Muya *v* Shah

High Court, at Nairobi September 28, 1992

Tanui J

Civil Case No 486 of 1990

Civil Practice and Procedure *– judgment in default of appearance and defence – discretion of the courts to set aside – whether where service is improper the Courts have the discretion.*

Civil Practice and Procedure *- Service of Summons – defendant's brother served with summons on his behalf on first visit and without ascertaining whether he had authority to accept service – whether service proper.*

The applicant in this suit was sued by the respondent and judgment entered against him in default of appearance and defence. The case thereafter proceeded for formal proof and damages in the sum of Kshs 150,000 awarded against him.

On application for setting aside default judgment and consequential orders, it was submitted by his counsel that the alleged service of summons on his brother was defective. The process server initially said in his affidavit of service that he served the defendant's brother at his place of work where the two were partners in business. Later on he swore another affidavit in which he stated that the defendant's brother who was allegedly served lived with him.

The respondent is opposing the application for setting aside submitted that the elder brother was indeed served and he infact lives with the applicant. In any event service of summons was later confirmed by the applicant's insurance company who wrote to the respondent's advocate.

Held:

1. Where judgment has been entered under order IXA rule 10 the Court may set aside or vary such judgment and any consequent decree or order upon such terms as just.

2. Judgment in this case was entered in default of entry of appearance by the defendant and therefore falls within the provisions of order IXA. The language with which the rule is couched indicates that the Court has a wide discretion on the matter.

3. Where there has been no proper service of the summons the Court does not have a discretion such as appeared to be conferred upon it by order IXA rule 10.

4. Under order 5 rule 9(1) it is stipulated that whenever it is practicable service shall be on the defendant in person unless he has an agent empowered to accept service.

5. In the present case there is no evidence that the defendant had an agent. It was therefore incumbent upon the process server to look for the defendant not once but a number of times before he could fall for the alternative.

Application allowed.

Cases

Narani v Ramji (1954) 21 EACA 20

Statutes

Civil Procedure Rules (cap 21 Sub Leg) order V rules 9(1), 12; order IXA rules 10, 11

Advocates

Mr Bowry for Applicant

Mrs Magunga for Respondent

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 486 OF 1990

MUYA .....APPLICANT

VERSUS

SHAH.....RESPONDENT

RULING

This is an application by Life Concord Insurance Company Limited for orders that the *ex-parte* judgment entered against the defendant and the decree passed in this case by which damages with interests and costs were awarded to the plaintiff be set aside and (b) that the defendant be granted leave to file a defence. The application which is brought by Summons in Chambers under order IXA rule 10 and 11 of the Civil Procedure Rules is grounded on an affidavit of Mr Nduati, a Claims Supervisor with the said insurance company sworn on the 29th of January 1992 and further relies on a statement of grounds of opposition filed herein on the 30th of March 1990, a replying affidavit of Mr Gembe the advocate who was in conduct of this case on behalf of the plaintiff sworn on the 26th March 1992. The plaintiff also relies on other three affidavits of Mr Gembe, Mr Marogia the process server and his own.

The events leading to this appeal are that on the 12th February 1989 the plaintiff sustained severe personal injuries as a result of a road accident in Nakuru. She was taken to Nakuru General Hospital where she was admitted and remained as in-patient for a period of one month while undergoing treatment. As the plaintiff had sustained the said injuries as result of a motor cycle she was riding on colliding with the defendant's vehicle, she instituted this suit on 1st October 1990 against the said defendant, claiming damages as compensation for her injuries. However the defendant did not enter appearance within the stipulated time and an interlocutory judgment was sought and obtained. The same was later on formally proved and the plaintiff was awarded Shs 150,000/- as general damages and Shs 1100 as specific damages with costs and interests on the 17th September 1991. On 27th February 1992 the said insurance company lodged this present application and on the 30th March 1992 formally sought a stay of execution of the decree pending hearing *inter-partes* of the former application and the same granted.

Mr Bowry for the insurance company submitted at the hearing of the application that service of the summons upon the defendant was bad and defective in that it was served upon a brother of the defendant who refused to sign it. According to Mr Bowry the process server had stated in his affidavit of 6th November 1990 that the elder brother of the defendant was only a business partner but in a later affidavit

sworn on the 8th June the process server tried to state that the said elder brother of the defendant was working and staying with the defendant. Mr Bowry stated that this claim that the defendant and his elder brother who was served with the summons were staying together with the defendants was an afterthought stated to circumvent the provisions of the law. Mr Bowry further stated that his client insurance company was misled by the plaintiff's advocate into believing that while negotiations were going on no suit would be instituted against the defendant as stated in the affidavit of Mr Nduati. But suit was filed and while negotiations were going on without notice and consequently according to Mr Bowry the insurance company was unfairly treated especially when it had sought the opinion of a second doctor as to the injuries sustained by the plaintiff but the doctor was not accorded the necessary opportunity to examine the plaintiff. Mr Bowry stated that there are triable issues in this case which should enable the defendant to defend the suit.

Mrs Magunga for the plaintiff opposing the application submitted that the elder brother of the defendant who was served with summons works and lives with him and that the service was therefore proper. She claimed that the service of the summons was later on confirmed by the insurance company by letter it wrote to the advocates for the plaintiff. According to Mrs Magunga the failure on the part of the defendant to enter appearance was fatal to this case. She further stated that there was no undertaking by the advocates for the plaintiff not to institute the suit as claimed and as there was an undue delay on the part of the insurance company to settle the matter the plaintiff had no option but to file a suit against the defendant. Mrs Magunga felt that the insurance company has also been sufficiently diligent in bringing in this application in good time and for that reason the application ought to be dismissed. As to the appointment of a second doctor, Mrs Magunga claimed that the letter from the insurance company was received after formal proof had been conducted. She dismissed the claim that there were triable issues raised by the insurance company as no draft defence has been made available to the Court and that the defence in the HCCC No 756 1991 cannot be a defence in the present suit.

This is stated to be brought under order IXA rule 10 of the Civil Procedure Rules which reads:-

> "10 where judgment has been entered under this order the Court may set aside or vary such judgment and any consequent decree on order upon such terms as just."

As indicated above judgment in this case was entered in default of entry of appearance by the defendant of this application and therefore falls within the provisions of order IXA which lays down the consequences of non-appearance and default in defence. The language with which the above quoted rule is couched is in such a manner which indicates that the Court has a wide discretion on the matter. However the former Court of Appeal for Eastern Africa in the case of *Kanji Narani v Velji Ramji* (1954) 21 EACA 20 held that where there has been no proper service of the summons the Court does not have a discretion such as appears to be conferred upon a Court by order IXA rule 10.

The insurance company has urged this Court that service of the summons was not properly effected upon the defendant as was claimed. The plaintiff on the other hand claimes that the service was effected upon the brother of the defendant and that the insurance company acknowledged it as evidenced by their letter to the advocates for the plaintiff.

The provisions in the Civil Procedure Rules for service of summons and other processes are contained in order 5. Under rule 9(1) of the order it is stipulated that whenever it is practicable service shall be made on the defendant in person unless he has an agent empowered to accept service. In the present case there is no evidence that the defendant had an agent. It was therefore incumbent upon the process server to look for the defendant not once but on a number of times before he could fall upon the alternative. Rule 12 of the said order states that where the defendant cannot be found service may be made on an agent of the defendant empowered to accept service or on any member of the family of the defendant who is residing with him.

In the present case there is no evidence that the defendant could not be found. He might have gone to the bank or gone back to his house for that matter. The process server did not make any attempts to effect service upon the defendant in person as can be seen.

When it came to service the said process server said he served the summons upon the brother of the defendant who works together with the defendant. The Civil Procedure Rules do not make this the condition of serving upon the brother. The main consideration is “the adult member of the family who lives with him”. The attempt by the process server to state that the defendant lives with his brother appears as suggested by Mr Bowry as an afterthought, as if he was serious he should have stated the place where both live.

The end result of this examination is that the service of the summons was defective for all purposes and as this Court does not have any discretion on the matter of the *ex-parte* judgment as was held in *Kanji Narani* case and there are no terms to be considered. The *ex-parte* judgment entered against the defendant is therefore set aside. The defendant will have the costs of this application.

In view of this development it is not necessary to examine the other issues raised by the learned counsel during the hearing of this application.

Dated and delivered at Nairobi this 28th day of September 1992.

B.K TANUI

JUDGE