



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 300 of 2005

MOSES MUTAMBUI WANYONYIPLAINTIFF

VERSUS

- 1. HOUSING FINANCE COMPANY OF KENYA...1ST DEFENDANT**
- 2. VINCENT OPIYO.....2ND DEFENDANT**
- 3. ATIENO OPIYO.....3RD DEFENDANT**

RULING

On 26th October 2006, the defendant's application dated 21st August 2006 was listed before me, for hearing.

Although the plaintiff was not present in court, I did allow the defendants to prosecute the application, after I had satisfied myself that their advocates had been served with an appropriate Hearing Notice. After the defendants had made their submissions on the application, I reserved my ruling thereon.

However, when I got round to writing the ruling, I gave more careful consideration to the Affidavit of Service sworn by Mr. Vincent Maiga. It is then that I noted that when the said process server went to the physical address of the plaintiff's advocates, Messrs Abuodha & Omino Advocates, the process server learnt that the advocates had vacated their former offices. Efforts to ascertain the advocates' new offices were unsuccessful.

At that point in time, the process server sought advise from Mr. Mansur M. Issa, advocate for the applicant, who instructed him to effect service through the last known postal address of the Plaintiff's advocates.

On the strength of the instructions from Mr. Issa, the process server proceeded to the General Post Office, Nairobi, and dispatched the Hearing Notice by way of registered post, addressed to P. O. Box 73532, NAIROBI. The process server has provided the court with a certificate of posting of a registered article, to prove that he did dispatch the Hearing Notice to the said postal address.

A perusal of the documents filed in this case reveals that M/s Abuodha & Omino Advocates had given their postal address as being P. O. Box 73532, NARIOBI. That implies that the Notice was sent to the correct address.

According to the process server, that constituted proper service, pursuant to the provisions of Order 5

rule 2 of the Civil Procedure Rules. The said Rule is worded as follows;

“Subject to any other written law, where the suit is against a corporation, the summons may be served –

(a) on the secretary, director or other principal officer of the corporation; or

(b) if the process server is unable to find any of the officers of the corporation mentioned in rule 2(9), by leaving it at the registered office of the corporation or sending it by prepaid registered post to the registered postal address of the corporation, or if there is no registered office and no registered address of the corporation by leaving it at the place where the corporation carries on business or by sending it by registered post to the last known postal address of the corporation.”

As is evident from the contents of that rule, as well as the marginal note, those provisions relate to service on a corporation. Therefore, in as far as the firm of Abuodha & Omino Advocates were not a corporation, the provisions of Order 5 rule 2 of the Civil Procedure Rules would be inapplicable to them.

In any event, the suit herein was not against the said firm of advocates, but against their client, who is a natural person. For that reason, it does appear to me that the service herein was irregular.

When it is borne in mind that the relief sought is to strike out the plaint, I believe that it is important for the court to ensure that there was strict compliance with the requisite rules relating to service. Therefore, I decline to make any comments on the submissions which the applicant had made on the substantive application, for now. Instead, I direct that the plaintiff’s advocates be served appropriately, before the application dated 21st August 2006 could be heard inter partes.

Meanwhile, the costs of the court attendance on 26th October 2006 shall be in the cause.

Dated and Delivered at Nairobi, this 28th day of November 2006.

FRED A. OCHIENG

JUDGE