



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 213 of 2001

NJERU NDWIGA.....PLAINTIFF/RESPONDENT

VERSUS

WILLIAM MUGO.....DEFENDANT/APPLICANT

RULING

1. I have before me an application dated 19/09/2002 filed by the Defendant Respondent in which he seeks an order of stay of execution of the interlocutory judgment entered on 12/10/2001 and all other subsequent orders made thereafter. The Applicant also prays that the said interlocutory judgment and other subsequent order/decrees thereafter be set aside and that the Defendant be given leave to file defence herein. The Applicant prays that the draft defence annexed to his application be deemed as duly filed and served.

2. The main ground in support of the application is that the Defendant was not served with summons to enter appearance and further that he was not given notice of entry of judgment. The Defendant also says that he has a viable defence and that unless he is given an opportunity to be heard, he will suffer substantial loss and damage.

3. The application is opposed. The Plaintiff avers that the Defendant was served personally although admittedly the process server who served the Defendant on 25/05/2001 did not say how he knew the Defendant. The Plaintiff further avers that the Defendant's drafts defence annexed to the supporting affidavit consists of mere denials and raises no triable issues. The Plaintiff relies on **Shah –vs- Mbogo EALR 1967** at page 116. The court therein stipulated the principle to be applied in considering applications such as the present one, namely that the court's discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but not to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. The Plaintiff urges the court to find that the Defendant's actions amount to attempts on his part to delay the course of justice and to dismiss the application. This same principle was applied in **Omaera Pharmaceutical Limited –vs- Diani Pharmacy Milimani HCCC No. 1352 of 1996**. The main concern of the court is to do justice between the parties and must take into account the reasons given by the party seeking the court's discretion to be exercised in its favour for failing to do what it ought to have done.

4. In his supporting affidavit the Defendant denies categorically that he was served with any court process on the 25/05/2001. He also denies particulars of the description given of his home and says that the process server failed to give the name of the woman who was alleged to be the Defendant's wife.

5. Having carefully considered the written submissions filed by the parties herein and bearing the

above principles into account, I have come to the conclusion that the Applicant's application lacks merit and the same ought to be rejected because the Defendant is using it as a mere delaying tactic. I have looked at the detailed Affidavits of Service and note that in the affidavit sworn on 13/02/2001, the process server Daniel G. Ngunjiri states that on 9/02/2001 he was accompanied by the Plaintiff to the Defendant's home situated in Embu District, Kirigi Shopping Centre and served the Summons upon the Defendant's son, one Jack Mugo who accepted service by signing at the back of the copy of the summons. The process server in his Affidavit of Service dated 29/05/2001 says that he went alone to on 9/02/2001 and effected service of summons for a second time but this time upon the Defendant's wife. I am satisfied that the service herein was properly effected upon the Defendant; and that the Defendant is denying service simply because execution has issued against him.

6. Even if I were to allow the Applicant's application, I am of the view that I would be making such an order in vain. The reason for saying so is that the annexed draft defence raises no triable issues. The same comprises mere denials and gives no indication of any substantive issues to be determined at a full hearing.

7. For the reasons above stated, I dismiss the Defendant's application dated 19/09/2002 with costs to the Plaintiff/ Respondent.

8. It is so ordered.

Dated and delivered today 24th day of July 2009 at Nairobi.

R.N. SITATI

JUDGE

Delivered in the presence of:-

..... For the Plaintiff/Respondent

..... For the Defendant/Applicant

..... Court clerk