

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 2318 of 1986

NATIONAL FINANCE COMPANY LIMITED.....PLAINTIFF/RESPONDENT

-versus-

BENEDICT MWENDWA MULI.....DEFENDANT/APPLICANT

RULING

In the Chamber Summons herein dated 29th August 2005, the Applicant who is the Defendant in this suit where the said Chamber Summons is filed, is praying for court orders to set aside the exparte judgment entered on 21st November 1986 so that the Applicant is granted leave to defend the claim in the suit.

The suit having been filed on 9th July 1986, the Applicant, on 28th October 1986, entered appearance in person. That was within the prescribed period from the time of service of the summons to enter appearance on 21st October 1986. The process server John Musee in his Return of Service dated 22nd October 1986 stated that he served the summons to enter appearance together with the plaint upon a sister of the Applicant who the said process server personally knew as Miss Mutathya who refused to sign the summons. The Applicant was not present by then and that was at the Applicant's home where the process server was told the Applicant had gone for a short evening walk. The sister and brother were staying together and therefore the Applicant, as can be seen, seems to have had no problem entering appearance in the suit within only seven days from the date of that service in a suit the Applicant had not otherwise known had been filed against him. That must have been a good service upon an adult member of the family of the Applicant and the question of there having been no service as presently alleged in this chamber summons before me does not therefore arise.

Thereafter, the Applicant having entered appearance within the prescribed period, whether he had been served with the summons to enter appearance or not, what prevented him from filing his defence within the prescribed period? The exparte judgment was entered in this matter, not because the Applicant had failed to enter appearance, but because the Applicant had failed to file his defence within the prescribed period after he had properly entered appearance within the prescribed period. It follows that the reason, failure to serve summons, being advanced by the Applicant in support of this Chamber Summons does not hold water because between the entering of appearance on 28th October 1986 and the entering of exparte judgment on 21st November 1986 before the Applicant's defence was filed on 11th December 1986, no serving of summons to enter appearance was required under relevant provisions of the Civil Procedure Act and its rules.

Otherwise although I could find Order XXI Rule 22, Order XLI Rule 4 of the Civil Procedure Rules as well as Section 3A of the Civil Procedure Act, under which this Chamber Summons is said to be brought, I could not find Order LXB Rule 8 of the Civil Procedure Rules which the Applicant also included.

Furthermore Order XXI Rule 22 concerns stay of execution. It was not revealed to me whether the applicant got the stay in terms of prayer 1 which was intended to persist until determination of this application and therefore is not included in the prayers I have to grant in this ruling. Order XLI Rule 4

concerns appeals which I am not dealing with, while Section 3A of the Civil Procedure Act should apply only where there are no specific rules governing the issue to be decided. I do not therefore see any of the aforementioned provisions of the law assisting the Applicant in this Chamber summons.

In the circumstances the alleged defects or short comings in the Return of Service filed by Mr. John Musee do not have any legal effect as, if any existed, they did not prevent the Applicant from knowing this suit had been filed against him and therefore did not prevent him from entering appearance in good time and in that respect no injustice had been done to him.

Having seen and said the above, it is clear from subsequent events that the Applicant knew about the existence of the judgment against him as early as at the time he was filing his late defence on 31st December 1986 and thereafter got engaged into fighting against the resultant execution of the judgment without applying to set the judgment aside or otherwise appealing. On a number of occasions he failed to attend court sometimes even where date had been taken by consent like when he failed to appear on 21st November 1999 following a previous consent order fixing that date.

It is this Chamber Summons which is now making him readily available. But regrettably, not only do I find the Chamber Summons lacking in merits but also find it too much delayed for no acceptable reason.

Although I find the Applicant's present Advocates, M/s Gakoi Maina & Company properly on record; for the reasons I stated earlier, this Chamber Summons dated 29th August 2005 be and is hereby dismissed with costs to the Plaintiff/Respondent.

Dated this 28th day of November 2008.

J. M. KHAMONI

JUDGE