REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT 258 OF 2000

RAPANDO ..... PLAINTIFF

VERSUS

OUMA & 6 OTHERS ..... DEFENDANT

RULING

The matter before me concerns the exercise of judicial discretion under order IXA rule 10 and 11 and section 3A of the Civil Procedure Rules and Act. The application by way of chamber summons dated 5/10/03, which *inter alia* prayed for:

(c) that the *exparte* judgment herein and all consequential orders be set side and/or reviewed.

(d) that the applicant be granted leave to file defence outside time."

The application is supported by the affidavit of the applicant namely Constantine Ouma who alleges that at the time the alleged service was effected, he was sick and was being treated at St Elizabeth Hospital Mukumu and confirms no service was effected upon him, during that time and/or any other time. The applicant further states he does not know anybody by the names Bwire Ouma and Joseph Mbugo whom the process server claims to have served the summons on his behalf. The applicant complains that the farming contract number 39629 does not fall on the land in dispute herein but on his own different piece and parcel number 1307 after sub division of plot number 149. He claims the land in dispute is on 1308 and he should not suffer as he was never served and much more the land in dispute is completely different from his sugarcane farming contract.

It was the submission, of Mr D Otieno learned counsel for the applicant that since the applicant has denied knowledge of the two persons who accepted service on his behalf and since the respondent did not disclose and/or explain the relationship between the applicant and the said person, then the application ought succeed. He further submitted that there is no credible evidence that proper service, as envisaged under order 5 rule 12 was effected by the respondent.

However, the application was opposed by Mr Kasamani learned counsel for the respondent who urged me to dismiss the application for it was unmysterious on the following grounds.

(1) That the 1st defendant is guilty as laches as the decree sought to be set aside is dated 13th July 2001 therefore the applicant should not benefit from the discretion of the Court.

(2) That the applicant was properly served and the person served is an adult family member of the

applicant and since he does not deny the physical address on the affidavit of service, then that ought to be his place of residence.

(3) That the applicant has no defence and it would be an exercise infutility to set aside judgment which is three years old, hence he urged me to dismiss the application with costs.

The matter that has fallen for my determination is whether there was proper service, whether proper summons were taken out by the plaintiff and/or whether proper summons were taken out by the plaintiff and/or whether the said summons were properly effected on the first defendant/applicant herein. As I understand personal service has been and would be good mode of service without underscoring other acceptable mode of service. As per order V rule 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". It is clear that the law permits that service be affected on the defendant and/or such service shall always be effected on the defendant unless there are compelling reasons to not to do so and in such circumstances other mode of service is permitted. However it is mandatory that the person serving must state in a return of service the following.:

(1) Time when service was effected on the said person

(2) The manner in which summons were served.

(3) The name and address of the person identifying the person served.

(4) The place where service was effected.

(5) Whether the person serving is known to the person served.

(6) If no personal service, the person serving must indicate the relationship between the person served and the person summons were directed at in a precise manner.

(7) Must indicate that he required his/her signature in order to validate any purported service as that is the mandatory requirement of order V rule 15 and failure to adhere to the same would lead to rejection of such irregular service.

It is not in dispute that no personal service was effected on the first defendant/applicant and it also not in dispute the person served was not a known agent of the applicant. However, it is contended by the respondent that proper service was done hence the discretion of the Court cannot/ should not be exercised in favour of the applicant.

As regards the exercise of my discretion, certain fundamental principles must be satisfied and/or established. In *Patel v EA Cargo Handling Services Ltd* (1974) it was held "there be no limits or restriction on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just ……the main concern of the Courts is to do justice to the parties and the Court will not impose conditions on itself to fetter the wide discretion given it by the rules." I must add that discretionary power must be exercised judicially and not arbitrarily in order to safeguard the interest of both parties. In doing so the Court must be guided by the facts and circumstances both prior and subsequent and the respective merits of the parties claim.

I have looked at the plaintiff's claim which is in respect of LR No N/ Wanga Koyonzo 1308 while the first defendant's sugarcane farming contract is on 1307, which is completely different from that of the plaintiff, that is the defence of the applicant which I must consider though not on a defence. As earlier stated the main concern of the Court is to do justice to the parties, however the Court has no discretion where it appears there has been no proper service, it becomes mandatory to set aside the *ex parte* judgment.

I am aware that to deny a person a hearing is draconian and should be the last resort while it would be

equally bad to deny a person the fruits and success of a claim, which is justified. The Courts would always go by the basis that an *ex parte* judgment having been entered neither upon merits of the case or by the consent of the parties whether by default or otherwise is subject to the Court's discretionary powers.

I have looked at the summons to enter appearance addressed to the applicant and it is my considered opinion that the same is defective and therefore invalid. It requires the applicant to enter appearance within 10 days from the date of service instead of giving at least 10 days. Such defect makes the summons effected on the applicant improper and irregular, hence the same is defective and the applicant was not even required to act on it.

In Civil Appeal No 13/01 (unreported) *Atulkumar Maganlal Shah Vs Investment & Mortgages Bank Ltd & 2 others*. It was held by the Court of Appeal.

"It was being contended by the appellants before Mbaluto J, that the summonses which had been issued on the case and served on all the appellants and Nakumatt had all been invalid because they had provided for entry of appearance within 10 days instead of giving them atleast 10 days to enter appearance. The learned judge found that summonses had been defective on that respective and ordered fresh summons to issue and we too agree"

In *Ceneast Airlines Ltd vs Kenya Shell Ltd* Civil Appeal No 174/1999 (unreported)

"If the summons is defective the service of the same upon the other party must itself be defective."

It is clear in mind that the affidavit of service which is dated 3/10/00 states that service was affected on the same day, however the time and other essential ingredients were omitted by the process server and it is extremely difficult to attach any value to that mode of service. It was incumbent upon the process server to verify and authenticate the relationship between the person served and defendant in order to forstel any future denial by the said person. I am afraid to say that his return of service was too casual and in the process committed fundamental lapse which clearly mitigates in favour of the applicant.

Lastly it was submitted by Mr Kasamani learned counsel for the respondent that the applicant is guilty of laches, as the decree been set aside is 3 years old; However I must state that the power to set aside *ex parte* judgment does not cease and/or extinguish because of the duration and/or age of the decree. An *ex parte* judgment would be concern to a person when he gets knowledge of the same, hence I decline that submissions too, in view of what I have stated herein above I allow the application with costs and order that fresh summons be taken out and served on the 1st defendant.

Dated and Delivered at Kisumu this 9th day of February 2004.

M.WARSAME

JUDGE