

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 161 OF 2002

LABAN KARIUKI WAMBUGU & 68 OTHERSPLAINTIFFS

VERSUS

HON. KIIHIKA KIMANIDEFENDANT

RULING

This is an application stated to be brought under Orders IXA Rules 10 and 11 and XXI Rule 22 of the Civil Procedure Rules (hereinafter referred to as “the Rules”), Section 3A of the Civil Procedure Act and all the enabling provisions of the law. In it, the Defendant seeks, in pertinent part, the following Order:

“(c) The ex -parte proceedings, judgment, decree and the resultant execution and the sale against the Defendant be set aside and the Plaintiffs be ordered to serve the Defendant with Summons afresh so that the suit may be heard on merits.”

The application was based on 14 grounds and was supported by the affidavit of the Defendant. The substance of the Defendant’s case was that he had not been served with Summons to Enter Appearance in the matter.

The ex-parte Judgment sought to be set aside was entered on the basis of an affidavit of service sworn on July 2, 2002 by one Meshack Mathenge in which it was deposed as follows at paragraph three:

“THAT after conducting investigation to the whereabouts of the Defendant ... I went to his Njokerio farm in Njoro. I did not find him I only found his housekeeper who told me that to get ... (the Defendant) I go to Rumuruti Lanet these are the places where he go (sic). I however proceeded to Lanet I did not find him then there after I proceeded to www.kenyalawreports.or.ke 2 Rumuruti I enquired from matatu drivers the resident (sic) of ... (the Defendant) they directed me where the house was to reach there, I didn’t find ... (the Defendant) I found his wife Lucy Wangari and a grand daughter called Monicah, I introduced myself and the purpose of my visit then I served her with Summons to Enter Appearance and a copy of Complaint, when I told her to sign my copy she told me that she has instructions not to sign any court documents only to receive it. When I was asking the wife how I could get ... (the Defendant) she told me that it is difficult unless I go to Parliament Building to trace him. Moreover (the Defendant) is my area M.P. and I know him and at the same time somebody known to so many people. I however return my copy duly served on June 20, 2002 at 1.15 p.m.”

Order V Rule 15(1) of the Rules provides as follows:

“The Serving Officer in all cases in which Summons has been served under any of the foregoing rules of this order shall swear and annex or cause to be annexed to the Original Summons an affidavit of service stating the time when and the manner in which the Summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of Summons...”

It is common ground that service of Summons was not effected personally on the Defendant. Service

was apparently effected according to Order V Rule 12 of the Rules. The affidavit of service in this case does not, however, disclose the names and addresses of the “*matatu dri vers*” who pointed out to the process server the residence of the Defendant where service was allegedly effected as required by Order V Rule 15 of the Rules. The Process Server does not also disclose whether the wife of the Defendant upon whom service was allegedly effected upon was known to him or was identified to him. These are serious statutory breaches which disentitled the Deputy Registrar of this Court from entering the exparte Judgment on the basis of the said affidavit of service. In **M. B. Automobiles v. Kampala Bus Service** [1966] EA 480 it was held as much. On this conclusion alone, I find it unnecessary to go into the other matters raised at the hearing of the application.

I, therefore, allow the Defendant’s application dated May 2, 2003 with costs.

Dated and Delivered at Nakuru this 18th day of June, 2003.

ALNASHIR VISRAM

JUDGE