



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**Civil Case 277 of 1997**

**THE DELPHIS BANK LIMITED ..... PLAINTIFF**

**VERSUS**

**SAMWEL O. BALLA ..... 1st DEFENDANT**

**NICODEMUS HONGO OMOGO .....2nd DEFENDANT**

**JOHN NGAIRA SABWA .....3rd DEFENDANT**

**BENTA OUMA OBALLA.....4th DEFENDANT**

**RULING**

Benta Ouma Oballa was joined in these proceedings as the 4th defendant on 26/11/2001. Till then the other defendants were Samwel Oballa, Nicodemus Hongo Omogo and John Ngaira Sabwa.

On 28/2/2002, Oriental Commercial Bank Limited, originally known as The Delphis Bank Ltd, which is the plaintiff herein, obtained a decree against the 4th defendant, which it then proceeded to execute.

The 4th defendant, who I shall now refer to as the applicant, who feels aggrieved by the said action has now moved this court in an application in which she seeks an order to stay the execution of the said decree. She also seeks an order to set aside that ex parte judgment, and to be granted leave to file her defence out of time.

She bases her application on the grounds that she was never served with the summons to enter appearance and the plaint, and that she has an arguable defence to the claim.

I have considered the pleadings and the submission of both counsel. It is important to note at this stage that though the decree is dated 28/2/2002, the ex parte judgment for failure to enter appearance was not entered against the applicant until a year later, on 28/2/2003, and on this ground alone I would be inclined to set aside the decree as it was issued before the default judgment was granted.

Be that as it may, in an application of this nature, the onus to prove lack of service lies on the applicant.

She depones that she was not personally served with the original plaint and summons or even the amended plaint which was filed after judgment had been entered against her; that she only became aware of the suit on 22.3.2005 when she was served with a notice to show cause, why she should not be committed to civil jail.

The plaintiff, who opposes this application, however maintains that the relevant documents were served

upon her on 24/10/2002, and the relevant affidavit of service is annexed to the replying affidavit. The only proof of service on this applicant is found in the affidavit of service, where process server depones in paragraphs 4 & 5 as follows:

*“That on the same day at around 4.30 p.m. (24/10/2002) accompanied by the said Bob Mweya we proceeded to Milimani Estate within Kisumu Town and upon reaching there we met MR. SAMUEL OBALA the 1st defendant herein and I introduced myself to him and the nature of my mission and served him with the said Summons to Enter appearance together with the Plaint by tendering a copy to him and requesting him to sign at the back of the return copy.*

*That he accepted service and signed at the back of the return, which I consequently return to Court duly served.”*

The mode of service is provided for in Order V rules 9, 12, 13 and 14 of the Civil Procedure Rules, which stipulate that:

*9. (1) Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.*

*(2) A summons may be delivered to an advocate who has instructions to accept service and to enter an appearance to the summons, but judgment in default of appearance may not be entered after such delivery.*

*12. Where in any suit the defendant cannot be found, service may be made on an agent of the defendant empowered to accept service or on any adult member of the family of the defendant who is residing with him.*

*13. Where a duplicate of the summons is duly delivered or tendered to the defendant personally or to an agent or other person on his behalf, the defendant or such agent or other person shall be required to endorse an acknowledgement of service on the original summons:*

*Provided that, if the court is satisfied that the defendant or such agent or other person has refused so to endorse, the court may declare the summons to have been duly served.*

*14. Where the serving officer, after using all due and reasonable diligence, cannot find the defendant, or any person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the court from which it was issued, together with a return of service.”*

It is not controverted that service was effected on a person other than the 4th defendant, this is despite the requirement that *“where there are more defendants than one, service of the summons shall be made on each defendant”*. (rule 8 of the aforementioned Order).

As I understand it, the above provision of the law provide that service can only be effected on a third party where due and diligent efforts to trace the party to the suit have failed, yet the process server does not give any sufficient reasons why he had to serve it on the third party, who in any event was not her agent, nor does he show what efforts he had made prior to the contentious service, or even that his efforts had been in vain. Lack of such disclosure renders the service ineffective and the only logical conclusion is that the process server failed to comply with the laid down procedure on service. I therefore find that service of the aforementioned documents was not effected, as is required.

But that was not all, for it is on record, that the plaint was amended on 9/8/2004, which was after the

default judgment had been entered, yet there is no evidence that the further amended plaint was ever served on the applicant.

It cannot be gainsaid that all pleadings including all amendments thereto must be served on all parties to the suit. Needless to say where a plaint is amended after judgment has already been entered and decree issued, the net effect of the said amendment would be to set aside the judgment and decree, and unless judgment is entered afresh, execution cannot lie. I would for the above reasons allow this application.

It is trite law that where the proposed defence raises even a single triable issue, the defendant should be given leave to defend the suit otherwise there would be no need to set aside a default judgment.

As expected of me in an application of nature, I have therefore looked at the proposed defence, which is attached to the application, and in my mind, it raises several triable issues.

I do in the circumstances allow this application. The ex parte default judgment is hereby set aside, and I do order that the defence be filed and served within the next fourteen days.

Costs shall however be in the cause.

Dated at Eldoret this 19th day of July 2005.

JEANNE GACHECHE

Judge

Delivered at Eldoret this 27th day of July 2005.

GEORGE DULU

JUDGE

Delivered in the presence of:

Mr. Gicheru for plaintiff

No appearance for defendants