



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Case 1678 of 2000**

**YAHYA SAID YANYA.....PLAINTIFF**

**VERSUS**

**THE KENYA TIMES MEDIA TRUST.....DEFENDANT**

**RULING**

The background information to this application is that the plaintiff has a judgement in his favour delivered by M. G. Mugo J. on the 9<sup>th</sup> day of July 2004. The relevant portion relevant to this ruling is found at page 12 of the typed copy of the judgment, line 5 from the bottom and it reads:-

*“Taking all the above into consideration, I find in conclusion that the plaintiff is entitled to the reliefs and damages claimed and enter judgment in his favour as against the defendants jointly and severally for:-*

- (a) Kshs.5,000,000/= - general damages.*
- (b) Kshs.300,0000/= - aggravated damages.*
- (c) Interest on (a) and (b) per annum from the date hereof until payment in full.*
- (d) Costs of the suit with interest at court rates.”*

There is a decree on record signed and sealed by an officer of this court dated 8<sup>th</sup> day of December 2005 to the total tune of Kshs.6,435,555.48. Accompanying the decree is a warrant for sale of property in execution of the decree for money also dated, signed and sealed on the 8<sup>th</sup> day of December 2005.

Proclamation of what is believed to be the judgement debtors property was done by Messers White Stone Auctioneers (K) Ltd. dated 14.12.2005. The notice of objection to attachment dated 19<sup>th</sup> December 2005 was filed by Manyarkiy & Company Advocates for the objector. It was filed the same 19<sup>th</sup> December 2005. The notice of objection was dated and filed simultaneously with the notice of objection to attachment. It is on record that on the same date of 19<sup>th</sup> December 2005, the Deputy Registrar issued the statutory notice of stay of execution under Order XXI Rule 54 Civil Procedure Rules, simultaneously with the notice of objection under Order XXI Rule 54. The notice of stay of execution was in essence dressed to the Auctioneer Messers White Stone (K) Ltd. It required the said Auctioneer “to stay the execution and keep the attached property if any in safe custody until further orders of this court, or until the matter has been fully determined”.

Whereas the notice of objection to attachment was addressed to the advocate for the decree holder. He was “*required within 15 days (15) of service of this notice to intimate to the court, in writing whether (you) they propose to proceed with the attachment and on the whole, or in part, of the effects attached in execution of the decree in this case*”. The notice of intention to proceed by the decree holders advocate is dated 11<sup>th</sup> day of January 2006 and the same is under Order XXI Rules 56 of the Civil Procedure Rules. The relevant portion of it reads:- “*take notice that the decree holder herein proposes to proceed with the attachment and execution wholly of the property of the judgement debtor*”.

Upon receipt of the same the Deputy Registrar of this court notified the advocate of the objector, a notification of the decree holders intention to proceed issued under Order XXI Rule 56 Civil Procedure Rules. For purposes of the record it reads:- “*Take notice that M/s Musalia Mwenesi of P.O. Box 29880-00200, Nairobi for the decree holder have lodged a notice in this court under Order XXI Rule 56 of the Civil Procedure Rules intimating to this court, that the decree holder herein intends to proceed wholly with attachment and sale in execution of decree herein. You are required within 10 days from the date of service of this notice upon you to take such proceedings as may be necessary to establish objectors claims*”. The said notice is dated 24<sup>th</sup> day of January 2006.

Vide an application presented by way of chamber summons dated 23<sup>rd</sup> January 2006 and filed the same date. It is brought under Section 3 and 3 A of the Civil Procedure Act and Order XXI Rule 56 and 57 of the Civil Procedure Rules. It sought the following prayers:-

“1. *That any orders and or attachment and/or proclamation against the objectors properties and assets in this suit be declared null and void abinitio and consequently set aside.*

(2) *That the costs of this application be provided for.*”

The said application is anchored on paragraphs 4, 5 and 6 of the supporting affidavit. These read:-

“4. *That the said proclamation was wrongful, unlawful, immeritorious and without any legal basis since the aforesaid properties and assets belong to the objector herein and not to the judgment debtor.*

5. *That in the period between August 1995 and October 1997 the judgment debtor sold some of their business assets and equipment to the objector herein as more specifically set out in the schedule to the sale agreement a true copy of which is attached here to and marked LK 2.*

6. *That I therefore confirm that the objector is the current legal owner of the properties and assets aforesaid, not with standing the fact that the same are in the possession and use of the judgment – debtor with the consent of the objector. A true copy of the proclamation of the properties is attached hereto and marked LK 3”.*

Against the aforeset out background information advocate for the objector has come to this court vide an application by way of chamber summons dated 21<sup>st</sup> day of February 2008. It is brought under Order V Rule 17 Civil Procedure Rules. The prayers sought are:-

(1) That this Honourable Court be pleased to grant leave to the objector/applicant to effect service of the objection proceedings dated 23<sup>rd</sup> Janaury2006 upon the judgment debtor by registered post.

(2) That costs of this application be provided for.

The grounds in support are set out in the body of the application, supporting affidavit and oral submissions in court. The major ones are:-

(1) They received instructions from the objector to file objection proceedings against the decree holders execution and attachment process.

- (2) They duly filed the objection as required.
- (3) On 11.5.2006 the court directed that the judgement debtor be served with pleadings.
- (4) That they have endeavoured to serve the application and all the relevant affidavits upon the judgement debtor but they have failed to locate the premises and or offices of the judgment debtor.
- (5) That it is a mandatory requirement that the said judgement debtor be served before the said application is prosecuted hence the plea for substituted service.

The said supporting affidavit was sworn by counsel on record namely Leah Manyariki on 21.2.2008. There is a supplementary affidavit sworn by the same counsel on 29<sup>th</sup> day of May 2008 and filed on 30<sup>th</sup> May 2008.

The salient features of the same are:-

The deponent confirmed that:-

- (i) They have not served the objection proceedings because the only address they have is Box 30958, Nairobi which they intend to use for service.
- (ii) No documents have been attached confirming the judgement debtors physical address.
- (iii) They visited Loita House, 2<sup>nd</sup> floor but were unable to locate their offices therein.

In their oral submissions in court, counsel for the applicant reiterated the content of the deponements in both the supporting and supplementary affidavit and then stressed the following points:-

- (i) They have been unable to locate the premises of the judgment debtor for service.
- (ii) It is mandatory that the judgment debtor be served as directed by the court, on 11.05.2006.
- (iii) It is only fair and just that the orders sought be granted to the applicant.

In response counsel for the respondent put in a replying affidavit sworn by one Angela Njeri Thuku sworn on 14<sup>th</sup> May 2008 and filed on the same date. The salient features of the same are:-

- (i) Confirmed that the firm of Manyariki and Company Advocates is on record for the objector.
- (ii) Confirmed that on 11.5.2006 the court directed that the chamber summons be served on the judgment debtor.
- (iii) That the objection is against the decree holders move to execute in a bid to realize the fruits of the judgment.
- (iv) That the respondents have done the over the counter search at the company registry and have evidence that the judgment debtor can be located.
- (v) That the sale agreement provided that the objection was to be paying the judgment debtor annually for the items sold and since the payment is being made annually, then the objector must be knowing the location of the judgment debtor where the payment is being made.
- (vi) The annual returns for 2006 show that the judgment debtor is located at Loita House, 2<sup>nd</sup> Floor Loita Street.

(vii) The registered address, they are going to use to effect the said substituted served had not been indicated.

(viii) That the decree holder has already suffered great prejudice since. The date of the judgment on 9<sup>th</sup> July 2004 and issuance of the final decree on 27.09.2004 the decree holder has been waiting to enjoy the fruits of his judgment.

(ix) The application on record is meant to put a set back on the realization of the decree hence their request that it be turned down.

In the oral submissions in court, counsel reiterated the points in the replying affidavit and then reiterated the following points:-

(i) The objector has not made concerted efforts to trace the judgement debtor as no demonstrable efforts have been displayed, as no return of services have not been filed to show those efforts were made, when they were made and by whom made.

(ii) No annexures have been exhibited.

(iii) They are un-deserving of the courts, discretion.

(iv) The decree holder has been unjustifiably kept from his decree for the last, 4 years at no fault of his own and as such the orders, sought should not be granted.

In response counsel for the applicant added that:-

(i). They have provided the address for service.

(ii). If service is not effected, the objection proceeding will be rendered invalid..

(iii). Authorities relied upon may not apply as they relate to interlocutors proceedings.

(iv). Effecting service by registered post would pave the way for the objection proceedings to proceed as it will be deemed to be proper service.

On case law counsel for the respondent referred the court to the C.A decision in the case of Joseph Katana Ngala versus Kenya Finance Corporation limited Mombasa CA 129 of 1993 decided by the CA at Mombasa on 28<sup>th</sup> day of July 1994.

At page 2 of the judgement line 5 from the bottom the law Lords of the CA made the following observations;-

*“The cardinal principle of law in this matter under order 5 rule 9 is that process wherever practicable must be served personally on those to whom they are addressed. There are however, exceptions to this principle and the one that are relevant to the present appeal is that which is set out in order 5 rule 12 CPR and which permit effective substituted service on an adult residing in the same place as the one to be served only if he can not be found . . .It is clear from this affidavit that far from the position, being that the applicant could not be found, there was ample evidence to show that he could indeed be found. In the circumstances therefore the condition under which the process is served could properly embark upon substituted service did not at all exist. This court has said with nausca that, in order for it to be said that a person to be served with the process cannot be found so as to permit substituted service on an adult residing with him, it must be shown that after a reasonable number of vain attempts to serve him he indeed could not be found and that his whereabouts are known.*

*When the matter came before the Deputy Registrar and indeed before the learned judge, the evidence that was before them was not that the appellant could not be found but rather he could be found. In those*

*circumstances substituted service could not be allowed.”*

At page 3 of the judgement the law Lords of the CA quoted within approval own decision in the case of Filimona Afwandi Yalwala versus Ronald Indimuli and Jared Shindu Kisumu CA no 69 of 1987 in which it had been held that “ *there can not be effective substituted service unless reasonable steps have been taken in vain to effect personal service and the whereabouts of the person to be served are unknown*”

Reference was also made on to another decision by the CA namely the case of John Akasirwa versus Alfred INAT KIMUSO Kisumu CA no 16 of 1999 decided by the CA on 23<sup>rd</sup> March 2001.

At page 3 of the judgement line 13 from the top the law Lords of the CA made the following observations:-

*“Proper service of the summons to enter appearance in litigation is a crucial matter in the process where by the court, satisfies itself that the other party to be litigation has notice of the same and therefore choose to enter appearance or not. Hence the need for strict compliance with order 5 rule 9 (I) CPR. The ideal form of service is personal. It is only when the defendant cannot be found, that service on his agent empowered to accept service is acceptable. But then as stated by this court in Filimon Afwandi Yalwala versus Ronald Sindimuli and another CA no 9 of 1987 (UR) a departure from this ideal service must be based on same agent.....”*

At page 4 line 14 from the bottom the law Lords of the CA concluded thus:-

*“The up shot of this is that there was no evidence that the process server ever tried, to find the applicant and therefore, it was not open to him to conclude that he would not be found”*

On the courts’ assessment of the facts herein, there is no dispute that the applicant seeks the relief sought under order V rule 17 CPR, sections 3A and 3A of the CPA. These provide:-

*“Order V rule 17 (i) where the court is satisfied that for any reason the summons cannot be served in accordance with any of the preceding rules of this order, the court, may on application order the summons to be served by affixing a copy thereof in some conspicuous place in the court, house and also upon service conspicuous part of the house, if any in which the defendant is known to have last resided or carried on business or personally worked for gain or in such other manner as the court think fit.*

*(2) Substituted service under an order of the court should be as effectual as if it had been made on the defendant personally.*

*(3) where the court, makes an order for substituted service, it shall fix such time for the appearance of the defendant as the case may require.*

*(4) Unless otherwise directed where substituted service of a summons is ordered order this rule, to be by advertisement shall be in form no 23 of Appendix A with such variations as the circumstances require section 3 in the absence of any specific provision to the contrary. Nothing in this Act shall limit or otherwise effect any special jurisdiction or power conferred on any special formal or procedure prescribed by or under any other law for the time being in force 3A. Nothing in this act shall limit or otherwise effect the inherent power of the court, to make such orders as may be necessary for the ends of justice or to prevent a abuse of the process of the court.*

Applying the above provisions to the facts herein, the court, is of the opinion, that it is now trite law that section 3A of the CPA is the reservoir for the courts inherent jurisdiction tapped on by a litigant only in circumstances where no other avenue exists to access the reliefs and where if those reliefs are not accessed the party will suffer injustice or alternatively the process of the court would have been abused. Herein, what is in controversy is whether the applicant has demonstrated sufficient cause to enable this court, grant him the relief of substituted service. Substituted is provided for under order V rule 17 CPR

which has been cited and all that the applicant needs to do is to satisfy the ingredients of the said rule.

The relevant ingredients as solidified by case law emanating from the CA whose decisions are binding on this court is that:-

- (i). The starting point is that personal service is the best service advocated by the courts.
- (ii). There is however, an escape route for a litigant where personal service can not be effected. This escape route is through substituted service. However, in order to qualify for substituted service, one has to demonstrate that they made attempt to effect personal service to no avail.

In order to establish the existence and or non existence of such efforts having been made the court, has to go to the deponement of the party seeking the relief to establish if any, what efforts were made

In order to satisfy that ingredient.

This court has revisited the applicants deponement both in the supporting affidavit as well as the supplementary affidavit. It has sing led out the following paragraphs as being of help namely ground (a) in the body of the application, paragraph 4 of the supporting affidavit and paragraph 3,4 and 5 of the supplementary affidavit.

The respondent counsel took issue with all of them arguing that they do not demonstrate efforts made by the applicant as to how they have tried to locate the judgement debtor, by whom those efforts were being made, when and how they were being made.

The mentioned paragraph read thus:-

“9 (a) of the body of the application that the objector applicant has totally failed to locate the premises and or offices belonging to the judgement debtor to be able to serve the application and other pleadings”. Areading of this ground does not yield any evidence as to what efforts were made, by whom made, and when made. It is therefore necessary to turn to the supporting affidavit for assistance.

Paragraph 4 of the said supporting affidavit reads:-

*“That we have endeavoured to serve the application and all the relevant affidavit upon the judgement debtor but we have failed to locate the premises and or office of the judgement debtor”*

A reading of the paragraph does not yield:-

- (a) Evidence of the nature of endeavors made by the application to serve the relevant affidavits.
- (b) Evidence of a process server by way of return of service specifying when such efforts were made and where made.
- (c) Evidence of an investigators’ report showing enquiries made in an effort to locate the judgement debtor starting from the last known address.
- (d) Evidence of who made these endeavours.

Turning to the supplementary affidavit paragraph 3 thereof reads:-

*“ 3 that in response to paragraph 5 of the replying affidavit of Anjela Njeri Thuku, do confirm that my firm has not been able to serve the objection proceedings to date and the only contact address we have from the available documents is P.O Box 30958 Nairobi, and which we intend to use for service.*

A reading of this paragraph does not yield:-

- a. The nature of the document from which the said address was accessed?
- b. Who had possession of the said document?
- c. When did the applicant access the said document?
- d. Why they have not even attempted to serve by registered past through it.?
- e. What proof they have to show that the said address belongs to the judgement debtor, such as documents from the post office showing who the rental subscriber of the said box is.
- f. Whether the said be rental post office box has any physical address attached to it.
- g. The name of the subscriber of the said rental box in order to show that it has any links to the judgment debtor herein.

Paragraph 4 on the other hand reads:-

*“That the deponent alleged over the counter search attaching a copy of a receipt is a neither useful to the court nor our selves as she has not attached any document confirming the judgement debtors physical address. There are no copies of annual returns for 2006 attached to assist my firm trace the judgement debtor and serve the proceedings”*

The objector come on to the scene and record herein on 19<sup>th</sup> December 2005. is assumed they must have perused the record, and must have come across the content of the plaint filed herein dated 31<sup>st</sup> October 2000 and filed the same date. Paragraph 2 thereof which describes the personality of the first defendant provides thus:-

*“ the first defendant is a limited liability company in incorporated under the companies Act, chapter 486 of the laws of Kenya, and its address is at Kenyatta International Conference Centre Harambee Avenue P.O BOX 30958 Nairobi Kenya”* The applicant must also have read the preamble to the sale agreement of sale annexed to the main objection application supporting affidavit as annexure LK2, that the judgement debtor is a limited liability company. It is to be noted that in paragraph 4, of the supporting affidavit the applicant disputes the correctness of the information annexed by the respondent having been obtained from the registrar of companies as regards the current status of the judgement debtor, and yet they themselves have not annexed proof of any effort made trough the company registrar as regards the whereabouts of the judgement debtor and its current status.

Paragraph 5 on the other hand reads:-

*“ 5 that I note that the Bargain and deed agreement annexure Ant-2 was entered in to in 1995 and do believe that the judgement debtor may have changed offices as the objector is unable to advise us on the whereabouts or trace them now. We visited Loita house, 2<sup>nd</sup> floor Loita street in an attempt to serve the judgement debtor but we were unable to trace their offices therein”* A reading of this paragraph does not reveal:-

- (a) Who the “we” refers to. Is it the deponent or a process server.
- (b) That indeed efforts to serve the judgement debtor were made as there is no R/S filed either by the deponent or a process server duly appointed to serve the same.
- (c) What was found on 2<sup>nd</sup> floor Loita house? Who were the occupants of the second floor, and what information was given as to whether the judgement debtor had ever occupied the said premise or not. If so when did it leave the said premises and where did they say they were headed to.

Lastly there is paragraph 5 and 6 of the supporting affidavit to the main objection/application which are also relevant. These reads:-

*(5) That in the period between August 1995 and October 1997 the judgement debtor sold some of their business assets and equipment to the objector herein as more specifically set out in the schedule to the sale agreement a true copy of which is attached hereto and marked LK2.*

*(6) That I therefore confirm that the objector is the current legal owner of the properties and assets a fore said, notwithstanding the fact that the same are in the possession and use of the judgement debtor with the consent of the objector. A true copy of the proclamation of the properties and asset is attached and marked LK3”*

In this courts’ construction of the above paragraphs, if indeed the objector purchased the said proclaimed items, but left them with the judgement debtor who had use of the same with permission of the objector which asserting claim over objector is the same it can not be believed that the objector does not know where the items attached and which it had laid claim on are located. There is no deponement either in the main affidavit, supporting objection proceedings or ones supporting plea for substituted service that these goods were carried away by the auctioneer, or that they were on some other premises, other than those of the judgement debtor. This being the case lack of knowledge of the whereabouts of the judgement debtor in order to satisfy issue of an order for substituted service has been negated. In this courts’, opinion, where the goods whose attachment is objected to, is the same place where the judgement debtor can be served. The objector has knowledge of the whereabouts of the attached goods, then they also know the whereabouts of the judgement debtor, as it has not been alleged that the attached goods were moved from the original location. The location where the goods are is where the judgement debtor should be served.

For the reasons given above, the applicant herein has not satisfied the ingredients set by the rules as well as case law decided by the CA cited above, for entitling one for a relief of an order for substituted service. The application dated 21<sup>st</sup> February 2008 and filed on 21 February 2008 has no merit. The same is dismissed with costs to the respondent to it.

Dated, Read and Delivered at Nairobi this 24<sup>th</sup> October 2008.

**R.N. NAMBUYE**

**JUDGE**