



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO.2842 OF 1991

BHAVNABEN CHAMPAKHAI LAD.....PLAINTIFF

versus

HIRJI KERAJ t/a HEER ENTERPRISES.....DEFENDANT

RULING

The applicants who are Third Party in the suit have moved the court under Orders XXI rules 22 (1) and (2) and rule 91, IXA rules 10 and 11, Order 1 rules 15 & 16 of the Civil Procedure Rules, section 3 of the Civil Procedure Act and all other enabling provisions of the law.

It seeks following orders inter alia

1. That the court do stay the order and decree in the suit
2. That the court do set aside the judgment that was granted on 24th March 2000
3. That they be granted leave to enter appearance and file its defence to the third party notice

The application is based on the grounds that the judgment which they now wish to have set aside was entered against them due to their non-appearance, that they had never been served with the 3rd Party Notice, and in the circumstances they could not have entered appearance. They also base their application on the ground that they have a good defence to the defendants Third Party Notice, which they should be allowed to file and argue to enable the matter against it be determined on merits.

The application is opposed.

It is the plaintiff=s ground that, the same lacks in merit, is vexatious misconceived and an abuse of the process of the court. Further that the deceased was a workman as defined in Workmen=s Compensation Act and that the applicant has no good reason to have set aside the judgment as the matter was heard interparties when both the plaintiff and the defendant adduced evidence.

The respondent therefore maintains that service of the third party notice was proper, having been made by way of sending it by registered post was proper. However, the mode of service was challenged by the applicant whose contention it is, service by post could only be made only if the process server is unable to find any of the officers of the corporation.

I have had to refer to order V rule 2 which clearly stipulates the mode of The applicant is a corporation.

service on corporations. It stipulates that:

2. A Subject to any other written law, where the suit is against

a corporation the summons may be served a) on the secretary, director or other principal agreement of the corporation; or

b) if the process server is unable to find any of the officers of the corporation mentioned in rule 2(a), by leaving it at the registered office of the corporation or sending it by prepaid registered post to the registered postal address of the corporation, or if there is no registered office and no registered postal address of the corporation by leaving it at the place where the corporation comes on business or by sending it by registered post to the last known postal address of the corporation@

I find that ,when he proceeded to serve the notice by way of registered post without firstly trying to locate the principal officer of the company who in any event one would safely assume, that he knew very well, having been its former employee the process server did not comply with the above requirements. On that ground alone I would allow the application. Rules of natural justice demand that a party be heard and that the party should not be condemned without being given an opportunity to be heard. Having not ben properly served they were not accorded an opportunity to be heard.

Be that as it may, it is imperative that one peruses the proposed defence at least to establish whether the same raises triable issues with a probability of success. I find that the proposed defence raises prima facie several triable issues specially as pertain to whether the deceased would have qualified under the Workerman=s Compensation Act.

In the circumstances, I allow the application and grant orders to prayer nos 2, 3 and 4 thereof. Further, the applicant do file and serve its memorandum of appearance and its defence to the Third Party Notice within the next fourteen days.

Costs of the application shall be in the cause.

Dated and delivered this 23rd day of November 2000

JEANNE W. GACHECHE

COMMISSIONER OF ASSIZE