



REPUBLIC OF KENYA

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

Civil Case 1821 of 1999

GANIJEE GLASS MART LTD.....1ST PLAINTIFF

PAN AFRICAN GLASS INDUSTRIES LTD.....2ND PLAINTIFF

NAJMUDIN JIWAJI GANIJEE3RD PLAINTIFF

VERSUS

FIRST AMERICAN BANK OF (K) LIMITED.....DEFENDANT

RULING

This is an Application primarily to set aside an Order made ex-parte by the Deputy Registrar on 22nd February, 2005 against the 3rd Plaintiff/Applicant. The Application before the Deputy Registrar was a Notice to Show Cause why execution should not issue against the Applicant. The Application is expressed to be made under Order 1XB Rule 8 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Application is based on the grounds that the Applicant was not served with the Notice to Show Cause and that the prohibitory orders that were subsequently issued were irregular as there was no compliance with the provisions of Order XXI Rule 49 and 41 of the Civil Procedure Rules.

The Application is supported by an Affidavit sworn by the Applicant. The application is opposed. There is a Replying Affidavit sworn by the process server. The Application was canvassed before me on 24.6.2005 by Mr. Nyakundi Learned Counsel for the Applicant and Mr. Ngatia Learned Counsel for the Respondent.

Counsel for the Applicant submitted that the process server was not consistent in his affidavits i.e. the affidavit of service and the Replying Affidavit and this was evidence that he was not telling the truth regarding the purported service. In any event Counsel argued, the alleged service was purportedly effected on Saturday which is not allowed by the Rules. Finally Counsel argued that the prohibitory order ought not to have issued on an Application for Notice to Show Cause.

In response Mr. Ngatia for the Respondent submitted that there is a valid judgment against the Applicant in favour of the Respondent. There is therefore no impediment to execution and a previous application for stay of execution having been dismissed; it was not open to the Applicant to seek a stay of execution afresh. With regard to the Notice Show Cause before the Deputy Registrar, Counsel argued that the Deputy Registrar was satisfied with the service and the challenge against the said service is without merit particularly since the process server made 4 attempts at effecting personal service without success. Reliance was placed on the case of **Joseph Katana Ngala –v- Kenya Finance Corporation Limited: Mombasa CA. 129 of 1993(UR)** for the proposition that where personal service is not possible substituted service is allowed.

Counsel for the Respondent further argued that the Respondent was not giving any reason why the order of the Deputy Registrar should be set aside. In Counsel's view the Applicant had no defence to the Notice to Show Cause and is not entitled to the order sought. For this proposition reliance was placed upon the case of **Orion East Africa Ltd –v- Komothai Farmers Co-operative Society Ltd: Nairobi HCCC No.378 of 2004 (UR)** in which Njagi J. refused to set aside an ex-parte judgment for the reason inter alia that the Defendant had not shown that he had a *prima facie* defence to the Plaintiff's claim.

I have now considered the Application, the Affidavits the submissions of Counsel and the authorities cited. Having done so, I take the following view of the matter. The process server swore two affidavits. The first was sworn in proof of the service of the Notice to Show Cause on 21st February 2005. The process server deponed therein, that he visited the Applicant's residence on 29th January 2005 but did not get the Applicant. He further deponed that he again visited the same residence on 5th February 2005 when he was introduced to a Mr. Ganijee by a watchman who was not named. The unnamed watchman introduced the said Ganijee as the Applicant's son who accepted service but declined to sign the Notice to Show Cause.

In the replying affidavit sworn on 6th May 2005, the same process server deponed that Mr. Ijaz Najmudin Ganijee was known to him as the son of the Applicant, and further that the said Ijaz N. Ganijee attends Court for the hearing of this matter and several other related suits. He further deponed that the same Ijaz N. Ganijee used to serve pleadings on behalf of A.L.R. Shah Advocate upon M/S Ngatia & Associates. He also deponed that the first visit he made to the Applicant's residence was on 28th January 2005.

The two affidavits have sharp contradictions which the deponent has not to explained. In the Affidavit of service the deponent stated that he received the Notice to Show Cause for service on 28th January 2005 and made the first visit to the Applicant's residence on 29th January 2005. This statement is changed in the replying affidavit and the visit to the Applicant's residence is alleged to have been made on 28th January 2005.

The more serious inconsistency is in the description of the person upon whom the process server effected service. The process server in the affidavit of service describes the person who accepted service as a Mr. Ganijee who was introduced to him by the watchman as the Applicant's son. In the replying affidavit the process server now alleges that the person upon whom he effected service of the Notice to Show Cause was known to him. The process server indeed gives the full name of the person he served as a Mr. Ijaz Najmudin Ganijee who even attends the Court for the hearing of this matter and had previously effected service of pleadings on behalf of A.L.R. Shah Advocate. In my view a person who was so well known to the process server did not have to be introduced by an unnamed watchman. In the premises I do not believe the process server. I therefore find that the Applicant was not served with the Notice to Show Cause in question. Having found that there was no service the merits or demerits of the Notice to Show Cause do not fall for consideration. The proceedings before the Deputy Registrar on 22nd February 2005 must be set aside *ex debito justitiae*. I accordingly allow the Applicant's Application dated 12th April, 2005 in terms of prayer (c) thereof.

The Notice to Show Cause should be fixed for hearing afresh before the Deputy Registrar.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JULY 2005.

F. AZANGALALA

JUDGE

Read in the presence of:-