REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 2 of 2002

(From the ruling of the Chief Magistrate (Mrs. G. A. Ndeda) in Nakuru CMCC No. 766 of 2001 dated 14th December, 2001)

NAHASHON OCHIENG ONYANGO……..…..APPELLANT

VERSUS

SOKORO FIBRE BOARDS LTD……...RESPONDENT

JUDGMENT

The appeal herein arose from a ruling delivered on 14th December, 2001 in respect of an application dated 25th October 2001. In that application, the appellant had prayed for stay of execution of the judgment that had been entered against him in default of appearance and defence. He had also prayed for an injunction to prohibit the respondent from further occupation of a parcel of land known as **No. 530/25** in Elburgon town which he claimed was his. He had further prayed that the status quo that obtained prior to the entry of the ex-parte judgment be maintained.

He claimed that the respondent had failed to serve him with summons to enter appearance and that was why he had not filed a memorandum of appearance and defence. He argued that the affidavit of service that had been filed by the process server was false and defective.

The court held that the appellant had been properly served with summons to enter appearance. The court further held that the appellant's proposed defence did not show that he was the registered owner of the suit premises as he had alleged. The court also stated that the appellant had already been evicted from the suit premises and so the court could not order that the original status quo be maintained. The said application was dismissed with costs and that triggered off this appeal. In his memorandum of appeal, the appellant raised the following issues:-

(a) That the appellant had not been served with summons to enter appearance.

(b) That the process server, not being an authorised officer of the respondent could not competently swear an affidavit in reply to the appellant's application to set aside the said judgment.

(c) That the learned trial magistrate erred in law and fact in failing to find that the proposed defence and counter-claim raised triable issues.

(d) That the learned trial magistrate erred in failing to find that the appellant had occupied the suit land for over 30 years.

Mr. Nyagaka for the respondent opposed the appeal and submitted that the appellant was a licencee over the suit premises when he was an employee of the respondent and upon termination of his contract, he was given notice to vacate but he refused to do so and thus became a trespasser. He further submitted that service of summons to enter appearance was properly effected upon the appellant and thereafter an appropriate affidavit of service was filed.

When an application to set aside the judgment was filed on the ground that there was no service, the process server was duly authorised by the respondent to file a replying affidavit to confirm that he had properly served the appellant, Mr. Nyagaka submitted.He urged the court to dismiss the appeal.

Having summarised the rival arguments that were raised by both sides, I find that the main issues that arise for determination in this matter are as follows:-

(a) The propriety of the respondent's claim in the original suit.

(b) Whether the appellant was duly served with summons to enter appearance.

(c) Whether the appellant's proposed defence had any merits.

The respondent stated in paragraph 3 of its plaint that:-

"3. The plaintiff is the registered owner of all that

piece or parcel of land known as L.R. NO. 530/325

in Elburgon Township."

It then went on to allege that the appellant had trespassed upon that parcel of land and sought his eviction.

During the formal proof, the respondent called one witness, Moses Obura, its personnel Manager and in the relevant part of his testimony in proof of the respondent's claim he stated as follows:-

"I know the Defendant. He used to be contracted to lift logs

from the forest. He is no longer a contractor. He lives in the

factory compound. We told him to vacate."

The witness did not make any effort to prove that the aforesaid parcel of land was owned by the respondent as had been alleged in the plaint. He did not state what land parcel number the appellant was allegedly occupying. It is trite law that he who alleges must prove. The burden of proof is the same even in a formal proof. The respondent did not make any reference to L.R. No. 530/325 or produce any document in proof of ownership of the said property which was the most important thing the respondent should have done in the formal proof. Before a litigant is pronounced the owner of a registered property and granted by a court of law eviction orders against an alleged trespasser thereto, he must first prove that he is lawfully entitled to the property to the exclusion of the alleged trespasser and the respondent failed to tender such evidence as would have been sufficient to prove its claim. In the circumstances, eviction orders should not have issued as against the appellant.

I now turn to the issue of service of summons to enter appearance. The process server deponed in his affidavit that upon receipt of the summons and plaint from the respondent's advocates, he proceeded to Elburgon and contacted the appellant's personnel manager, Mr. Moses Obura to direct him and identify the appellant. He further stated that as they stood along the respondent's security perimetre fence, Mr.

Obura pointed to him a man whom he identified as the appellant then the process server approached him.

The process server stated in paragraph 4 of his affidavit as follows:-

> ***"4. That as I introduced myself to the defendant, he agreed with the***
>
> ***contents of the plaint, but stated that he cannot sign the original summons***
>
> ***for this was cooked up case by the plaintiff but stated that he will take the***
>
> ***papers to his lawyers who will advice him accordingly and I left him with***
>
> ***the papers and treated them as officially served."***

According to the provisions of order **V Rule 15,** affidavits of service should take the format as shown in **Form No. 8 of Appendix A** with such variations as circumstances may require. The illustrative affidavit exhibited in Form No. 8 of Appendix A shows that the process server must tender a copy of the summons to enter appearance upon the person to be served and require him to sign on the original summons. He may sign or refuse to sign but the process server is required to return the original summons either signed or unsigned together with his affidavit of service.

There is no express indication by the process server that he tendered the summons to the appellant and requested him to sign on the original thereof.

But even more important, the process server did not indicate the place at which he served the appellant, if at all he did. He merely stated that the appellant was pointed out to him from across a security fence. Was the appellant served in his home or somewhere within the respondent's premies or somewhere just next to the said fence? How soon was it after he had allegedly been identified to him by Mr. Obura?

The said affidavit of service was defective and it left serious doubts hanging in my mind as to whether the appellant was actually served with summons to enter appearance and the plaint.

Taking into consideration the appellant's proposed defence and counter claim that he had been residing on the suit premises for nearly 35 years, I am inclined to believe that had he been served with the court process he would have taken urgent steps to defend the suit.Though he did not exhibit a copy of any title deed for the suit premises, he showed copies of an allotment letter in respect of the suit land, letter of acceptance of the allotment, receipt for payment of various sums which he was required to pay for the said property, a letter from the County Council of Nakuru showing that he had been living on the land since 1965 and receipts issued to him by the then County Council of the Central Rift on 8/2/65 and Nakuru County council in respect of the suit land. Although all the said documents are not conclusive evidence that he was the rightful owner of the land, they pointed to the fact that his proposed defence was not frivolous and required serious consideration, particularly so in view of the fact that the respondent had not produced any title deed to prove its ownership of the suit premises.

As was held in **GANDHI BROTHERS VS H. K. NJAGE T/A H. K. ENTERPRISES** Milimani Commercial Courts at Nairobi, HCCC No. 1330 of 2001 (unreported) if there is no proper service of summons to enter appearance, the resulting default judgment is irregular and must be set aside ***ex debito justitiae*** and as I have already pointed out, the service of the summons in this matter was defective, if at all there was any. The trial court should therefore have set aside the ex parte judgment which I hereby do.

Having reached that conclusion, I allow the appeal and direct that the appellant files and serves his defence within the next fifteen (15) days from the date hereof and the suit, CMCC No. 766 of 2001 be heard before a court of competent jurisdiction.

The respondent shall bear the costs of this appeal.

DATED, SIGNED AND DELIVERED at Nakuru this 18th day of November, 2005.

D. MUSINGA

JUDGE

18/11/2005

Judgment delivered in chambers in the presence of M. Orege for the appellant and Mr. Nyagaka for the **respondent.**

D. MUSINGA

JUDGE

18/11/2005