



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO. 1938 OF 2001

DICKSON MBUGUA)

NASIB ABDUL MALIK)

.....
PLAINTIFFS

JOSEPH GATHAARA)

MATATU WELFARE

ASSOCIATION)

VERSUS

STEWALT L. HENDERSON)

BENSON I. WAIREGI)

..... **DEFENDANTS**

JOSEPH K. NDUNGU)

THE ASSOCIATION OF KENYA

INSURERS)

RULING

This matter first came to court on 31st December 2001 by way of an application under certificate of urgency. The court made an order part of which is:

“In the result, I grant orders in terms of prayers (1) and (2) of the Chamber summons pending interparte hearing of the application on 9.1.2002. I direct that the application be served forthwith and in any event on or before 4th January 2002 for interparte hearing. The interim temporary injunction is issued on terms that the 1st three Plaintiffs do on behalf of themselves and on behalf of the 4th Plaintiff file a written undertaking as to damages on or before 4.1.2002”.

On 4th January 2002, the Plaintiff filed another application under certificate of urgency seeking that service of court process, order issued on 31st December 2001 and notice of Penal Consequences be effected on the Respondents/Defendants and its members by advertisement in the Daily Nation and East

African Standard Newspapers. That application was heard *ex parte* and was granted on 7th January 2002.

The matter came up for hearing on 9.1.2002, and the learned counsels for the first, 2nd and 3rd Defendants raised a preliminary issues on law stating that the orders given *ex parte* on 7.1.2002 were given without jurisdiction as the Applicant/Plaintiff had not shown that they had made efforts to serve the Defendants in accordance with the preceding rules and that if the Defendants had been served as alleged by the Plaintiff's process server then there was no valid reason for further service by substituted service. If the Defendants had been served then all that was necessary for the Plaintiff to do was to invoke Order 5 Rules 13 & 15. Secondly he contended that if the Respondent had not been personally served then the Plaintiff could have invoked Order 5 rule 17 there is nothing to show they had taken any of those steps before they came to court for substituted service. He thus maintained that there is no valid service as the court could not direct substituted service unless and until it was shown that the Plaintiff had taken action to serve as is required by the rules preceding rule 17 of Order 5. He also said the second advertisement did not comply with the Form 23 in Civil Procedure rules appendix at page 237.

The learned counsel for the fourth Defendant raised a Preliminary point that as far as the fourth Defendant was concerned, it was an association that could not sue or be sued and it lacks legal capacity. It is a Society exempt from registration and any action against its members can only be brought by way of a representative suit and so Order 1 rule 8 of the civil Procedure rules had to be invoked. This was not done here. He also raised the question of non compliance with Form 23 in the Civil Procedure rules.

Mr. Lutta, the learned counsel for the Plaintiffs in his response to the objection stated that the objections should have been brought by way of substantive application. He maintained that there had been no prejudice occasioned. He contended that even if it was superfluous, it did not infringe any law; that the substituted service was sought because there was an interim order which had to be served and other methods had been used but did not appear substantial. He then referred me to other affidavits of Service and invited me to peruse them to see which service was proper. He maintained that the service was effected under Order 5 Rule 14 as the process was left at the offices of the defendants. His reaction to non compliance with form 23 is that that is a matter of form only and the main issue is whether the person served would know the nature of what was required of him or not. His stand as regards the fourth Defendant's position is that the fourth Defendant is capable of suing and being sued and so there is no need for representative action in respect of the fourth Defendant.

I have considered the objections and the response to the same. I do agree that as the order made by the court on 7th January 2002 was an *ex parte* order, it can be set aside if proper reasons are advanced for the same. I also do agree that as the matters raised (except that of need for representative action) are matters of law, I can receive oral objection and there would be no need for substantive application seeking to set such an *ex parte* order aside.

In this case, the Order issued on 31st December 2001 was specific and it stated that the application was to be served "forthwith and in any event on or before 4th January 2002 for interparte hearing". I have perused each of the affidavits of Service sworn by Philip Obadiah Musenjeli Wachiya. First Defendant Stewart L. Henderson was to be served in person. This was not done. He was said to be out of the country. It is alleged that John Irungu, a property Manager of old Mutual Insurance company Ltd accepted service but refused to acknowledge the same. One is bound to ask, under what provisions of the law was Irungu supposed to acknowledge service for Henderson who was sued as a person? No other mode of service was attempted as far as that Affidavit is concerned. The second Defendant was also not in the office, and the process server left the documents with the Secretary who had refused to accept service. That second Defendant was also to be served in person failing which other modes of service could be involved. No other mode of service was involved. Joseph K. Ndungu, the third Defendant was allegedly served through the receptionist. That could not have been a proper service. Lastly the fourth Defendant was allegedly served through the Secretary to Mr. Ngugi. The name of the same Secretary was not given. In my humble opinion, none of the Defendants was properly served by 4th January 2002 as was directed by the court and there is no evidence that other modes of service were attempted as is required by the relevant rules of order 5 of the civil Procedure Rules. Further court's order as to the period of service was not extended either.

It is then correct that when an application was presented to the court under Certificate of urgency on 7th January 2002, seeking that the service of court process, order issued on 31.12.2001 and notice of penal consequences be effected on the Defendants and its members by advertisement, the Applicant had not exhausted all modes of service upon the defendants to enable the court to act under Order V Rule 17. It is also true that the service by advertisement was not superfluous as it was (if the order was properly obtained) the only valid service as the other services were all not proper.

I have now reconsidered the whole matter in the light of the new developments and I do agree that the Order for substituted service ought not to have issued as the Plaintiff had not shown that he had made attempt to effect service upon the Defendants as required in the rules preceding Order 5 Rule 17 and in any case as the order that required service to be effected on or before 4th January 2002 had not been extended, the Order of 7th January 2002 could not be effective. I have no alternative but to set aside the orders of 7th January 2002 and I do set the same orders aside.

As to the objection by the fourth Defendant, I cannot sustain it as Mr. Lutta says that the fourth Defendant is an entity capable of suing and being sued. That in effect means that the facts are in issue and there is no presumption that the facts are agreed. That being the case evidence must be adduced and thus the issues ceases to be a preliminary matter. I do however advise the Plaintiff to check its position on whether or not there is need to file a representative suit as far as the fourth defendant is concerned.

However for the time being, the objection is rejected.

Lastly, I do also feel that the omission in second advertisement is important as it was necessary to show that the advertisement was made pursuant to an order of the court. However for what I have stated above, I do not think this is any longer important.

The effect of the above order is that the exparte interim orders cannot be extended as there has not been proper service of the same order and the relevant court documents. The Plaintiff will obviously see what action to take to have another valid order on record if they still think the same is necessary.

The above shall be the orders of the court. No order as to costs.

Dated at Nairobi this 10th day of January 2002.

ONYANGO OTIENO

JUDGE