



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Suit 228 of 2000

**ABEID HAMISI.....
.....PLAINTIFF**

VERSUS

IBRAHIM MUSA & SONS PROPERTIES LTD.....DEFENDANT

RULING

Ibrahim Musa, described as Interested Party, (hereinafter “the Applicant”) seeks by his application dated 15th August 2008, to set aside orders made pursuant to the plaintiff’s application dated 9th November 2001 and the warrants of arrest issued against him on 21st April 2008 and 4th December 2008. The Applicant also seeks leave of the court to defend the said application of 9th November 2001. The application is made on the primary grounds that the applicant was not served with a hearing notice in respect of the said application, the order of 8th September 2006 and the Notice to show cause why execution should not issue against him. He also states that the said application did not specifically pray for an order that he be made personally liable for the defendant’s debts. The application is made under the provisions of Section 3A and 34 of the Civil Procedure Act, Order IX B Rules 3 and 8, Order XXI Rules 32 and 36, Order L Rules 2 and 17 and all enabling provisions of the Law.

The application is supported by an affidavit sworn by the applicant. In the affidavit, the applicant has deponed that he was never served with the said documents. He has further deponed that he has been advised by his advocates that the corporate veil of a company can only be lifted upon application appropriately made and not in these proceedings as the plaintiff has done.

The application is opposed and there is a replying affidavit sworn by the plaintiff. In the said affidavit, it is deponed, *inter alia*, that the applicant was indeed served with the hearing notice in respect of the proceedings of 7th September 2006 and that the orders made on that date were validly made. It is further deponed that the Notice to show cause was also duly served upon the applicant on 11th April 2008 but the applicant did not attend the court upon which failure, the Warrant of Arrest was properly issued against him. The plaintiff has further deponed that he has been advised by his advocate that the court had jurisdiction to issue the orders now being challenged by the applicant.

When the application came up for hearing before me on 19th February 2009, counsel agreed to file written submissions. The same were duly filed by 11th March 2009. I have perused the application, the affidavits on record and the submissions of counsel. Having done so, I take the following view of this matter. Two broad issues have emerged from the material availed to the court. The first issue relates to service of various documents upon the applicant. The second issue relates to the validity of the order making the applicant personally liable for the debts of the defendant company.

With regard to service of the hearing notice dated 19th July 2006, I note that the same was purportedly served by a Process Server called Francis M. Katana on 15th August 2006. The said Process Server deponed that he served the Director of the Defendant at the General Post Office situated along Digo Road, but the said Director refused to sign the Original Hearing Notice. It is significant that the Process Server does not depone that he knew the applicant. It is also significant that the hearing notice itself did not have the applicant's physical address of service. Indeed on the basis of the address given in the hearing notice, it would be nigh impossible to serve the applicant without the assistance of an identifying person.

The applicant has sworn that he was not at the General Post Office on the day of the said service. Unfortunately the only person who could have rebutted that averment is deceased. There is therefore doubt as to whether indeed the applicant was served with the hearing notice in respect of the plaintiff's application dated 9th November 2001.

I have also noted that in the order made on 7th September 2006, service of the order upon the applicant along with the warrants of attachment was specifically made part of that order. There is no evidence that the said order was ever served upon the applicant at all. Yet it is by that order that the applicant was held personally liable to satisfy the decree in the suit. Where service is not established, orders made in default will be set aside *ex debito justitiae*. I accordingly find that the orders made against the applicant were irregular and must be set aside as of right.

Even if I had found that service upon the applicant was proper and the orders entered against him regular, I would still have exercised my discretion in favour of the applicant as, in my view, the applicant has demonstrated that he should be heard on the merits of the application at least with respect to the order that in effect pierced the veil of the defendant when the plaintiff had not specifically prayed for the same in the body of his application.

Before concluding this matter, I should mention one objection raised in the submissions of the plaintiff to the effect that the applicant is a stranger to these proceedings. That objection in my view was not well taken as the plaintiff sought and obtained orders against the applicant and cannot now challenge the applicant's right to seek relief. The objection was in any event on form and is rejected.

In the end, the applicant's application dated 15th December 2008 and filed on the same date is allowed in terms of prayers 3, 4 and 5 of the application. As the applicant is a principal player in the affairs of the defendant, whose liability to the plaintiff has been established, I order that costs be in the cause.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF APRIL 2009.

F. AZANGALALA

JUDGE

Read in the presence of:

Munyi holding brief for Omondi for the plaintiff.

F. AZANGALALA

JUDGE

24TH APRIL 2009