

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 394 OF 2001

PAUL O. OGADA PLAINTIFF

VERSUS

KASSIM OWANGO 1ST DEFENDANT

MILLIGAN & COMPANY LIMITED 2ND DEFENDANT

RULING

The defendants in this suit have lodged this application to set aside a judgment entered against them on 18.4.2001 in default of appearance and defence. The basis of the application is the claim that neither of them was served with summons to enter appearance.

Regarding the 1st defendant Kassim Owango, the affidavit of service on the basis of which the default judgment was entered does not state that he had been served and consequently no judgment should have been entered against him. Accordingly, in so far as it relates to him, the request for judgment was irregular and the judgment entered against him should not therefore be allowed to stand.

The position is however different as far as the 2nd defendant is concerned. The affidavit of service sworn by the process server reveals that summons to enter appearance together with a copy of the plaint were served at the 2nd business premises at Prudential Building, Wabera Street, Nairobi upon Mr. Khasoa, a manager of the 2nd defendant who duly informed the process server that he had authority from the 2nd defendant to accept service and who signed the original documents in acknowledgement of the service. Although Mr. Kassim Owango, in his affidavit in support of this application, claims that Mr. Khasoa is an employee of a sister company known as Miligan Properties Limited, he does not deny that the said Khasoa, as such manager of a sister company, had as he claimed authority to accept service on behalf of the 2nd defendant. Given that position, what the process server states regarding Mr. Khasoa stands unchallenged. In my view therefore, that was good service of summons to enter appearance upon the 2nd defendant. The implication of that finding is that the 2nd defendant's failure to enter appearance and defence in time has not been satisfactorily explained.

For the above reasons the application by the 1st defendant succeeds and the default judgment entered against him set aside. His defence will be deemed as duly filed upon payment of the requisite court fees. As regards the 2nd defendant, the application is dismissed with costs.

Dated at Nairobi this 26th day of October, 2001.

T. MBALUTO

JUDGE