



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
Civil Suit 816 of 2000

HOUSING FINANCE COMPANY OF KENYA LIMITED.....PLAINTIFF

VERSUS

JUSTUS OKWATCHO.....1ST DEFENDANT

PRISCILLA NYAWIRA OKWATCHO.....2ND DEFENDANT

RULING

The defendants by their chamber summons dated 24th June 2005 seek the setting aside of judgment and decree obtained by the plaintiff in default of appearance. The application is brought under Order I XA Rule 10.

The defendants charged their property **NAIROBI BLOCK 106/5** to the plaintiff on or about 1990 for kshs 630, 000. In the affidavit of the 1st defendant, in support of the application it is deponed that the interest chargeable was not 16.5% per annum; that neither he nor the second defendant were served with statutory notice, of the plaintiff's intention to sell the charged property; that both defendants were not aware of the advertisement of the charged property and as a consequence of not being aware, of the sale of the charged property, they were unable to monitor the auction sale; that they were unaware of the interest charged in the plaintiff. The 1st defendant denied that they were ever served with the summons. In submissions the defendant's counsel found fault with the affidavit to service; counsel said that the defendants were not served, and particularly emphasized that the affidavit of service, does not disclose that the 2nd defendant, was served. He denied that the cell phone number, given in the affidavit of service, belonged to the 1st defendant. Counsel submitted that the particulars given by the process server, regarding 1st defendant's place of residence was conjunctive; he said if indeed service was effected then nothing would have been easier than the 1st defendant acknowledging service. In view of the large amount in this claim, counsel said it was important for the court to be satisfied about service. Counsel argued that under section 74 (3) Registered Land Act (cap 300) the only option opened to the plaintiff was to file suit, and not to sell the charged property. Counsel said that in any case the defendants were not notified of the sale, and therefore the due process of a sale of a charged property was not followed. Counsel drew the court's attention to the draft defence annexed to the supporting affidavit.

The application was opposed. The replying affidavit stated that the plaintiff had in all circumstances acted within the law and followed the valid procedures. That the defendants, on defaulting were served with demand notices, statutory notice, and notifications of sale. The deponent stated that the application ought not to be granted and that the draft defence was a mere denial. Plaintiff's counsel in opposition drew the court's attention to the affidavit of service and said that it was the defendants who selected not to file their defence or memorandum. That it was the duty of the defendants to ask for the process server to avail himself for cross examination, but this they did not do, and therefore the service, cannot be discredited. That it was also not enough for the defendant, to say that they did not default in payment, of

their debt, and yet fail to annex evidence of repayment.

The defendants counsel in final response said that under Order 5 rule 15 the court can summon the process server to attend court for cross examination. That it was not the burden of the defendant to summon the process server. Counsel also argued that the affidavit of service breached section 35 of the Advocates Act for having been drawn by an unqualified person. To this, plaintiff's counsel responded that the affidavit was competent and capable of assisting the court in determination of service.

I wish to start by considering the submissions by defence counsel on Section 35 Cap 16. That section lays an obligation, on any person drawing documents stated in section 34, to endorse the name and address of the firm of advocates. I have looked at the affidavit of service filed in court on 19th May 2004. The said affidavit is drawn by Francis M Ndaiga and it is filed by Mathenge Muchemi Advocates. There was no evidence presented before me, that the said Francis Ndaiga is not advocate, but even if he was not an advocate I am satisfied that the mischief these two sections were addressing was that there be notice that there is an advocate who is answerable for the legal document. I find that having the name of Mathenge & Muchemi Advocates satisfies that requirement.

Regarding section 74 (3) RLA, which defence said laid a burden on the plaintiff to get another security from the defendants before filing suit; I was unable to follow the logic of that argument. That section provides: -

“The chargee shall be entitled to sue for the money secured by the charge in the following cases only –

(a) where the chargor is bound to repay the same;

(b) where by any cause other than the wrongful act of the chargor or chargee, the charged property is wholly or partially destroyed or the security is rendered insufficient and the chargee has given the chargor a reasonable opportunity for providing further security which will render the whole security sufficient, and the chargor has failed to provide such security;

Counsel failed to convince me that, that section is relevant to the facts before me.

In considering an application such as the one before me I am required, in exercise of my discretion to consider whether service effected on the defendant was proper. 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.”

Having considered the affidavit of service filed herein on 19th May 2004, I find that the 2nd defendant, was not served with summons as the above rule requires.

According to that affidavit only the 1st defendant was served. I therefore find that judgment entered against the 2nd defendant on 27th may 2005 to be improper and I therefore will set it aside ex debito josititiae.

In regard to the service of the 1st defendant I find that it was not faulted by the submissions made before me. To say that the affidavit was mere conjecture, merely because the 1st defendant did not acknowledge service is I think to simplify the matter. It is not always that parties agree to acknowledge service of process on them, they do, for own reason refuse to acknowledge service. I do therefore find the service on the 1st defendant was proper. In exercise of my discretion, I am obligated to consider whether the draft defence herein, is a reasonable one or whether it raises triable issues: See PATEL V CARGO HANDLING SERVICES LTD [1974] EA 75.

The draft defence denies the rate of interest to be 16.5% per annum and yet the charge instrument, which the 1st defendant does not deny signing contains the rate of interest at 16.5% per annum. The

defendants then, in their defence, went into a lot of detail about their lack of knowledge of their indebtedness, of the sale of the charge property and of any demands sent to them. The argument in the defence, essentially is saying, that the sale of the property was wrongful. Having said that the sale was wrongful the defendants do not counter claim for the loss of the property. Their failure to counter claim leaves their defence to be categorized as a mere denial. It is not conceivable that one who says, that their property ought not to have been sold, and then allege that it was fraudulently sold can do so without seeking a counter claim. To fail to file a counter claim leaves the defendants complaint to be empty clamour. I find that the draft defence herein raises no triable issues that can go for trial.

I also find that there is no obligation on the court to summon the process server for cross-examination. It is the responsibility of the applicant to so summon him.

The end result is that the court will issue the following order: -

(1) That judgment entered on 27th May 2005 as it relates to the 2nd defendant is hereby set aside for lack of service;

(2) The application dated 24th June 2004 as it relates to the 1st defendant is hereby dismissed with costs to the plaintiff.

Date and delivered this 17th day of August 2005. MARY KASANGO

**MARY KASANGO
JUDGE**