



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2559 OF 1998

SEBASTIAN MPUATHIA MWUARANIA.....PLAINTIFF

VERSUS

JAMES GITHUKU GATUNE.....DEFENDANT

RULING

This is the defendant's application for two main orders namely:

1.
2. The summons to enter appearance issued by this court in this matter be declared null and void and of no legal effect and consequently the ex parte judgment founded on a nullity in law be set aside ex debito justitiae.
3. The defendant be given unconditional leave to defend this suit upon an Order of this Court directing the issuance for fresh, proper and valid summons to enter appearance.

This suit was filed on 18.11.98. Plaintiff avers in the plaint that he is the registered owner of L.R No. Nairobi/Block 60/492 since 2.11.95 when he was issued with a certificate of the lease. He avers that defendant illegally and unlawfully entered into possession of the suit land.

The relief's sought are an order for delivery of vacant possession and mesne profits. Summons to enter appearance dated 24.11.98 were issued. They are in the court printed form. The summons required the defendant

“within 10 days from the date of service hereof” to enter appearance in the suit.”

According to the affidavit of service filed by Richard K. Macharia on 11.3.99, he served the defendant with summons to enter appearance and a copy of the plaint on 7.2.99 at defendant's place of business within Otiende Estate.

The process server deposes that defendant accepted service but refused to sign the original summons. Defendant did not enter appearance a request for judgment was filed on 4.5.99 and interlocutory judgment entered on 19.5.99. The suit was heard on 4.5.2000.

Plaintiff did not press the prayer for mesne profits. On 17.5.2000 Judgment was entered for plaintiff and defendant was ordered to give vacant possession within 3 months. A notice of taxation was issued requiring defendant to attend taxation on 15.10.2001. The same process server Richard Kanini Macharia filed an affidavit of service on 11.9.2001 deponing, inter alia, that he served defendant with the Notice on

4.9.2001 at defendants garage Otiende shopping centre and that defendant accepted service but refused to sign the original.

Defendant attended taxation on 15.10.2001 and applied for adjournment to engage a lawyer. The taxation was adjourned to 15.11.2001.

On 15.11.2001 Mr. Muturi advocate appeared for defendant and applied for adjournment. The application was refused and Mr. Muturi left court with leave. The Bill of costs was taxed subsequently on 11.2.2002, a Notice to show cause why execution should not issue was served on the defendant on 4.3.2002.

The same process server Mr. Richard Kanini filed an affidavit of service deposing, inter alia, that he served defendant on 4.3.2002 and that defendant accepted service but refused to sign the original notice. Defendant did not attend on 18.3.2002 and a warrant of arrest was issued. The present application was filed on 23.4.2002.

The applicant deposes in paragraph 8 of the supporting affidavit that no summons were served personally on him as required by the law.

Applicant engaged M/S Keshar Shiani Advocates who filed a notice of Appointment on 12.11.2001. M/S Nelson Hurun and Company Advocates filed a Notice of change of Advocates contemporaneously with the present application on 23.4.2002. Judgment and decree was passed before M/S Keshar Shiani Advocates came on record. In such circumstances leave of the court is not required before applicants new advocates can take over and order III Rule 9A has not been breached.

Was the applicant served with the summons to enter appearance? Applicant merely states that he was not served with summons to enter appearance. But Mr. Richard Kanini Macharia filed an affidavit of service indicating when and where he served the applicant.

He deposes that applicant accepted service but declined to sign the original. Mr Richard Kanini Macharia also served applicant with Bill of Costs and Notices of Taxation on 4.9.2001. Mr. Kanini deposes that applicant accepted service but refused to sign the original. The applicant admits service of the Notice of taxation on 4.9.2001. The affidavits of service filed by Mr. Richard Kanini show that he knew the applicant and service was done at the same place on all the occasions.

The applicant does not deny that place shown as place of service in the affidavit of service is not his place of business. Indeed, his supporting affidavit shows that t he was running a motor garage at the premises where Mr. Richard Kanini Macharia specifies as the place of service. The fact that Applicant declined to sign the original when he was served on 4.9.2001 makes it more probable than not that he was also served with summons to enter appearance on 7.12.99 but declined to sign the original.

Applicants has not shown circumstances which would indicate that he was not served with the summons to enter appearance. I believe the affidavit Evidence of Richard Kanini Macharia that he indeed served applicant with summons to enter appearance.

Applicants counsel submits that the summons served were, in case invalid and of no effect as the summons give applicant less than 10 days within which to enter appearance It is true that Rule 3(4) of Order IV Civil Procedure Rules contains a proviso as follows: "Provided the time for appearance shall not be less than 10 days"

Mr. Muturi for applicant relied on two decisions of the Court of Appeal. In Civil Appeal No. 174?99 – Ceneast Airlines ltd versus Kenya Shell ltd the Court of Appeal on 26.5.2001 said that a summons which requires defendant to enter appearance within 10 days is in clear breach of order IV Rule 3(4) Civil Procedure Rules and makes the summons invalid and of no effect. But as that decision shows, that issue was not argued before the Court and only came to the notice of the court after the court had already allowed the appeal. That holding is obviously an obiter dictum.

Later on 14.12.2001, the Court of Appeal in Civil Appeal No. 13 of 2001 Atul Kumar Muganlal Shah versus Investments & Mortgage Bank ltd agreed with the decision of the High court which set aside defective service and ordered fresh summons to issue.

It is apparent from that decision that the High Court held the summons to be defective for requiring defendants to enter appearance within 10 days instead of giving them at least 10 days to enter appearance. The decision of the Court of Appeal shows that that was not one of the two issues which arose for the determination of the Court of Appeal. The appeal was against the decision of the High Court refusing to strike out the suit on the ground that the suit was founded on unsigned plaint. Again it is apparent that reference to defective summons was an Obiter dictum.

The Obiter dicta of the Court of Appeal deserve respect especially when they deal with points of law. But as I have observed above, the Court of Appeal was not dealing with the construction of the words:-

“provided the time for appearance shall not be less than 10 days”.

The definition of the word “within” as it relates to time in The Concise Oxford Dictionary of Current English 7th Edition is “No longer than before expiry or since beginning of”

By section 57(a) of the interpretation and General provisions Act (Cap 2) the day of service is excluded from the computation of time. In my view, the words “within 10 days from date of service hereof” do not connote “less than 10 days” (from date of service.)

It is not therefore correct to say that the summons which required applicant to enter appearance with 10 days from date of service gave applicant less than 10 days within which to enter appearance in any case, it would an abuse of the process of the court for a party who did not intend to enter appearance after service at all to come to court after 2 years to complain that the summons which were served gave him less than 10 days within which to enter appearance. He would be estopped from edenying the validity of the summons.

Lastly this application is an after thought for applicant engaged a lawyer on 12.11.2001 but did not file the present application until 24.4.2002. For the foregoing reasons I dismiss the application with costs.

E. M. Githinji

Judge

11.7.2002

Mr. Kiama present

Mr. Muturi absent – served

Domnic Mbsya – his clerk prepresent