



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Case 202 of 1999

NATIONAL BANK LTD:.....PLANTIFF/APPLICANT

VERSUS

SIRGOI CONSTRUCTION CO. LTD:.....DEFENDANT/RESPONDENT

RULING

The applicant **HENRY KIPKIRONG LELEI** who is the 3rd defendant in the suit seeks court to set aside the default judgement and the resultant decree and allow him leave to defend the suit. He also prays for costs.

The respondent **NATIONAL BANK OF KENYA** initially filed a plaint suing **SIRGOI CONSTRUCTION COMPANY LTD** for a sum of money being loan advanced to the defendant company. Later that plaint was amended and enjoined **JOHN KIPRUOTO LELEI** and **HENRY KIPKIRONG LELEI** the applicant herein, as the 2nd and 3rd defendants respectively. Thereafter summons were served on the father 3rd defendant on his behalf. No appearance was entered or defence filed and plaintiff applied for judgment. The court however found service of summons to the father of 3rd defendant on his behalf was improper and ordered fresh service. The second service was said to have been effected upon the 2nd defendant who received them on his own behalf and that of the 3rd defendant who was said to be his brother and also on behalf of 1st defendant. On 27th April, 2005 M/S Chemitei & Co. Advocates filed a memorandum of appearance on behalf of all the three defendants. No defence was however filed in time and the plaintiff/Respondent applied for judgment against all the three defendants. Judgment was entered and later taxation of bill of costs done. After that a warrant of arrest was issued against the defendant. The applicant instructed the firm of M/S Kimaru Kiplagat & Co. Advocates who filed this application.

In his affidavit the applicant denied ever being served. He denied that the 2nd defendant was his brother or his agent to receive the summons on his behalf. He further denied ever instructing M/S Chemitei & Co. Advocates to act on his behalf in this matter. He deponed that it was only on 27th October, 2006 he became aware of the suit when he was arrested by a court Bailiff. Thereafter he instructed his counsel to bring this application. He stated that he has good defence and he should be allowed to defend the suit.

Mr. Cheruiyot who prosecuted the application on behalf of the applicant basically retaliated the averments in the supporting affidavit. He submitted that the applicant did not instruct the firm of Chemitei and Company to enter appearance on his behalf. When applicant filed application to appoint

M/S Kimaru Kiplagat & Co. Advocates as his co-counsels he raised that issue and M/S Chemitei & Co. Advocates did not contest the application which in itself is an admission that he had no instructions to act for the applicant.

Respondent did not appear on the date set for hearing of this application despite being served. However a replying affidavit opposing the application was filed on 21st November.2006. It had been sworn by one **JOSPHAT KAMAU** an official of the Respondent. He deponed that the applicant was aware of the amended plaint and that is why he instructed M/S Chemitei & Co. Advocates who entered appearance on his behalf and that of the other defendants but failed to file a defence. After that a Notice of Taxation of Bill of costs was served on the applicant but he did not appear in court. thereafter a letter was sent to him informing him of the entry of decree and further he was served with a Notice to show cause. It was only after warrant of arrest was issued that he instructed in his current Advocate.

I have considered the application. It is clear neither the first service on the father of the 3rd defendant or the 2nd service on the 2nd defendant were proper. It is not denied that the defendant was not served in person with the summons. Service to the 2nd defendant on his behalf was not proper. Each defendant was served in their own capacities. There was no evidence that the 2nd defendant was an agent of the 3rd defendant to receive summons on his behalf. Hence the 3rd defendant denied that he was his brother and there was no reply to that averment. In any case even if he were, he could not be said to be an adult member of family. I believe they are both grown ups each with his own family and possibly living differently. Service on the 2nd defendant on behalf of the 3rd was therefore not proper service.

There is however the fact that M/S Chemitei & Co. Advocates entered appearance on behalf of all the three defendants which on the face of it presupposes that after service was effected on 2nd defendant he passed the summons to the 3rd defendants and they all instructed the counsel to enter appearance. However the applicant has denied ever instructing that counsel. This issue was averred by the applicant in his affidavit in support of an application to have the current counsel come on record. M/S Chemitei & Co. Advocates did not challenge that application or averment. One can only therefore assume the averment is correct. In any case the respondent seem to have release that point and that is why he served other documents like the Bill of costs directly to the applicant. If indeed he had a counsel on record the respondent should have served all subsequent papers on that counsel and not on the party directly. There was no attempt by the Respondent to explain why he chose to do that. Again one can only assume that he released that M/s Chemitei & Co. Advocates were not indeed appearing for them. It is therefore clear that the applicant was not properly served with the summons and the subsequent judgement was therefore not properly obtained. On that ground therefore I allow the application and set aside the exparte judgement and all subsequent orders. I will allow the applicant to defend the suit and grant him 15 days from today's date to file his defence.

As for costs I note that the firm of M/S Chemitei & Co. Advocate caused all this confusion by entering appearance for the applicant. He was served with this application but did not put in any explanation as to why he did so. I therefore direct that the said firm of M/S Chemitei & Co. Advocates do pay the costs of this application to both the applicant and the respondent after the same are taxed.

It is so ordered.

Dated and Delivered at Eldoret this 28th day of February,2007

KABURU BAUNI

JUDGE

DELIVERED IN THE PRESENCE OF :-

C/C - David

Mr. Buluma for Cheruiyot for Applicant

N/A for Respondent.