

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

Civil Case 902 of 2004

HON. NICK SALAT.....PLAINTIFF

VERSUS

NIXON NG'ANG'A.....1ST DEFENDANT

THE STANDARD LTD..... 2ND DEFENDANT

RULING

The 1st Defendant by way of this Notice of Motion dated 9th November 2005 and expressed to be brought under Order IXA Rule 10, Order V Rules 7 and 9 of the Civil Procedure Rules and Section 3A of the Civil procedure Act seeks orders that the interlocutory judgment entered against him herein on 8th December 2004 be set aside. He also prays for costs of this application.

The application is based on the ground that the interlocutory judgment against the 1st Defendant/Applicant was obtained on material misrepresentation contained in an affidavit of service filed on behalf of the Plaintiff/Respondent on 21st September 2004. He denies to have been served with the plaint and summons to enter appearance issued by this Honourable Court in this suit. The application is also supported by an affidavit sworn by the Applicant himself.

The application is opposed by the Plaintiff who has filed a replying affidavit sworn by Mr. Fred Mutua in which he avers that he is an Advocate of the High Court having conduct of this suit on behalf of the Plaintiff/Respondent and competent to swear this affidavit; that pursuant to acquisition of the summons, he personally in company of fellow counsel Robert Langat visited the offices of the 2nd Defendant on I and M building and sought to see the 1st Defendant to enable them to serve him with summons. While at the front office, a receptionist called Mr. Ng'ang'a enables him to speak to the 1st Defendant through the phone and the 1st defendant informed him verbatim over the phone that the Legal Advisor to the 2nd Defendant Mr. Kurgat would receive the papers on his behalf which he did.

Mr. Fred Mutua filed return of service in which he avers that he visited the offices of the 2nd Defendant where the receptionist put him through to the 1st Defendant on phone. The 1st Defendant refused to see them but asked them to see the 2nd Defendant's Legal Advisor Mr. Kurgat who could receive service on his behalf. But service is denied by the 1st Defendant.

In my opinion in the present case the first consideration is Order 5 Rule 9 (1) which provides –

“Where it is practicable, service shall be made on the Defendant in person unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.”

On the evidence the Defendant had no agent empowered to accept service. Therefore service of the summons had to be made on the Defendant to the extent it was practicable. That is the ideal form of service. Before it is departed from there must be circumstances which would reasonably support the departure.

The words wherever it is practicable suggest that there would be occasions when it would not be

practicable to effect personal service. The process servers must however not easily resign from personal service merely because of the alternatives. In the first place the Advocate who purportedly effected service does not state whether he is an authorized process server. And in any case Advocates who are seized with the conduct of the matter should be discouraged from effecting service because in the event service is denied, he would then turn to be a witness in the suit he is himself conducting and be subjected to cross examination.

The Respondent has not adduced evidence to prove that the said Mr. Kurgat was empowered by the 1st Defendant to accept service on his behalf. And in any case there is no evidence to show that a Legal Advisor to the 2nd Defendant is in a position and empowered to accept service on behalf of either the 2nd Defendant or the 1st Defendant. Service was therefore invalid. Accordingly I allow the 1st Defendant's application in terms of Prayers 1, 2 and 3 of the Chamber Summons dated 9th November 2005.

Dated and delivered at Nairobi this 7th day of May, 2007.

J.L.A. OSIEMO

JUDGE