



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT 214 of 2007

SONIA ARTS LIMITED PLAINTIFF

- Versus -

CONSTELLATION LIMITED DEFENDANT

Coram: Before Hon. Justice L. Njagi

Mr. Songoro h/b for Wandabwa

For Applicant N/A for Respondent

Court clerk - Ibrahim

RULING

In this application, the plaintiffs pray for a mandatory injunction compelling the defendants to part with the vacant possession of the suit property, and also for a temporary injunction restraining the defendants from interfering with the suit property. The application is made by a notice of motion dated 29th August, 2007, and brought under the provisions of Sections 3A and 63 of the Civil Procedure Act, Section 23(3) of the Judicature Acts of England (1873 – 1875), Orders XXXIX and L of the Civil Procedure Rules, the inherent powers of the court, and all other enabling provisions of the law.

The application is based on the grounds that the plaintiffs are the registered proprietors of the suit premises, i.e. L.R. No. 5352 of Section 1, Mainland North. They entered into a sublease agreement with the defendants which the defendants have breached and defaulted in paying rent which has accumulated to the tune of Kshs. 1,000,000.00 and continues to accrue. One of the defendants' directors has been deported from the country on immigration issues, and that the suit premises are inactive and largely abandoned without any operations. These grounds are amplified in the supporting affidavit of Kundan Pankaj Shah sworn on 29th August, 2007.

The matter first came before the court on 5th September, 2007, when it was certified urgent with an order that the application be fixed for inter partes hearing within 45 days. On 7th September, 2007, the same was fixed for hearing on 1st October, 2007.

When the matter was called for hearing on 1st October, 2007, Mr. Sangoro appeared for the plaintiff/applicant, but there was no appearance for the defendant. Mr. Sangoro told the court that the respondents had been served but they were not in court. He also told the court that there were two affidavits of service. Upon quickly perusing the record, the court noted that there were indeed two affidavits. Prima facie, one spoke of having served the pleadings on 14th September, 2007, and the other

one of having served the same by registered post. A copy of the certificate of posting a registered postal article was attached to the latter. On that basis, the court proceeded ex parte. Upon re-examining the two affidavits more closely after the hearing, the facts narrated hereunder came to light.

According to paragraphs 8 and 9 of his affidavit of service sworn on 29th September, 2007, Mr. Alexander Kalure Musembi, the process server, went to the suit premises on 14th September, 2007 and saw a man open the suit premises. That man introduced himself as Kennedy George Otieno. This answers to the defendant's General Manager, Mr. George Kennedy O. James, whose business card had earlier been given to the process server. In paragraph 10 of the affidavit of service, Mr. Musembi avers as follows –

“That I served Mr. Otieno with summons to enter appearance, plaint, verifying affidavit and Notice of Motion dated 4/9/2007 scheduled for hearing on 1/10/2007. Mr. Otieno received the documents but declined to sign at the back of my copies which I now return as duly served.”

It is notable that one of the documents which were served on Mr. Otieno was a notice of motion dated 4th September, 2007, and which was scheduled for hearing on 1st October, 2007. Unfortunately there is no such application on record. Instead, the application which is minuted as fixed for hearing on 1st October, 2007, was the one dated 29th August, 2007. The Notice of Motion which the process server served upon the defendant's General Manager, if there ever was such an application, was not set down for hearing on 1st October, 2007, or any other date at all. Therefore since the application dated 29th August, 2007, was not served on the defendants, it should not have proceeded to hearing ex parte on 1st October, 2007.

Secondly, Mr. Sangoro told the court that there were two affidavits of service. The first one is the one sworn by Mr. Musembi and dealt with herein above. The second one was sworn by Mr. Sangoro, Advocate, on 29th September, 2007. In paragraphs 2 and 3 thereof, learned counsel states that on or around 5/09/2007, he filed suit and argued the notice of motion filed under a certificate of urgency dated 4/09/2007. The matter was certified urgent and a date given for the inter partes hearing on 1/10/2007. He thereupon prepared a forwarding letter and served the defendant with the pleadings through registered post. A copy of the forwarding letter is annexed to his affidavit, and so is a copy of the certificate of postage. Mr. Sangoro then avers that he swore that affidavit to confirm that the pleadings were served through registered post.

The forwarding letter is addressed to the defendant's managing director. Paragraph 2 of that letter states – “Pursuant to Order V Rule 2(b) of the Civil Procedure Rules, we serve upon your Corporation, the defendant herein with the following documents, that is to say, a Certificate of Urgency and Notice of Motion dated 29/8/2007 together with its supporting affidavit and annexures, the plaint, verifying affidavit and summons to enter appearance.”

Under Order V rule 2(b) of the Civil Procedure Rules, I would accept such service as effective and conclusive. However, the date stamp on the copy of the certificate of posting is not clear. It depicts the registered letter as having been posted either on 26th or 29th September, 2007. Since the matter was coming for hearing on 1st October, 2007, postage on either of those two dates did not accord the defendants sufficient time to attend court.

I note that Section 3A was among the provisions under which this application was made. This section articulates the inherent

powers of the court to make such orders as may be necessary for the ends of justice. It is my considered opinion that in the circumstances of this matter, it is in the wider interests of justice that this application should be given a fresh hearing date, which should give the defendants sufficient time to attend court.

I therefore direct that a fresh date be given for the hearing of application by notice of motion dated 29th August, 2007, within 14 days from today. The defendants should be served with the hearing notice

at least 10 days before the hearing date. This, I reckon, will give them sufficient time to decide how to conduct themselves in relation to the application.

Dated and delivered at Mombasa this 26th day of October, 2007.

L. NJAGI

JUDGE