



REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

Civil Appeal 130 of 2003

PETER GITAHI KAMAITHAAPPELLANT

VERSUS

PETER GITAHI KAMAITHA RESPONDENT

(Appeal from the ruling in Chief Magistrate's Court at Nyeri, CMCC. No. 75 of 2002 dated 15th September 2003 by Mr. Kaburu Bauni – C.M.)

J U D G M E N T

The appellant filed a suit in the Chief Magistrate's Court at Nairobi Milimani Courts claiming payment of salary arrears or terminal dues and costs of the suit. The Respondent entered appearance and filed a defence. Subsequent thereto the suit was transferred to the Chief Magistrate's Court, Nyeri on the application of the Respondent. On the 24th March, 2003 the suit came up for hearing and whereas counsel for the Respondent was present and ready for the hearing neither the Appellant nor his counsel were present. Accordingly, Counsel for the Respondent applied for the dismissal of the suit for want of attendance on the part of the appellant. The trial court upon being satisfied that the appellant's counsel had been duly served with the hearing notice but was absent obliged and proceeded to dismiss the suit with costs to the respondent.

On the 2nd April, 2003, the appellant filed an application by way of chamber summons seeking to set aside the order dismissing the suit for non-attendance aforesaid. The application was heard interpartes and on 15th September 2003, the court in a well thought out ruling turned down the application. It is against this decision that the appellant now appeals to this court.

The appellant's application before the subordinate court was supported by an affidavit in which he denied that his counsel was served with hearing notice for the suit. That though the affidavit of service filed in court stated that his advocates **K. Mugambi & Co. Advocates** were located and served with the hearing notice on Agip house 6th floor, in fact his advocates offices were in Bima House 8th floor until December 2002 when they relocated to Nyambene house. The appellant further deponed that the secretary by the name **Lucy** who was alleged to have received the hearing notice on behalf of the appellant's advocates was never an employee of the said advocates.

On the other hand the Respondent maintained that the applicant's advocates were properly served as their employee signed and stamped on the reverse side of the hearing notice dated 13th February, 2003 and it was immaterial that the house where their offices were situated had been misdescribed in the affidavit of service.

Faced with this conflicting affidavits and having listened to respective submissions by learned counsels

from both sides, the learned magistrate leaned in favour of the respondent.

In his home made petition of appeal in which he has set out 12 grounds but which may be reduced in one broad ground the appellant impugns the ruling delivered by the Chief Magistrate on 15th September 2003 on the basis of his finding that the appellant's advocates had been properly served with the hearing notice. In a bid to prove that his counsel was not actually served with the hearing notice, the appellant claims that the Respondent's advocates failed to summon the court process server to come and testify in court as to how he served his advocates, that his advocate's affidavit was not admitted in evidence, that the affidavit of service indicated that the advocate served were **Mugambi & Co. Advocates** located on Agip House 6th floor along Haile Selassie Avenue and not **K. Mugambi & Co. Advocates** who were located on Nyambene House 2nd floor Tom Mboya Street, that the secretary by the name **Lucy** who is alleged to have received the hearing notice on behalf of her employer had left the appellant's advocates employment in December 2002, that the two firms **K. Mugambi & Co. Advocates** and **Mugambi & Co. Advocates** were not same. Finally the appellant pointed out that the learned magistrate erred in law and fact in not finding that the issue was whether or not the appellant's advocates had been served with a hearing notice and not whether the appellant had filed a similar suit elsewhere. That in holding that there was no sufficient reasons to reinstate the case the learned magistrate erred.

When the appeal came up for hearing the appellant who was unrepresented submitted that his advocates were **K. Mugambi & Co. Advocates** and not **Mugambi & Co. Advocates** who were served with the hearing notice. That the stamp affixed at the back of the hearing notice reads **K. Mugambi & Co. Advocates**. The appellant further submitted that his advocate swore an affidavit in support of his application in which he deponed that he practised as **K. Mugambi & Co. Advocates** on Nyambene House. The appellant cited the case of **Karatina Garments Ltd v/s Nyanama (1976) KLR 94** in support of his submission that the respondent should have availed the process server to be examined on oath as to how he served the appellant's advocates. The appellant further submitted that his advocates denied having an employee by the name **Lucy**. Accordingly the learned magistrate erred in not admitting his advocates affidavit in evidence. As regards ground 6 of the memorandum of appeal, the appellant submitted that the Respondent's advocate never told the court of any confusion regarding the location of the appellant's advocates offices. Rather his submission was that it was irrelevant.

In response, **Mr. Gikonyo**, learned counsel for the Respondent submitted in opposing the appeal that the learned magistrate did not err in any way and his findings cannot be faulted. The magistrate had opportunity of listening to both advocates and made a finding that the appellant's advocates were served which is an issue of fact. Counsel submitted that though the appellant claimed that the advocates who were served were not his, that was an issue which was not canvassed before the subordinate court and cannot be raised in this appeal. Counsel further pointed out that at page 46 of the record which contains the appellant's own affidavit, he concedes that service was effected on his advocates. However he does not say whether the advocates were **Mugambi & Co. Advocates** and not **K. Mugambi & Co. Advocates** who were served. Counsel further submitted that **Mr. Ng'ang'a** advocate, who argued the application to set aside the order of dismissal had submitted that **K. Mugambi & Co. Advocates** had not been served with the hearing notice and in the same breath stated that the date was also not convenient to them. The court had opportunity to see the rubber stamp at the back of the hearing notice and concluded that it had been affixed by the appellant's advocates further. Nobody had deponed that it was forgery. Counsel for the Respondent submitted that the appellant had filed a similar suit in the High Court seeking the same orders as in the instant suit.

As the first appellate court I have subjected the pleadings and submissions to fresh evaluation and analysis. I have also carefully considered the submissions of the respective parties to this appeal. The issue for determination is whether the appellant's counsel was served with the hearing notice as was held by the learned magistrate. On the material placed before him, the learned magistrate was perfectly entitled to come to that conclusion. First there was an affidavit of service on which a copy of the hearing notice had been annexed. The trial magistrate subjected the hearing notice to close scrutiny and in particular the stamp affixed on reverse side of the hearing notice and came to the conclusion that it had been affixed by the firm of **K. Mugambi & Co. Advocates**. I have also examined the hearing notice and the stamp affixed at the back thereof and I am in no doubt at all that it was affixed by the firm of **Messrs**

K. Mugambi & Co. Advocates. I did not hear the appellant claiming that the alleged stamp was a forgery. Had the stamp been a forgery, I am certain that it would have been the subject of police investigations considering the seriousness of the matter as it resulted in a dismissal of the appellant's claim. **K. Mugambi** being a lawyer could not have failed to take up the matter with the appropriate authorities if indeed the stamp was a forgery. He did not and one can rightly assume that his firm was duly served with the relevant hearing notice and he is merely looking for an escape route from the mess he has subjected the appellant to. The appellant has submitted that the process server ought to have been called to shade light on how he had served **K. Mugambi advocates** on Agip house whereas their offices were at the time on Nyambene house. Further he should have been able to tell the court why he served the hearing notice on **K. Mugambi & Co. Advocates** when in fact it had been meant to serve **Mugambi & Co. Advocates**. This issue was never canvassed before the trial magistrate. The appellant never moved the court to have the process server summoned to come and testify. Much as it would have been the right thing to do in terms of the holding in **Karatina Garments Ltd case (supra)**, the court was not moved as appropriate. The appellant is not without blemish. Nothing barred him from asking the court to move in that direction. Clearly this issue is being raised in this appeal as an afterthought therefore.

According to the affidavit of service, the hearing notice was served on one **Lucy**, a secretary in the employment of **K. Mugambi & Co. Advocates**. Whereas in his further supporting affidavit, **Amos Kathuri Mugambi Esq.** admits having at some time had an employee by that name. **Mr. Ng'ang'a** on the other hand stated in his submissions during the hearing of the application that the alleged secretary had never worked for **Messrs K. Mugambi & Co. Advocates**. Indeed even the appellant in his supporting affidavit denied that his advocate had an employee by that name. The learned magistrate read mischief in this apparent contradiction. He felt that and rightly so in my view that the court was not being told the truth. There is yet another element of contradiction. The advocate deponed that he was not served with hearing notice and yet in the same breath depones that he "**was having matter in High Court Nairobi HCCC No. 2730 of 1985 on 24th March 2003. So I could not attend the court Nyeri....**" Does this averment not suggest that the appellant's counsel was actually aware of the date of the hearing of the application but failed to turn up because he had another matter in Nairobi? My sixth sense tells me that, actually this was the position. The appellant has faulted the magistrate for not admitting in evidence his counsel's further supporting affidavit. This criticism is umerited. It is quite clear from the ruling that the learned magistrate subjected that affidavit to close scrutiny and that is why he noted the discrepancy regarding an employee by the name **Lucy**. **Mr. Mugambi** in his affidavit admits having had in his employment a person by the name **Lucy** but claims that by the time the service of hearing notice was allegedly being effected, she had already left his employment. However there was no evidence, documentary or otherwise to back up this claim. It is also strange or is it mere coincidence that a person by name **Lucy** would receive the hearing notice when not in the employment of the appellant's counsel.

The appellant has placed much reliance on the fact that whereas the process server claimed to have served the hearing notice on his advocate's firm at Agip house, his offices were in fact on Nyambene house. In his view therefore the firm served with the hearing notice was not his. No evidence was however tendered to show that the firms **K. Mugambi & Co. Advocates** and **Mugambi & Co. Advocates** were distinct and different firms of advocates. Further no evidence was tendered to show when exactly the counsel for the appellant shifted his offices from Bima house to Nyambene house. I think the reference to Agip house by the process server might have been a mistake and or inadvertent error. What is important however is the fact that the hearing notice was served on **Lucy**, an employee of the appellant's advocates then, who acknowledged receipt by stamping on its reverse side. This clearly shows that **Messrs K. Mugambi & Co. Advocates** were served. It is immaterial whether the service was at Agip house, Bima house or even Nyambene house.

The appellant has also complained that the learned magistrate erred in taking into account the fact that the appellant had filed another suit in the High Court seeking almost similar prayers as in the instant suit. In my view that was a peripheral issue. Essentially the ruling of the learned magistrate turned on the issue as to whether or not the appellant's counsel had been served. Further even if the issue was not peripheral, I do not see the mistake the learned magistrate committed in making such reference. He was perfectly within his mandate to take into account such a case, to forestall possible abuse of the court process.

All in all I am satisfied just like the learned magistrate was that the appellant was properly served but failed to attend court on the date of hearing. The learned magistrate was therefore right in dismissing the application. I do not therefore see any merit in this appeal. Accordingly it is dismissed with costs to the respondent.

Dated and delivered at Nyeri this 15th day of October 2007

M. S. A. MAKHANDIA

JUDGE