



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT 360 OF 1999

CONSTANCE M. MWAKITWA (suing as Personal representative

Of JAMES M. NDELEKO) PLAINTIFF

- VERSUS -

RESHMA AFTAB KHAN DEFENDANT

RULING

The Defendant seeks orders under order 9B rule 8 Order 5 rule 16 of the Civil Procedure Rules and Section 63 (a) and 3A of the Civil Procedure Act. It seeks orders as follows:-

- “1. That the service of this application be dispensed with in the first instance.
2. That there be a stay of further proceedings herein pending the hearing and determination of this application.
3. That this Honourable Court be pleased to set aside the judgement and all consequential orders of 13th June, 2002 and the defendant be allowed to defend the suit.
4. That the serving officer be examined on Oath on the averments of his affidavit.
5. That costs of this application be provided for.”

The first prayer was granted when the application came up *ex parte*. In his Submission, Mr. Kalama said the defendant was never served with a hearing notice. He then proceeded to cross-examine the process server Mr. James Oban Osamo who admitted he did not have a process server licence for the year in issue. He further admitted that his Affidavit of service did not contain all the information required as it didn't indicate the time nor the name of the person served. The other issue raised is regarding the building on which the process server said the Defence Counsel's offices were situated. The process server was however firm that the building known as Regal Chambers is also commonly referred to Regal Building. Order 5 rule 15(1) deals with the mode of service of summons. There is no other specific provision on the manner in which a hearing Notice should be served but the same rules have been applied in search cases. The process server however having admitted he had no valid licence to carry out the said service, then regardless of whether the service was effected. The same cannot be said to have been by an authorized agent. I have also taken into consideration that this is a matter involving land. The Defence Counsel on the appointed hearing date had instructed a Counsel to hold his brief but Counsel refused to participate in the proceedings. And even thereafter he judgement it took a period of 2 months to bring this application before the court. In my assessment both parties are to blame. The plaintiff for employing the services of an unauthorized process server and the Defendant for taking too long to bring this application. It is also

worth considering the nature of the claim. The suit property is land and although from the face of it, the plaintiff has a valid judgement, I find it necessary to consider the implications of the said judgement upon the Defendant who had engaged the services of a lawyer only to discover the matter was not handled professionally. I agree with Mr. Kalama that the mistakes of a Counsel should not be visited upon a client. For the reasons given, I will set aside the said judgement but on the following conditions:-

- (a) The Defence Counsel to personally pay costs to the plaintiff's Counsel of Kshs.8,000/= with a period of 30 days.
- (b) The Defence Counsel to pay the plaintiff's traveling expenses of Kshs.3,000/= within 30 days.
- (c) The suit to be set down for hearing within a period of 6 months.
- (d) In default of (a) and (b) herein the judgement dated 11th June, 2002 to stand.
- (e) Costs of the application to be borne by each party.

Dated and Delivered at Mombasa this 14th day of March, 2003.

P.M. TUTUI

COMMISSIONER OF ASSIZE