



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Suit 150 of 2003

NATIONAL BANK OF KENYA LIMITED.....PLAINTIFFS

VERSUS

PUNTLAND AGENCIES LIMITED.....1ST DEFENDANT

AHMED MOHAMED HAJ.....2ND DEFENDANT

YUSSUF MOHAMED HAJI.....3RD DEFENDANT

R U L I N G

The plaintiff on instituting this suit in February 2001 against the defendants summons were accordingly issue thereafter.

The summons were given to a process server for service to be effected upon the defendant's the process server swore an affidavit of service and because service is at the centre of this ruling it is important to reproduce some of the paragraphs of the affidavits of service as follows:

“* That on 12.2.2001 I received summons, plaint and verifying affidavit herein from AHMEDNASIR, ABDIKADIR & COMPANY ADVOCATES with instructions effect service upon defendants.

· **That on 13th day of February 2001, the 3rd defendant came to the offices of AHMEDNASIR ABDIKADIR & COMPANY ADVOCATES at PRUDENTIAL ASSURANCE BUILDING, 1ST FLOOR, WING B, WABERA STREET, NAIROBI for a meeting with Mr Ahmednasir M. Abdullahi over this case and I served him with the summons and plaint and verifying affidavit which he accepted and signed.**

· **That on 16th February, the 3rd defendant returned to the said offices of AHMEDNASSIR, ABDIKADIR & COMPANY ADVOCATES for further negotiations with the said Mr ABDULLAHI. Upon my request he confirmed that he had authority as a Director of the 1st defendant to accept summons on its behalf and even on behalf of his co-director the 2nd defendant. I promptly served him with summons for both defendants and he signed the same.”**

On the basis of the said affidavit of service judgment was entered in default of appearance against all the

defendants.

The defendants by a chamber summons dated 21st October 2004 seek to set aside the aforesaid default judgment.

The application is based on the grounds that the defendants were never served with the summons to enter appearance. The plaintiff has not yet realised the security securing the defendant's facility with the plaintiff. The defendants have a defence to the plaintiff's claim and a counter claim.

The arguments presented on behalf of the defendant are that the 3rd defendant was not authorised to receive summons to enter an appearance on behalf of his co-defendants and that in any case the 3rd defendant was not served with the summon nor did he ever attend the offices of the former plaintiff's advocates as stated in the affidavits of service.

Defence counsel referred to order V Rule 2, which provides the procedure of service upon a corporation. He said that service on a corporation ought to be effect upon a secretary, director or other principal officer of the corporation and if these are not traced the process server is empowered to leave the summons at the registered office of the corporation or at the registered address and if the corporation has neither of these at the place where that corporation carries out its business.

Defence gave notice to the plaintiff counsel to avail the process server for purpose of cross-examination. The plaintiff's counsels response to this was that there is no legal requirement for the process server to be cross-examined.

The plaintiff in response to the defendant's application dealt with the merits of the case, the history of this case and then stated that the defendants had been served and that by the present application the defendants **"exhibited gross dishonesty in denying service....."**

I have looked at the 3rd defendant's affidavit in support of the application; he stated that he is a director of the 1st defendant but he denies ever been served, either on his behalf or on behalf of the defendants, with summons to enter an appearance.

Once service was denied by the 3rd defendant the evidential proof shifted to the plaintiff to prove service was infact effected. Order V Rule 16 provides:

"On any allegation that a summons has not been properly served, the court may examine the serving officer on Oath or cause him to be so examined by another court....."

The provision clearly responds to the plaintiff's assertion that cross-examination of the process server was not provided for.

Order V Rule 8 provides:

"Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant."

The process server, if indeed he effected service upon the 3rd defendant, on behalf of the other defendants it is not stated why he failed to personally serve the 2nd defendant in accordance with the aforesaid Rule.

The discretion to set aside exparte judgment as provided in Order 1XA Rule 10 is exercisable to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct delay

the court of justice: SHAH – V – MBOGO [1977] E.A.

In our case however the defendants state they were not served with the summon and the plaintiff failed to rise up to the challenge to prove service. The court therefore makes a finding that the defendants were not served with the summons to enter an appearance. Having so found the judgment, which was based on that service, must fail.

In the case of JOHN AKASIRWA – V – ALFRED INAI KIMUSO (C.A. NO. 164 OF 1999) (UR) the court of appeal indicated the proper mode of service on individual as follows:

“Proper service of summons to enter appearance in litigation is a crucial matter in the process whereby the court satisfied itself that the other party to litigation has notice of the same and therefore chose to enter appearance or not. Hence the need for strict compliance with order 5 Rule 9 [1]. The ideal form of service is personal service, it is only when the defendant cannot be found, that service on his agent empowered to accept service is acceptable.”

Here the process server did not indicate what attempts he made to serve the 2nd defendant personally before attempting to serve his alleged agent. That service was very poor and must accordingly fail.

The court makes the following order: -

- 1) **That judgement entered against the defendants on 15th March 2001 is hereby set aside with all of its consequential orders.**
- 2) **The costs of the chamber summons dated 21st October 2004 are awarded to the defendants.**

MARY KASANGO

JUDGE

Dated and delivered this 23.6.2006

MARY KASANGO

JUDGE