

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 45 OF 200

DIM PROPERTIES LIMITED PLAINTIFF

- Versus -

J.R. EGESA DEFENDANT

R U L I N G

Two applications in this suit came up for hearing on the 2nd March 2004. the first one dated the 8th July 2003 is by the plaintiff seeking to have the defendant committed to civil jail for contempt of court. The second one dated the 15th September and amended on the 25th September 2003 is by the defendant in which he seeks to set aside the order of injunction issued by this court on the 24th March 2003 together with all consequential orders arising therefrom, to set aside the ex-parte judgment entered herein on the 20th June 2003 and grant the defendant leave to defend unconditionally and also to set aside the order of 3rd July 2003 granting the plaintiff leave to institute contempt proceedings against the defendant. Before the applications were heard there was argument as to which application should be heard first. I ordered that both the application be heard at the same time but that the defendant's be argued first. At the end of the hearing of the defendant's application both parties agreed that I should rule on that application before the plaintiff's is heard.

The defendant's application is supported by his affidavit sworn and filed on the 15th September 2003 in which the defendant deposed inter alia that he has never been served with the summons to enter appearance or the application for injunction. Mr. Okello, learned state counsel for the defendant, submitted that the affidavit of service by the process server alleging that the defendant was personally known to him should be struck out as it does not disclose the source of the deponent's knowledge. He cited the cases of **Assanand & Sons -Vs- E.A. Records Ltd. [1959] E.A. 360 (CA) and Caspair Ltd. - Vs- Harry Gandy [1962] E.A. 414** as authorities for that proposition. Mr. Okello also submitted that the defendant failed to inform the court that sections 12 and 13 of the Government Proceedings Act had not been complied with and that an injunction cannot be issued against a government officer as that could contravene section 16 of the same Act.

In response Mr. Khanna for the plaintiff argued that both the verifying affidavit and the affidavit of service do not contain any matter of information and are therefore not defective. On the case Mr. Khanna argued that the plaintiff decided to sue the defendant personally because, first, there is nothing to show that the defendant acted on any one's orders when he placed police to guard the property. Secondly, that the way the government has chosen to take back the property is illegal and that the defendant in acting illegally he has to be sued in his personal capacity.

I have perused the impugned affidavits. I agree with Mr. Khanna that there are no matters of information deposed in either of them. The cases cited by Mr. Okello are therefore distinguishable. In the **Caspair Ltd.** case for instance the affidavit by counsel sitting in Kampala alleged that a witness in Southern Cameroon was prevented by his duties from coming to Uganda to testify. The deponent did not say how he knew that the witness was so prevented. In both the verifying and the affidavit of service the matters deposed therein are from the respective deponents' personal knowledge. They are not matters one could expect the deponents not to have personal knowledge of to necessitate the revelation of the source of knowledge.

Counsel's argument that the plaintiff failed to serve or disclose that notice under sections 12 and 13A of the Government Proceedings Act had not been served has, in my view, no basis at this stage. The plaintiff's contention is that it has a claim against the defendant in his personal capacity. I cannot at this

stage, before hearing the parties, decide whether or not that contention is well founded. As is clear from the draft defence that is the defendant's major ground of attack which, as I have said, will be decided after hearing the case.

On the issue of service the defendant denies having been served with the summons to enter appearance or the application for injunction. It is his word against that of the process server. Neither party found it necessary to summon the process server for cross-examination on his affidavit of service. So I have no option but to peruse it and the affidavit of the defendant and decide who between the two is to be believed.

The process server simply states that he went to the District Commissioner's office at Mombasa, found the defendant and served him. While acknowledging that the defendant is the District Commissioner Mombasa he does not say whether or not he first talked with the defendant's secretary. One would have expected the process server to first talk with the defendant's secretary before going into his office unless he found him outside his office which is not stated. The defendant on the other hand avers and acknowledges receipt of the initial demand notice which he passed on together with his file to the Attorney General's office. He also admits having on the 26th June 2003 been served with the plaintiff's advocates' letter dated 25th June 2003 and the court order of 29th April 2003. On receipt of those documents he wrote to his Permanent Secretary with a copy to the Provincial State Counsel. The defendant also admits having, on the 21st July 2003, been served with the application seeking to have him cited for contempt of court. He immediately called the state counsel for advice on it. In the circumstances I am inclined to believe the defendant when he says that he was not served with the summons to enter appearance and the application for injunction. Why would he accept service of and sign for all other documents including the original demand notice and refuse to formally accept service of the summons to enter appearance and the application for injunction. On the material placed before me I find that the defendant was not served with the summons to enter appearance or the application for injunction.

Where there is no service of summons to enter appearance or where the service is improper or doubtful the court has no discretion to exercise when deciding on an application to set aside ex-parte judgment entered pursuant thereto. It has to set the judgment aside as a matter of judicial duty. **In Remco Ltd. Vs Mistry Jakva Parbat & Co. Ltd. [2002] 1 E.A. 233** Ringera J. stated at page 235 - 6 thus:- "... if there is no proper or any service of summons to enter appearance to the suit the resulting default judgment is an irregular one which the court must set aside ex debito justitiae (as a matter of right) on an application by the defendant. Such judgment is not set aside in exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself".

In the circumstances I set aside the interlocutory ex-parte judgment entered herein and the ex-parte order of injunction issued by this court on the 24th March 2003 as both were based on the alleged service which I have held was not effected. I must add that even if I had found that there was service, in view of the trial issues raised in the draft defence, I would, on the authority of **Patel Vs E.A. Cargo Handling Services [1974] E.A. 75**, have still set aside the ex-parte judgment herein. In that case Duffs P stated:- "**The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits does not mean in my view, a defence that must succeed, it means as Sheridan J. put it 'a triable issue' that is an issue which raises a prima facie defence and which should go to trial for adjudication**". The defendant shall have the costs of this application.

DATED this 26th day of March 2004.

D.K. Maraga

Ag. JUDGE

