



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CIVIL CASE NO. 91 OF 1998

NATIONAL BANK OF KENYA PLAINTIFF

VERSUS

PETER OLOO ARINGO DEFENDANT

RULING

The matter before me concerns the application dated 9th September 2003 brought Under Section 3, 3A, and 34 (1) of the Civil Procedure Act and Order 5 Rule 16, Order 9A Rule 10 and 11 and Order 21 (1) and its by way of Chamber Summons. The main prayer in that application is:-

"That the proceedings, interlocutory judgment and the decree herein issued be set aside and the defendant be served with Summons to enter appearance and the plaintiff."

The application was supported by applicants affidavits, in the name supporting affidavit and further affidavit. The applicant was also availed for cross-examination. It was the submission Mr. Kinyanjui Advocate for the applicant that the core issue in this somewhat acrimonious matter is whether the defendant was served at all in law with Summons. He stated that the defendant was never directly and/or indirectly served with the summons and he learnt the existence of the present through the press on 3.9.2003 as a result of a Bankruptcy Notice, which appeared in the daily press. When the firm of his application was attacked, Mr. Kinyanjui stated that the principle plea on his application is set aside the exparte judgment and moreover the filing a separate Notice of Motion would have split the matter and would be too tedious states Mr. Kinyanjui.

On his part Mr. Odunga emphatically opposed the application and filed two affidavits and availed the Process Server for crossexamination. It was the submission of Mr. Odunga that the application is incompetent as part of the application requires to be brought by way of Notice of Motion, while the other required a Chamber Summons, as the application was brought Under several provisions of the Civil Procedure. He also attacked the affidavit of the applicants in that some parts were not true. I must state that the purpose of the Court to do justice to the parties and determine questions, issues ----- rights of parties on merit. My view the essential point of going to Court is to have your case decided on merit and the Court would always endeavour to do so by even to do so by even excusing mistakes, representations and/or procedures technicalities provided such excuse does not prejudice the other party's case. With respect our Courts are not Police Training College or Army Training College or National Youth Serve Training College, whose ultimate and foremost goal is to install discipline but ours is to do justice. I have noted the application was brought Under several sections of the Civil Procedure Act and Several Orders of the Civil Procedure Rules, which requires different ways instituting application Under those provisions in my view to adopt different modes is meant to simplify the procedure of litigation and not to instill discipline. I entirely agree with Mr. Kinyanjui that to adopt two different modes would be too tedious and would consume judicial time, therefore the objection is rejected.

On merit I have considered the application, the affidavits filed on record by both sides and the oral evidence of the applicant and the process server, though regrettably extend to undue prolixity and unnecessary acrimony. To me the epicenter and the simple point I am called to determine is whether the defendant was properly served with the summons and what are the consequences of non compliance with the law of Service of Summons. According to 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."

The above manifestly confirms that personal and/or direct service is a good mode of service, while I appreciate the law permits other mode of service depending on the circumstances of the matter.

It is the case of the applicant the defendant has obtained an interlocutory judgment which is irregular as no service was personally served on him or his known agent and it would be unfair to place in motion execution which is based on irregular judgment. He states that he is aware of the significance of Summons and it would be foolish of him not to respond to a claim. He further states that he resides at Brooke Side Lane in Westlands in Nairobi, since 1987 and he does not reside in Kisumu or Bondo. However, I must state the Court would take judicial notice of the fact the applicant is a prominent Luo male who ought to have a rural home, though the right point is where is the location of that rural home. It is the contention of the plaintiff that the said home is at Mulaha Sub-Location, where the Process Server, served the Summons, hence the applicant is economical with the truth, alleges the plaintiff while the defendant states that he does not have a residential, temporary or rented house at the unspecified Mulaha sub-Location. He castigates the Process Server for failing to specify the village name or anything that made him identify the alleged residence. I am aware that the legal requirement is that the process server should specify the time and date he serves documents, as well as the person who points out the alleged residence of the persons he intend to effect, service upon. The gist of the matter can be found in paragraph 8 of the Return of Service by James Odhiambo Dulo and paragraph 14, 15 of the supporting affidavit and paragraph 23 of the further affidavit of the applicant. It is important to reproduce paragraph 8 of the return of service

"That on the 30 day of February 1999, at around 2.00 O'clock in the afternoon, I personally made further visits to the residential home of Peter Oloo Aringo at Mulaha sub-location, Central Alego Location, Boro Division of Siaya District but when I did not get him, I then served the summons to enter appearance together with the plaint in this suit upon Patricia Achieng who identified herself to me to be a daughter of Peter Oloo Aringo, an adult Member of the family who resides with him thereby tendering copies thereof to her and requiring her signature on the principal."

The plaintiff's reply can be found on paragraph 14 of the supporting affidavit, wherein he denies having a residential or rented house at Mulaha but explicitly states in paragraph 15.

"That I do not know anyone by the name Patricia Achieng nor do I have and have never had a daughter by the name Patricia Achieng neither do I have anyone living with me now or before by that name who the process server James Odhiambo Dulo claims to have served process due to me on."

That emphatic denial repeated in paragraph 23 of the further affidavit of the applicant wherein he lists the names and whereabouts of his children. He confirms that he has two daughters by names Elizabeth Achieng and Angela Anyango both 13 and 11 years old respectively. It must be noted immediately the lady the documents was served upon is called Patricia Achieng while one of the daughter of the applicant is Elizabeth Achieng. The one who received the documents on behalf of the applicant is an adult member of the family. The immediate question that came to my mind was whether the applicant was playing with the names of his daughter by changing the name from Patricia to Elizabeth as a matter of convenience. It was the evidence of the process server during cross-examination that the lady he served had told him that she calls Peter Oloo Aringo father and when pressed he stated that he was unable to confirm whether the

applicant was the biological father of the lady.

It is not in dispute from all the material before me that no personal service was effected on the defendant and it is not in doubt the person served was not a known agent of the defendant, but the contention the person served was, an adult family member of the applicant, hence there was a proper and legitimate service. In order the Court to validate a mode of service other than personal, which is mandatory, the persons alleging proper service must have and proof in his return of service or otherwise 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 exact place where service was affected.**
- (5) Must state in the affidavit that the person served is known to the person the summons is meant for if the person is not known to the process server.**
- (6) If no personal service the person serving should indicate the relationship between the person, served and the person summons were directed at.**
- (7) The source of the information in paragraph 6 must be also stated.**
- (8) That indicate that he/she required his/her signature and response (whether signed and/or refused to sign - (See order V. Rule 15.)**

Non-compliance with any command of the above would make any such service fatally, defective. If there is no proper service there can be now regular judgment. The basis of the judgment is whether the service was proper. The foundation is the proper service and if the foundation is faulty then the house built thereon cannot stand, definitely it would fall. Admittedly the applicant was not served but the contention is whether the lady was part and parcel of his family. It is also my view a process server ought to explain the purpose of visit and the effect of the document served, so that the person served is able to comprehend his action if omission on third party. It has not been stated in all the affidavit of the respondents and even on the oral evidence of the process server whether the said Patricia understood the effect of such service. I have noted the two daughters of the applicants are not even adults, while the said Patricia is said to be an adult family member of the applicant. It is important to verify and confirm whether the adult member alleged to have been served actually, ordinarily and/or usually resides with the defendant at the time of service, otherwise any such service would be a material breach and there would be no proper service. In John Akasirwa Vs Alfred Mai Kimuso Civil Appeal No. 16/1999. The Court of Appeal Held:-

"Proper service of summons to enter appearance in litigation is a crucial matter in the process whereby the Court satisfies itself that the other party to litigation has notice of the same and therefore chose to enter appearance or not. Hence the need for strict compliance with order 5. Rule 9

(1). The ideal form of service is personal. It is only when the defendant cannot be found that service on his agent empowered to accept service is acceptable."

In essence the Court of Appeal is saying that the best and most acceptable mode of service is personal and normally the Court may accept service on agent empowered by the principal. Apart from the assertion that the lady served was an adult family member of the applicant, there was no evidence the said place was the rural home of the applicant. To me the applicant is a prominent Kenyan and is one of the longest serving Member of Parliament and any person looking for his rural home would easily find it for he has been the M.P. of Alego Usonga for quite some times. Any person looking for his rural home and his

immediate family members would not have a lot of difficulty. It can be easily located provided you know what you are looking for and where. It appears that the process server was not serious as he never even stated the time and exact area of service. By failing to put the essential ingredient expected in such kind of service the process server was economical with the truth. I have closely observed the demeanor of the process server and in my assessment, he was evasive inconsistent and in contradictory. He was lacking confidence and could not easily remember events. In view no service was effected on the defendant and the alleged family members served to me is a concoction by the process server, therefore there was no proper or any service of the summons, the resulting judgment, is an irregular which I am bound to set aside as a matter of right. It is my judicial duty and/or obligation to set aside an irregular judgment. It is also a judicial duty not to allow the plaintiff to escape the consequences of its untruthful process server who is the cause of this protracted litigation before me.

Last I have noted that the dispute arises out of a financial facility in which the defendant sought from the plaintiff. The defendant was given financial accommodation in the name of overdraft for Kenya Shillings Two Million and Five Hundred Thousand (2500,000/=) while I have noted the 3 securities provided is valued at KSh.4.3 Million. In KISUMU MUNICIPALITY/BLOCK 3/144, the principal debt is Kenya Shillings Nine Hundred and Sixty Thousand (KShs.960,000/=), in KISUMU/MUNICIPALITY/BLOCK 3/142 an aggregate amount not exceeding Kenya Shillings Six Hundred Thousand (KShs.600,000/=) and lastly in KISUMU MUNICIPALITY/BLOCK 3/134 an aggregate amount not exceeding Kenya Shillings One Million and Twenty Thousand (KSh.1020,000/=). The interest rate was fixed at 17% P.A. and all the charge documents the maximum principal debt plus interest is Two Million Five Hundred and Eighty Thousand (KShs.2580,000/=) which means the defendant could only enjoy an amount below KShs.2580,000/= while the security the Bank held is Kenya Shillings Four Million and Three Hundred Thousand (KShs.4.3 million), according to the documents annexed to the affidavit of the plaintiff. I have also noticed that the interest rate was changed from 17% to 32 to 34% giving rise to the present figure which is over Kenya Shillings Thirty Six Million (KShs.36,000,000/=) .

The question of interest is a crucial matter which ought to be allowed to go for hearing, for the draft defence alludes to the same. There is a charge document which is the contractual and legal document between the parties, which provided for the interest rate of 17% and any subsequent change in my view ought to be agreed between the parties. The other point is why the Bank failed to consider its statutory power of sale when the debt was in the range of the value of the security, in order to safeguard the interest of the Bank and that of the chargor. Therefore even if I were to consider my discretion, I would have considered the above issues, which do not go to the root of the application, However I stated earlier my discretion was not necessary, as the applicant is entitled to have the exparte judgment set aside as a matter of right.

The result is that the application is allowed the default judgment herein and all consequential orders are set aside. The defendant to file defence within 15 days from the date hereof. Plaintiff shall pay the costs of the application.

Delivered and Dated at Kisumu This 17th day of March 2004.

MOHAMMED WARSAME

AG. JUDGE

Ruling read in the presence of: