

Republic of Kenya
In the High Court of Kenya
at Nairobi (Milimani Commercial Courts)

Civil Case 692 of 1998

National Bank of Kenya Ltd

v

Hassan Ibrahim Duale

T Mbaluto, Judge

September 20, 2000 T Mbaluto, Judge delivered the following ruling. This is an application under Order IXA rules 10 and 11 of the Civil Procedure Rules to set aside a judgment entered herein in default of appearance. The application is supported by an affidavit sworn by the applicant in which he claims that summons to enter appearance had not been served upon him before judgment was entered. The applicant also claims that notice of the judgment entered against him was not served upon him. He says that he has a good defence to the claim.

In opposing the application, the respondent states that summons to enter appearance were properly served and an affidavit of service in that respect filed in court. As to the alleged good defence, it is the respondent's contention that the applicant has no defence at all to the suit; what he calls a defence being a sham.

The process server on the strength of whose affidavit the default judgment was entered gave oral evidence and was cross-examined by the applicant's learned counsel. In his evidence, he described the efforts he made to trace the applicant. Having failed to find the defendant, the process server effected service by affixing it at the door of the residence which the applicant had given as his address in his application to the respondent for the credit facility the basis of the suit. The process server also testified that before affixing the summons as aforesaid, he had received information from a person residing in the same house, that the applicant also resided in the same house.

The evidence of the process server was not shaken in cross-examination and I accept it as true. On the basis of that evidence, I find that the applicant was properly served with summons in accordance with the provisions of O. V rule 14 of the Civil Procedure Rules, which provides:- "Where the serving officer, after using all due and reasonable diligence, cannot find the defendant, or any person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the court from which it was issued, together with a return of service."

The suit herein arises from a claim by the respondent against the applicant in respect of the use by the applicant of a credit card issued by the respondent. The fact that the defendant in his draft defence denies the agreement while at the same time averring, albeit without prejudice to whatever else he has stated in the same defence, that he has paid everything that may have been outstanding under the facility, clearly shows that the defendant has avoided dealing with the case put forward against him in the pleadings. He is in my view employing delaying tactics in the hope that the claim will somehow disappear. The applicant has therefore not come to this court with clean hands and accordingly he is not deserving of this court's discretion. Furthermore, because his defence is a sham, no useful purpose will be served by setting

aside the default judgment.

For those reasons, the application is dismissed with costs.