



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Suit 534 of 2007
CO-OPERATIVE INSURANCE COMPANY LIMITED.....PLAINTIFF

VERSUS

FAIRSURE INSURANCE BROKERS LIMITEDDEFENDANT

RULING

The Plaintiff filed this suit on the 15th October, 2007. After the Defendant was served and failed to enter appearance and file a defence, the plaintiff applied for judgment. On 15th February, 2008, a judgment was entered against the Defendant and the Plaintiff commenced the execution process by securing entry of judgment on the Defendant. It is after service with the notice that the Defendant filed an application by a Chamber Summons which later amended it amended. The Application is brought under **Order IXA rules 10 and 11** and **Order XXI rule 22** of the **Civil Procedure Rules** and **Sections 3A and 63(e)** of **Civil Procedure Act**. In this application the Defendant seeks a stay of execution pending the hearing and determination of this application, an order setting aside the *ex-parte* interlocutory judgment and other consequential orders, leave to defend the suit and that the annexed draft defence be deemed as duly filed and served.

The application is supported by grounds on the face of the application, which are:

- a. THAT the complaints and summons in this matter were not properly served on the Defendant Company.
- b. THAT the applicants have a strong and valid defence, which it should be allowed to present in this case by being granted leave to defend the suit on merit.
- c. THAT this suit cannot lie between the plaintiff and the defendant.
- d. THAT the plaintiff has already extracted a decree and may proceed to execute the *ex- parte* interlocutory judgment any time from the present.
- e. THAT the Defendant/Applicant is apprehensive that the court halts the process of execution in this matter pending the hearing and determination of the Defendant's application to set aside the *ex parte* interlocutory judgment, the plaintiff and/or its agents may proceed to realize the claimed amount as a result of which the defendant stands to be subjected to blatant violation of its legal rights and the consequent grave, irreparable loss and damage.
- f. THAT the plaintiffs will not be prejudiced in any way by the orders sought.
- g. THAT it is in the interest of justice that the orders sought herein are granted.

The application is supported by an affidavit sworn by **NELSON OMOLO**, the Managing Director of the Defendant Company dated 25th March 2008 and supplementary affidavit dated 8th May 2008. The deponent states the facts of how the service of the summons and plaint in his case was effected and why it is being challenged in this application. I have considered the said affidavit together with the annexures thereto, including a draft defence.

The application is opposed. The Defendant relies on the replying affidavit sworn by the Credit Controller of the Plaintiff Company dated 15th April 2008 and a supplementary affidavit dated 14th May 2008. The replying affidavit annexes among others, the affidavit of service sworn by the process server dated 11th December, 2007. In the affidavit of

service, the process server, **Mark Okinda** depones that he served the Summons to enter appearance and the plaint upon a female secretary cum receptionist at 2.00 p.m. of the same date in which he received both documents for service.

I have considered GATIKO'S replying affidavit together with the annexures thereto.

I have also carefully considered the submissions of **Mr. K'Onyango** who argued the application on behalf of the Applicant and **Mrs. Wangombe** who argued the application for the Respondent. I have also considered the application and all the affidavits in support and in opposition of this application. I also considered the cases cited by each Counsel in support of their client's position in this matter.

The application before court is straightforward and the facts are not contested. It is not in doubt that the Defendant herein is a body corporate. There is no dispute that the summons to enter appearance and the plaint were served on the 7th December, 2007 at 2.00 p.m. It is not in dispute that the service was effected upon a Secretary cum Receptionist working at the place where the Defendant carries on its business. It is also not in dispute that no attempt was made to effect service upon any other officer of the Defendant Company. The issue in contention is whether the service upon the Secretary cum Receptionist was proper service. **Mrs. Wangombe** submitted that being an officer of the Company, service upon her was proper.

Mr. K'Onyango on his part maintained that the services contemplated a senior officer of a corporation commensurate in position to that of a director.

Order V rule 2 of the **Civil Procedure Rules** sets out the procedure of service on a corporation and stipulates as follows:

"O.V r. 2 Subject to any other written law, where the suit is against a corporation the summons may be served –

(a) on the secretary, director or other principal officer of the corporation; or

(b) if the process serve is unable to find any of the officers of the corporation mentioned in rule 2 (a), by leaving it at the registered office of the corporation or sending it by prepaid registered post to the registered postal address of the corporation, or if there is no registered office and no registered postal address of the corporation by leaving it at the place where the corporation carries on business or by sending it by registered post to the last known postal address of the corporation."

I agree that the Civil Procedure Act and Rules does not define who a secretary, director or principal officer of a corporation is. I will get back to this issue a little later. I propose to first state the applicable law. The court has power under **Order 1XA rule 10** to set aside or vary a judgment entered in default of defence and any consequential decree or order upon such terms as are just.

In exercise of the court's discretion to set aside, the court must act judiciously in order to do justice between the parties where there is no proper service, the resulting default judgment is an irregular one and the court's discretion whether or not to set aside such judgment is not required. Such Judgment should be set aside *ex debito justitiae*.

See **Gandhi Brothers vs. H.K. Njage t/a H.K. Enterprises Milimani, HCCC No. 1300 of 2001** and **Remco Limited vs. Mistry Jadra Parbat & Co. & 2 others Milimani HCCC No. 171 of 2001.**

Where however the default judgment is a regular one in that service was properly effected, the court has to exercise its discretion whether or not to set aside and in exercise of its discretion, several factors must be considered.

See **Shah vs. Mbogo [1967] EA 116** and **Pithon Waweru Maina vs. Thuku Murigia [1982-88] 1 KAR 171** and **Chemwolo & Another vs. Augustine Kubende [1982-88] 1 KAR 1086.**

I will not go into the details of factors the court must consider whether the judgment was a regular one because after hearing this matter I am convinced that the service in this case was irregular.

I have already stated the reason given by each of the advocates in support of their rival views why the service is or was not proper. The simple bone of contention narrowed down to the issue whether a Secretary cum Receptionist was one of the officers upon whom service of summons to enter appearance can be effected under **Order V rule 2** of the **Civil Procedure Rules**. Mark, the process server averred as follows:

“That on the same day at 2.00p.m. and having established the offices of FAIRSURE INSURANCE BROKERS LTD. to be on the 4th floor of Pan Africa Insurance House on Kenyatta Avenue, I proceeded to the said offices where upon arrival, I met and introduced the purpose of my visit to a female Secretary cum Receptionist then served the Plaintiff, Verifying Affidavit and Summons to enter Appearance through her which she in turn took with her to their Legal office then later came back and informed me that she had been authorized to accept service which she did by endorsing their companies stamp and signing against the same on the back of the Summons to Enter Appearance and Plaintiff which copies are returned herewith duly served.”

This is clear that Mark Okinda served the summons upon a person he found at the offices of the Defendant. By the mere description “Secretary cum Receptionist”, it is clear that this female person, whose name the process server did not bother to find out, was a junior employee of the Defendant.

Order V rule 2 contemplates a senior officer of a corporation of the calibre of a director. A director of a corporation is a senior member of the company. The secretary contemplated under this rule cannot, by any extension of interpretation or imagination include a member of staff who sits at the reception area of the company offices. The person served by the process server was a junior officer who received visitors at the Defendant’s Company and could not possibly be mistaken for a principal officer of the company.

Under **Order V rule 2(b)** the **Civil Procedure Rules** gives the process server guidance of how to effect service on a corporation where a principal officer of the corporation is not found. This rule gives a clear indication that attempt should be made to serve a principal officer and where one is not found, the only other alternatives given to a process server do not include service on any other person found at the company’s registered office. The rules are very strict on the issue of service upon a corporation and makes it clear that no service effected upon any other person, apart from a principal officer of the company, will be recognized.

Having considered the mode of service adopted by the process server in this case, it is clear as crystal that the service was improper. The person served was not a principal officer of the Defendant Company and the resulting default judgment entered was an irregular one. The Defendant is entitled to the order setting aside the judgment *ex debito justitiae*, together with all other consequential orders. The application is therefore merited in the circumstances and is granted in the following terms:

- (a) The amended Chamber Summons application dated 13th May 2008 be and is hereby allowed.
- (b) The exparte interlocutory judgment entered in this suit, together with all other consequential orders be and are hereby set aside.
- (c) The Defendant be and is hereby granted leave to defend the suit.
- (d) The Defendant is granted 14 days within which to file and serve its defence given the circumstances herein,
- (e) Each party will bear its costs of this application.

Dated at Nairobi this 23rd day of June, 2008.

LESIIIT, J.

JUDGE

Read, signed and delivered in the presence of:

Kibera holding brief for Mr. K.Onyango for the Applicant

Gacha holding brief for Mrs. Wamgombe for the Respondent

LESIT, J.

JUDGE