the affidavit in support by Mr Peter Kiarie Ndarwa advocate and his clerk Mr Macharia that service was done by ordinary mail. Thus the application has been brought in bad faith. It is backed up by conflicting evidence. There is no truth about the service. Accordingly, I discount the affidavit evidence regarding service by the applicant and find as a fact that service if ever done was purportedly done on J.K. Bosek & Co Advocates at Nairobi. But J.K. Bosek & Co Advocates deny that they were served. In the circumstances, I find as a fact that there was no service at all.

It is axiomatic that a person who comes to equity must come with clean hands. Since the applicant has come with soiled hands the court cannot assist her.

On law, order VIII Rule 2 of the Civil Procedure Rules (as amended by LN NO36/2000) provides thus:

“Where the defendant has been served with a summons to appear, he shall, unless some other order or further order be made by the court, file his defence within fifteen (15) days after he has entered an appearance in the suit and serve it on the plaintiff within seven days from the filing of the defence”.

On the available evidence, service was not effected at all on the plaintiff's advocate. Consequently the plaintiff's advocate made an application by way of Notice of Motion dated 4th June 2009 to strike out the defence filed on 12th April 2009 for want of service. Apparently with a view to scuttle the said application the applicant herein filed the Notice of Motion dated 16th September 2009 for enlargement of time within which to file Memorandum of Appearance and Defence.

In my considered view, that application, as I said earlier, was not made in good faith. The evidence in support of the same is also contradictory.

For the above reasons I decline to exercise my discretion in favour of the applicant. Accordingly, the application herein is for rejection. It is dismissed with costs to the respondent.

Dated and delivered at Kitale this.....1STday of.....**FEBRUARY**.....2010.

N.R.O OMBIJA

JUDGE

Mr Mukoros for Bosek for the Plaintiff

Mr Njoroge for Kiarie for Defendant