REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 935 of 2002

THE CHURCH COMMISSIONERS OF KENYA…….....…..PLAINTIFF

VERSUS

JULIA AYENGO'…….....……..1ST DEFENDANT

GORDON OKUMU WAYUMBA…….....…… 2ND DEFENDANT

ROSE AUMA AGENDO…….....……3RD DEFENDANT

ERIC OPON NYAMUNGA…..…….....……..……4TH DEFENDANT

CITY COUNCIL OF NAIROBI…….....…….……5TH DEFENDANT

R U L I N G

By chamber summons dated 01.11.05 and filed on 02.11.05 brought under Order IXB rule 8, Order XXI rules 22 and 91 of the Civil Procedure Rules and section 3A of the Civil Procedure Act (Cap.21), the 1st – 4th defendants prayed for the following orders:-

a) That this matter be certified urgent and in the first instance be heard *ex-parte*.

b) That the *ex-parte* interlocutory judgment of 27.10.03 and the judgment of Hon. Justice Kubo delivered on 12.10.05 and any decree arising therefrom be stayed pending the hearing and determination of this application.

c) That the interlocutory *ex-parte* judgment of this honourable court made on 27.10.03 in default of appearance together with the *ex-parte* proceedings and subsequent judgment of 12.10.05 entered in favour of the plaintiff on its plaint and the consequential orders be set aside.

d) That the costs of this application be provided for.

The grounds upon which the application is based are:-

i) The purported service of process by substituted service is and was a nullity *ab initio*.

ii) In any event failure on the part of the defendants and its counsel to enter appearance was not deliberate but was a consequence of a regrettable omission to notice an inoquously placed purported notice in the Standard Newspapers.

iii) The plaint was incurably defective and in breach of the rules of pleading.

iv) The plaintiffs and their advocates deliberately and fraudulently failed to make full disclosure of all material facts and the law to the court.

v) The plaintiffs and their advocates sought and obtained orders that were incapable of enforcement.

vi) That it would be in the interest of justice that the defendants are not denied a chance to be heard.

(a) as against immovable property that did not belong to them and

(b)over a registered public access road for the use of the entire public not only the defendants.

vii) That it would be in the interest of justice that the defendants are not denied a chance to be heard and

viii) No injustice will be caused to the plaintiff which cannot be compensated by costs by the grant of the orders sought.

The application is supported by the affidavit of Dorcas A. Nanjero and other grounds adduced at the hearing of the application.

It is noted, for the record, that the suit was withdrawn as against the 5th defendant, leaving only the 1st – 4th defendants as parties thereto.

At the hearing of the application, the 1st – 4th defendants/applicants were represented by learned counsel, Mr. J. Okwach while the plaintiff/respondent was represented by learned counsel, Mr. W. Owaga.

Applicants' counsel relied on 3 broad grounds:-

a) Service of summons preceding the interlocutory judgment. The basic point made here was that the plaintiff did not serve the requisite court process on the defendants or on the said Dorcas Nanjero whom the plaintiff knew to be the 1st – 4th defendants advocate or agent. In faulting the plaintiff in this regard, the defendants said they relied on Order V rule 2. The defendants also faulted the substituted service in that it was through a newspaper advertisement published in the East African Standard of Saturday 15.06.02 requiring the defendants to enter appearance before 19.06.02, which was less than 10 days, in violation of Order IV rule 3 (4). Defendants'/applications' counsel referred to Ceneast Airlines Ltd –vs- Kenya Shell Ltd [2000] 2 EA 364 in which the Kenya Court of Appeal, *inter alia*, held Order IV rule 3 (4) to require mandatorily that the time given for entering appearance must be at least 10 days. Counsel also referred to Yalwala -vs- Indumuli & Another [1989] KLR 373 to echo the point made by the Kenya Court of Appeal that the service of process is a crucial matter in litigation and that courts must encourage the best service, i.e. personal service, unless it is shown that personal service was not practicable despite attempts to effect such service. Counsel also cited Njoroge -vs- Kiarie [1987] KLR 38 to make the same point.

b) Counsel for 1st – 4th defendants/applicants also contended that there was no clarity given about the property, which is immovable, to facilitate its identification. For this proposition, counsel sought to rely on Order VII rule 3 contending in effect that it is such lack of clarity on the identity of the property in question which led this court to order the plaintiff to file a further affidavit to provide clarification about such identity and that the affidavit subsequently filed did not remedy the defect about the identity of the plot and that the lack of clarity about the identity of the plot could only be remedied by amendment of the plaint, which he said was not done.

c) Non-disclosure of material facts within the plaintiff's possession. Under this ground, the 1st – 4th defendants contended that the plaintiff claimed an access road to be its property while it had been notified by the Commissioner of Lands vide letter Ref. No.41445/215 dated 18.02.02 that the subject access road

was a road reserve of 0.25 of an acre, details of which were marked out in Deed Plan No.66827. That letter, which Dorcas Nanjero annexed to her affidavit sworn on 02.11.05 addressed to the Vicar, St. Francis Church, Karen (a diocese of All Saints Cathedral, Nairobi which is part of the Anglican Church of Kenya of which the plaintiff is the appointed trustee), also told St. Francis Church, Karen that it was only a trustee for the said portion of the road reserve and that time had come for the road reserve to be opened up for use by the owners of the adjacent plots (including 1st – 4th defendants). Counsel for 1st – 4th defendants/applicants contended that the letter of 18.02.02 contradicted the evidence produced to court by the plaintiff and referred to Fluid & Power Systems Limited -vs- Kalsi [1991] KLR 584 to echo the point made by the High Court (Bosire, J – as he then was) that a party who comes to court and obtains *ex-parte* orders either on the basis of a false affidavit, or having withheld from the court certain material facts disentitles himself to the orders sought.

Counsel for 1st – 4th defendants/applicants urged this court to grant the application with costs.

On the other hand, plaintiff's/respondent's counsel opposed the application and relied on the replying affidavit of Charles Victor Orodi sworn on 25.11.05. Counsel contended that Dorcas Nanjero, who swore the affidavit supporting the application, was not authorized by the plaintiff to swear the affidavit; that she is neither a party to the suit nor an advocate representing the 1st – 4th defendants in the suit. Counsel asked for Dorcas Nanjero's affidavit to be struck off and that once that was done, the 1st – 4th defendants' application had to go with it. Plaintiff's/respondent's counsel pointed out that even after the 2nd defendant, Gordon Okumu Wayumba was served by John Munsyoka (process server) with the plaint and summons to enter appearance herein on 11.06.02 and even after publication of the advertisement on 15.06.02 calling on the 1st – 4th defendants to enter appearance before 19.06.02, the said defendants slept on their right to defend the suit and only came to the picture when the court was about to deliver Judgment in 2005, i.e. some 3 years later. Counsel submitted that the defendants/applicants were to blame for not entering appearance despite service, including substituted service by a conspicuous newspaper advertisement. Counsel also submitted that the suit property was sufficiently identified in the plaint and that the clarification sought by the court regarding the suit property was confined to identification of ownership of the plaintiff's property which had already been identified in the plaint. Counsel added that the seeking of such clarification was permissible under Order XVII rule 12, which had guided the court. This rule provides that the court may at any stage of the suit recall any witness who has been examined and may, subject to the law of evidence for the time being in force, put such questions to him as the court thinks fit.

Regarding the complaint of non-disclosure of material facts, plaintiff's/respondent's counsel referred to letter of 13.12.01 from the Director of Surveys to the Vicar of St. Francis Anglican Church, Karen indicating a previous road reserve but at the same time recognizing there had been previous surveys which disregarded reservation of the purported access road. It was plaintiff's/respondent's case that the subject access road had been abandoned when the Forest Department which was using the access road left the area and that there is an alternative road to the area in question used even by the 1st – 4th defendants.

Plaintiff's/respondent's counsel urged the court to dismiss the application with costs.

I have given due consideration to the arguments and counter arguments of the parties.

Now that the question of service has been made an issue, it becomes necessary to subject it to closer scrutiny. Service of court process is a critical issue in this case and there are two aspects of it. One relates to the service alluded to by John Musyoka, process server in his affidavit of service sworn on 12.06.02. He deposed, *inter alia*, that on 11.06.02 he served the plaint together with summons to enter appearance on the 2nd defendant. There is no copy of the summons to enter appearance annexed to the affidavit of service. This court does not, therefore, have means of knowing how many days the 2nd defendant, Gordon Okumu Wayumba was given within which to enter appearance and cannot be sure if adequate notice was given to the 2nd defendant individually. Secondly, and more significantly, the process server deposed that when he went to the home of the 2nd defendant to service him on 11.06.02, he

found one Mary there. After the process server introduced himself and the purpose of his visit to the home, Mary told him 'that her boss had gone on safari and they would be back that afternoon'; that Mary accepted service but refused to sign at the back of the process server's original copies, stating that she would keep the copies for her boss until he came back.

The affidavit of service sworn by John Musyoka on 12.06.02 does not establish that he gave the 2nd defendant a period of not less than 10 days within which to enter appearance as mandatorily required by Order IV rule 3 (4). Secondly, process server John Musyoka took a short cut by serving Mary in absence of the 2nd defendant who, Mary said, would be back that afternoon. I note from John Musyoka's affidavit that he served Mary at 11.00 a.m. on 11.06.02. Why could he not wait until afternoon when the 2nd defendant was reported to be due back or, alternatively, book an appointment to serve the 2nd defendant next day or on another appointed day? In this regard, I associate myself with the holding by the Court of Appeal in Yalwala's case (supra) that the service of process is a crucial matter in litigation and that the best service, i.e. personal service, must be resorted to unless it is shown that personal service was not practicable despite attempts to effect such service. In the present case, there is no evidence of any serious attempt to effect personal service on the 2nd defendant and I hold the purported service on Mary on behalf of the 2nd defendant to be invalid.

The other aspect of service of process in this case is the substituted service by the newspaper advertisement published in the East African Standard of Saturday 15.06.02 requiring the 1st – 4th defendants to enter appearance before 19.06.02. That gave the defendants only the working days of Monday 17.06.02 and Tuesday 18.06.02, i.e. only 2 days, within which to enter appearance. That is a clear violation of Order IV rule 3 (4) requiring that the defendants should mandatorily have been given not less than 10 days to enter appearance. The substituted service too was invalid.

The plaint dated 03.06.02 and filed the same day by the plaintiff specified, at paragraph 3, L.R. 9482 situate at Karen, Nairobi as the plaintiff's subject property. That is also the plaintiff's property specifically referred to in Charles Victor Orodi's affidavit sworn on 03.06.02 in support of the suit. Plan No.72462 of 23.06.59 from the Director of Surveys shows, *inter alia*, that plot L R 9482 specified in the plaint as belonging to the plaintiff borders plot L.R. 10111 not specified in the plaint as belonging to the plaintiff but in respect of which evidence was availed showing that it too belonged to the plaintiff. Counsel for 1st – 4th defendants submitted in essence that if ownership of the two plots, i.e. L.R. 9482 and L.R. 10111, was central to the plaintiff's case, the latter plot should also have been specified in the plaint as belonging to the plaintiff. This may be a valid point ultimately but would appear to be a side issue as far as the question of identification of what seemed to be the plaintiff's property of central concern goes. Plaintiff's counsel was right in stating that the clarification sought by the court, and which was provided by Charles Victor Orodi's subsequent affidavit, was confined to identification of ownership of the plaintiff's L.R. 9482 which had already been identified in the plaint and I shall devote no more time to the issue of its identification in this Ruling.

Questions were raised by the plaintiff on whether Dorcas Nanjero had authority to swear her affidavit of 02.11.05 in support of the defendants' application herein. I note that she says she acted as advocate for the defendants previously and that she was deposing to facts which came to her knowledge during such acting. At paragraph 16 (c) of her affidavit, she refers to Order V rule 2 as a basis for urging that she should have been served with court process on behalf of the defendants. She clearly cited the wrong rule to support her proposition. The correct rule is rule 9 but I think the defect in citing the wrong rule is curable and I shall not strike out her affidavit on the basis of such error alone.

I now revert to the complaint of non-disclosure of material facts. In this regard, I note from the Director of Survey's letter Ref. CF/26/VOL.5/64 dated 13.12.01 to the Vicar of St. Francis Anglican Church, Karen that the Director acknowledged there had been recent surveys which disregarded the reservation of the access road in question and that the issue of disregarding the access road would be rectified in due course. The Survey Director's letter is copied, *inter alia*, to the Commissioner of Lands. I further note that the Commissioner of Lands wrote letter Ref. No.41445/215 dated 18.02.02 to the Vicar of St. Francis Church, Karen regarding the disputed access road to L.R. 9482, Karen and told the Vicar

that he was only a trustee for a portion of the road reserve and that time had come for the road reserve to be opened up for use by owners of the adjacent plots. The Lands Commissioner's letter was not copied to the Director of Surveys and it is not immediately clear if it was or was not a follow up of the Director's letter of 13.12.01 to the effect that the previously disregarded access road/road reserve would be rectified in due course. Linkage between the two letters, if any, is left hanging. This is unsatisfactory and I am not prepared to say at this stage that non-disclosure of material facts has been satisfactorily established.

I note that the substituted service through the newspaper advertisement in the East African Standard of Saturday 15.06.02 was placed in the 'Digger Classified Sell Faster' page (20) of the newspaper. That sounds like the kind of page which would readily attract the attention of persons looking for property to sell or buy. The court case in respect of which the substituted service was being published had nothing to do with the selling or buying of property. One can be excused for not getting attracted to such a notice. A more prominently published notice would have been preferable.

I have looked at the draft defence proposed to be filed by the 1st – 4th defendants and I am of the view that it raises triable issues. I have, of course, to weigh this against the fact that it took some 3 years before the defendants sprang into action and sought to be heard in defence of the suit. The surrounding circumstances, especially the defective/invalid service of court process, however, persuade me that it would be in the wider interests of justice for the defendants to be afforded an opportunity to defend the suit. Accordingly, I grant prayer (c) in the chamber summons dated 01.11.05 and set aside the interlocutory *ex-parte* judgment entered on 27.10.03 and also set aside the subsequent judgment delivered on 12.10.05 in default of appearance. Consequential orders are similarly set aside. Costs shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 31st day of July, 2006.

B.P. KUBO

JUDGE