REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 592 of 1998

JOHN SAKAJA……..DECREE HOLDER/RESPONDENT

VERSUS

CALEB KOSITANY……..……..JUDGMENT DEBTOR/APPLICANT

R U L I N G

I have before me an application to set aside the judgment in the sum of sh. 1,529,167.60 in default of appearance entered against the defendant on 6th June 1998 and any consequential decree or order arising therefrom and the applicant be granted leave to defend the suit.

The defendant seeks to set aside the default judgment on the ground that he was not served with the summons to enter appearance and the notice of entry of judgment and that he has a defence on the merits to the plaintiff's action. The application is made under Order IXA Rules 3, 5, 10 and 11 of the Civil Procedure Rules. The application is supported by an affidavit of the defendant sworn on 1st October 2007. The plaintiff responded to the application with replying affidavit sworn by John Sakiit Sakaja on 11th October 2007. In addition to affidavit evidence by both the plaintiff and the defendant I also have three affidavits of service from Joseph Atonya, the process serve who allegedly effected service of summons and notice of entry of judgment on the defendant. The application was canvassed before me at length. Mr. Sitonik appeared for the plaintiff and Mr. Avedi appeared for the defendant.

Having read the affidavits on record and the submissions of counsel. I now propose to consider this application I begin by stating the applicable law. First if there is no proper service or any service of the summons to enter appearance to the suit. The resulting default judgment is an irregular one which the court must set aside **ex debito justitiae** (as a matter of right) on application by the defendant. Such a judgment is not set aside in exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself. Secondly if the default judgment is a regular one, the court has unfettered discretion to set aside such judgment and any consequential decree or order upon such terms as are just as ordained by Order IXA Rule 10 of the Civil Procedure Rules. The matters which should be considered when an application is made were set out by **Harris J**. in **Jesse Kimani v Mc Connee** 1966 EA 547 sat p. 555 which included among other matters, the facts and circumstances both prior and subsequent and all the respective merits of the parties together with any material factor which appears to have been entered into the passing of the judgment which would not or ought not have been present had the judgment not been ex parte and whether or not it would be reasonable to set aside or vary the judgment, upon terms to be imposed. This was approved by the former Court of Appeal for East Africa in MBOGO V. SHAH 1968 EA 93 at p. 95 (F).

The question as to whether the affected party can reasonably be compensated by costs for any delay occasioned by the setting aside of the judgment should be considered and it should always be remembered that to deny a person a hearing should be the last resort of the court. SEBEI DISTRICT

ADMINISTRATION V. GASYALI [1968] EA 30. In the case of PHILIP CHEMWOLO & ANOTHER V. AUGUSTINE KUBENDE [1982 – 85] 1 KLR 1036 Apaloo JA enunciated the broad equitable approach in these sort of cases as follows:-

"**I think a distinguished equity judge has said:**

Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on the merits. I think the broad equity approach to this matter, is that unless there is fraud or intention to overreact, there is no error or default that cannot be put right by payment of costs. The court as is often said. Exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."

With the above perspective of the matter. I next ask myself whether the defendants have on a balance of probabilities established that there was not any or any proper service of summons to enter appearance in the suit. There are two affidavits of service sworn by Joseph Atonya stating that he effected service of summons upon the defendant. One sworn on 2nd June 1998 in which he avers that the defendant KALEB KOSITANY at the time of service was personally known to him. He accepted service but refused to sign at the back of the original. He filed a supplementary affidavit of service on 23rd June 1998 in which he avers that the defendant was pointed out to him by the plaintiff and that he accepted service but refused to sign at the back of the original. I find the contradiction as to the mode of service suspect. There is a 3rd affidavit of service of Notice to Show Cause sworn by George Wokenda on 23rd February 2006 in which he avers that he effected service on the defendant through his mobile phone which he gave as No. 07222530765. This mode of service is not provided for in our Civil Procedure Rules and therefore it is not proper service.

On considering the affidavit evidence on record as well as the submissions by both counsel I have come to a conclusion that the defendant was not served with summons to enter appearance or notice of entry of judgment. In his return of service dated 23rd February 2006 George Wakunda the process server avers that he served Notice to Show Cause upon the defendant through his mobile number 0722530765 which he was given by his manager. Such a service would have been improper service within the contemplation of the law. The case of JOHN AKASIRWA V. ALFRED INAI KIMUSO [CA No. 16 of 1999] (unreported) is quite instructive on the proper mode of service of summons on individuals. The Court of Appeal land down the law as follows:-

"**Proper service of summons to enter appearance in litigation is a critical matter in the process whereby the court satisfies itself that the other party to litigation has notice of the same and therefore chose to enter appearance or not. Hence the need for strict compliance with order 5 Rule 9 (1). The ideal form of service is personal service. It is only when the defendant cannot be found, that service on his agent, empowered to accept service is acceptable."**

osep Atonya stating how he effected sercice of summons upon the defendant. ne sworn on 2nd June 1998 in which he avers that the defendant KALEB

Having found that the plaintiff did not effect any or any proper service of the summons to enter appearance or notice of entry of judgment on the defendant the default judgment entered against him and all the consequential orders are for setting aside **ex debito justitiae.**

Having found that there was no proper service on the defendant I am entitled to set aside the default judgment and all consequential orders against the defendant **ex debito justitiae**.

It is therefore strictly unnecessary to enter into the realm of discretion to find out whether or not the defendant has otherwise made a case for setting aside the judgment in question.

Finally before I concede I would like to make a few observations about the mode of judgment. The claim involves supply of goods. The plaintiff claims the defendant used his account with Kenya Farmers Association to obtain agricultural goods and also render service worth Shs. 390,436/= during the year 1992. The suit ought to have been set down for formal proof but what was entered was a final judgment.

The upshot of my consideration of the defendant's application is that I order the default judgment herein and all the consequential orders to be set aside **ex debito justitiae.** The defendant granted leave to enter appearance and file defence within 15 days of today.

Costs of this application to the defendant.

Dated and delivered at Nairobi this 15th day of February 2008.

J. L. A OSIEMO

JUDGE