

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL CASE 280 OF 2009

KULTAR SINGH HANSPAL.....PLAINTIFF

VERSUS

ESTHER MUTHONI PASSARIS.....DEFENDANT

RULING

Before me is a notice of motion by the defendant made pursuant to the provisions of Order XXXIX Rule 4 and Order L Rule 1 of Civil Procedure Rule. The defendant seeks the exparte order issued by this court on 4th May 2009 be set aside and the defendant be granted unconditional leave to defend the plaintiff's application dated 16th April 2009. The application is supported by the annexed affidavit of the defendant and that of Sandra Ada Osembo and the grounds stated on the face of the application. In essence, the defendant alleges that she was not personally served with the pleadings and therefore the order obtained against her should be set aside. She further states that the plaintiff was guilty of material non disclosure and was therefore undeserving of the orders that were issued in his favour. In response, the plaintiff filed grounds in opposition to the application. Julius Muiu Mutuku, a duly authorized process server of this court, swore a supplementary affidavit of service in a bid to disprove the claim made by the defendant that she had not been served with the pleadings in question. In essence, it is the plaintiff's case that the defendant was duly served with the pleadings in question and therefore the orders obtained were regular.

At the hearing of the application, I heard submission made by Mr. Issa for the defendant and Miss Matano for the defendant. I have carefully considered the rival submissions made by counsel for the parties to this application. I have also read the pleadings filed by the parties herein in support of their respective opposing positions. The issue for determination by this court is whether the defendant has established a case to entitle this court set aside the order it issued on 4th of May 2009. Both parties appreciate the principles to be considered by this court in determining whether or not to set aside an exparte order. Under Order XXXIX Rule 4 of the Civil Procedure Rules, this court has jurisdiction to discharge, vary or set aside any order that it has issued. This court has unfettered discretion to set aside any exparte order provided it will serve the interest of justice and further provided that the opposing party would not suffer prejudice that cannot be compensated by an award of costs (*See Patel vs EA Cargo Handling Services [1974] EA 75*).

In the present application, it is the defendant's case that she was not served with the pleadings as alleged by the process server in his affidavit of service. According to the defendant, the process server delivered a parcel addressed in her name to her office and left it with her secretary. The parcel was sealed. It was upon opening the parcel, that the defendant realized that the contents were court documents. It was then that the defendant instructed her advocate to appear on her behalf in court. It was the defendant's case that the plaintiff had failed to disclose facts which would have been material for the court to determine the matters in dispute. For instance, the defendant claimed that, in his pleadings, the plaintiff failed to disclose the existence of other suits between the plaintiff and the defendant relating to the same suit property. It was the defendant's view that if the court was made aware of the existence of the other suit where the court had issued orders restraining the plaintiff from interfering with the defendant's tenancy, the court would not have issued the orders in question.

In response, the plaintiff reiterated that it had served the defendant with the pleadings in question.

According to the process server, he went to the offices of the defendant, identified himself to the receptionist known as Sandra after which she sought instruction from a person in the inner office. She returned to the reception and informed him that the defendant had authorized her to accept the pleadings on her behalf. It was then that he served the pleadings upon the said Sandra. Although the said Sandra did not sign copies of the pleadings in question, it was the plaintiff's case that the service was regular. Sandra Asembo, in an affidavit sworn in support of the defendant's application, denied that she was served by the process server in the manner that was explained by the process server in his affidavit of service. In his ground of opposition, the plaintiff denied that he had concealed any material facts from the court and urged the court to dismiss the application with costs.

Having considered the facts of this case in light of the applicable law, I take the following view of the matter. It was clear from the affidavit of service of Julius Mutuku that the defendant was indeed served with the pleadings in question. The defendant's denial notwithstanding, it was evident from the process server's narration of events that took place on the material day that indeed he had served the said pleadings. He identified the secretary of the defendant by name. The said secretary admitted that the process server visited the defendant's office on the date that the process server indicated that he served the defendant. Even if this court were to accept the defendant's explanation for failure to attend court on the date scheduled for the hearing of the application, the defendant clearly exhibited indolence when she failed to instruct her advocate immediately she became aware of the court documents that had been left on her desk.

It was therefore evident that the defendant, having been properly served, for reasons best known to herself, chose not to attend court on the date that the application was scheduled to be heard. However, this court has discretion to set aside an ex parte order even where it is established that service was regular. In view of the contested nature of the dispute between the plaintiff and the defendant, and for the interest of justice, I will allow the defendant's application and set aside the order that this court issued on 4th May 2009. I think it would serve the ends of justice if the matters in dispute in the application are heard and determined on its merit. The plaintiff will adequately be compensated by award of costs.

In the premises therefore, I will allow the defendant's application dated 8th May 2009. The orders issued by this court on 4th May 2009 is set aside. The defendant is granted leave to defend the plaintiff's application dated 16th April 2009. The defendant will file pleadings in response to the plaintiff's application within ten (10) days of today's date. The plaintiff shall be at liberty to file a reply thereto, if need be, within seven (7) days of service. The defendant shall pay the plaintiff thrown away costs which I assess at Kshs.20,000 /=. The said amount shall be paid within fourteen (14) days of today's date or in default thereof the orders issued herein in favour of the defendant shall stand automatically vacated.

DATED IN NAIROBI THIS 24TH DAY OF JUNE 2009.

L. KIMARU

JUDGE