



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 129 OF 2015

JOSEPH WAITIKI NDEGWA PLAINTIFF

-VERSUS-

DUNCAN NDERITU NDEGWA DEFENDANT

RULING

1. Vide its judgment delivered on **8th December 2016**, this court allowed the plaintiff's claim against the defendant which was for orders compelling the defendant to release to the plaintiff the title to land reference number **6380/8**.
2. The proceedings that led to the above judgment were premised on an affidavit of service sworn by Lawrence Kiarie Thuku, a licensed process server of this court to the effect that he had served summons to enter appearance and the pleadings filed in this matter upon the defendant.
3. Upon lapse of the time stipulated in law without the defendant having filed a defence to the plaintiff's suit, in accordance with the provisions of **Order 10 Rule 9** of the Civil Procedure Rules, this court set the plaintiff's suit for hearing.
4. Upon considering the case urged by the plaintiff and in the absence of any defence by the defendant this court entered judgment in favour of the plaintiff as prayed for in the plaint.
5. Vide a notice of motion dated **20th December, 2017** and amended on **15th February, 2018**, the defendant moved this court seeking the following orders: -
 - i. **Certification of the application as urgent (spent);**
 - ii. **That court be pleased to dispense with service of the application within the first instance (spent);**
 - iii. **That court be pleased to bring forward the hearing date of the application to 13th March, 2018 to 15th February, 2018 (overtaken by events);**
 - iv. **That the defendant/applicant be granted leave to amend his notice of motion dated 20th December, 2017;**
 - v. **That this court be pleased to grant a stay of execution of the decree issued on 17th January, 2017 in this matter until further orders of the court;**
 - a. **That the court be pleased to grant a stay of execution of further proceedings in this suit pending the hearing and determination of the application;**
 - b. **That this court be pleased to set aside the interlocutory judgment herein and the defendant be granted leave to defend the suit.**
 - c. **Costs of the application be provided for.**

6. The application is premised on the grounds that the defendant was never served with summons to enter appearance; that the defendant learnt about the case after delivery of judgment; that the defendant has a good defense to the plaintiff's claim and that had the defendant been

served with summons to enter appearance he would have filed a defense. Further that the defendant shall be prejudiced if the orders sought are not granted.

7. The application is supported by the affidavit of the defendant/applicant on which the grounds on the face of the application are reiterated.

8. In opposing the application, the plaintiff/ respondent filed the grounds of opposition dated 21st February, 2018 through which he contends that the application is frivolous, bad in law, an abuse of the process of the court and that the applicant's counsel is not properly on record.

Application to cross-examine certain individuals in this matter

9. Based on the defendant's contention that he was not served with summons to enter appearance and the decree issued in this matter, in respect of which the plaintiff seeks to have the defendant committed to civil jail, it became necessary to cross-examine the following persons:

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- i. Duncan Ndegwa Waitiki, the defendant herein;
- ii. Anne Anne Wambui Kamau, who allegedly received summons and pleadings filed in this matter on behalf of the defendant;
- iii. Lawrence Kiarie Thuku, process server who allegedly served Anne Wambui Kamau with summons to enter appearance;
- iv. John Chege, process server who allegedly effected service on the decree herein on the defendant and
- v. Gilbert Kariuki.

10. Despite having been accorded an opportunity to avail the process servers for cross examination by counsel for the defendant, the plaintiff did not avail the process servers, and in particular Lawrence Kiarie Thuku for cross examination when the matter was called for the said exercise.

11. Gilbert Kariuki was availed but counsel for the plaintiff informed the court that they no longer required to cross examine him. Consequently, he was discharged.

Testimony of Anne Wambui Kamau

12. Anne Wambui Kamau informed the court that she is not the person described in the affidavit of service of Lawrence Kiarie Thuku filed on 30th July 2015 as she is not Ann but Anne; that she works on 1st floor of Hughes building as opposed to 2nd floor as deposed by the process server and that she was on leave at the time of the alleged service.

13. She admitted that she is the personal assistant and administrator of the defendant.

14. She also gave a detailed account of receiving documents in their company and maintained that she was not served.

15. In cross examination, she stated that by stating that she is not an employee but an administrator she meant that she is an employee of Amalgamated Company as opposed to Keremara.

16. She acknowledged that both companies are situated in Hughes building 1st floor Banda wing and explained that all employees of the company knew that the defendant was out of the country.

Duncan Nderitu Ndegwa

17. He informed the court that the plaintiff is his younger brother.

18. He stated that it was not possible for the process server to serve him through his secretary as he was outside the country.

19. He informed the court that for one to serve documents on him he would start at the reception. The receptionist would contact him and he would give instructions. Concerning court documents his consultants and he would decide whether to take the documents or send them to their lawyers.

20. He contended that he had not given instructions to his staff to receive legal documents on his behalf.

21. In cross examination, he acknowledged that Anne Kamau is an employee of one of his companies- She is his personal secretary and can receive documents on his behalf.

22. He stated that it is possible that Anne could have received documents on his behalf.

23. Counsel for the defendant informed court that the evidence of John Chege was not necessary and urged the court to allow him argue his applications. The court acceded to the request.

Submissions by defendant's counsel

24. Based on the defendant's evidence to the effect that his offices are situated in 1st floor as opposed to the 2nd floor of Hughes building where service is said to have been effected, and given the uncontroverted evidence of Anne to the effect that she is not the Ann who received the summons, the Ann who was served is said to be a mysterious person.

25. According to counsel for the defendant, where there appears that there is no proper service, like in the circumstances of this case, the court has no discretion but to set aside the interlocutory judgment. Given that there are 7 floors in the building where the defendant's offices are situated, it is submitted that the process server should have explained how he got to know where the defendant's offices are situated.

26. Arguing that on rule of law, the plaintiff does not have a good cause of action against the defendant, counsel for the defendant urged the court to set aside the judgment hereto and allow the suit to proceed to trial.

27. Since the application for contempt is an offshoot of the judgment, counsel for the defendant submitted that the contempt does not arise.

Plaintiff's submissions

28. Counsel for the plaintiff relied on the grounds of opposition dated 21st February 2018, filed on 23rd February, 2018. He informed court that through the cross examination of the defendant and Anne, it was established that the defendant's office is located in Hughes building and that Anne is an employee of the defendant's company authorized to receive documents on behalf of the defendant, including court documents.

29. In a rejoinder, counsel for the defendant submitted that the affidavit of the process server is of little value as he did not avail himself for cross examination.

30. Concerning reference to an Ann who was served, he submitted that there are so many ladies with the name Ann and because the affidavit does not indicate who Ann is, he submitted that if such Ann exists, she is in 2nd floor and not 1st floor where Anne Wambui is located.

31. According to counsel for the defendant, if the process server went to the 2nd floor then he served the pleadings on the wrong person.

Analysis and determination

32. From the pleadings filed in this matter and the submissions in respect thereof, the issues for determination are found to be: -

i. Whether the defendant has made a case for grant of the orders sought in his application dated 15th February, 2018 or any of them?
and

ii. Whether the plaintiff has made a case for punishment of the defendant for contempt of court?

33. With regard to the first issue, I begin by pointing out that some of the prayers have either been overtaken by events or have been spent. These are prayers Nos. (i), (ii), (iii), (a). The orders remaining for consideration are:-

i. the prayer for leave to amend the notice of motion dated 20th December, 2017;

ii. the prayer for stay of execution of the decree issued on 17th January, 2017;

iii. the prayer for setting aside of the interlocutory judgment hereto and

iv. the prayer for costs.

34. Starting with the prayer for leave to amend, the notice of motion dated 20th December 2017, it is noteworthy that the proceedings in this matter were conducted as if that prayer had been granted. The plaintiff neither opposed that prayer nor demonstrated any prejudice occasioned on him or likely to be occasioned on him if the prayer is allowed. Being of the view that the amendment is necessary for full and fair determination of all the issues the court is called upon to determine, I allow the prayer.

35. With regard to the prayer for setting aside the judgment hereto, since that prayer has an impact on the prayers for stay of proceedings and stay of execution, I will tackle it next.

36. Concerning that prayer, considering that the defendant and the person who allegedly was served on defendant's behalf have denied having been served, it behooved the plaintiff to prove that indeed the defendant was served by controverting the evidence of the defendant to the effect that he was not served and if need be availing the process server for cross examination on the contents of his affidavit of service as requested by the defendant's counsel. Noting that the deponent of the affidavit of service of summons to enter appearance and other pleadings filed in this matter failed to attend court to be cross-examined by counsel for the defendant, I agree with the submission by the defendant's counsel that an inference should be made to the effect that the contents of the affidavit of service which formed the basis of the order for *ex parte* hearing of the plaintiff's suit are not true.

37. Being of the view that there is doubt as to whether the defendant was served, I grant the defendant the benefit of doubt concerning the question as to whether or not he was served.

34. Since the defendant has expressed interest in defending the plaintiff's claim against him, and being a cardinal principle of law that no one should be condemned without being given an opportunity to respond to the case urged against him, I am satisfied that the defendant has made up a case for setting aside the interlocutory judgment hereto and all consequential orders issued pursuant to that judgment.

38. Although the above determination has an effect on the plaintiff's application for contempt, being of the view that the defendant had a duty to obey the decree issued in this matter whether issued in regular or irregular proceeding, I now consider the question as to whether the plaintiff has made up a case for the defendant being cited for contempt of court.

39. Concerning that question, having read and considered the affidavit of the process server who allegedly served the decree issued in this matter on the defendant and the defendant respond thereto, I am satisfied that the defendant was served with that decree. In my considered view, it is highly unlikely that the process server lied on the question of service on the defendant considering that the defendant admitted having attended the function in which he is said to have been served. There was opportunity for the process server to serve the defendant. I find the defendant denial of service to be dishonest and incapable of controverting the process server's averments concerning service of the decree. No wonder, the defendant's counsel did not insist on the process server being availed for cross examination on the contents of his affidavit. Be that as it may, I agree with the defendant's contention that service of the decree cannot form a basis of his being found to be in contempt of the decree of this court as it was not endorsed with a penal notice. The process used by the plaintiff to enforce the decree of this court is unknown in law. The plaintiff ought to have used the ordinary processes of execution of a decree by for instance, issuing a notice to show cause on the defendant to come to court and show cause why he should not be arrested and committed to civil jail for failure to satisfy the court's decree.

40. For the foregoing reasons, I find and hold that the defendant's application dated 15th February, 2018 has merit and is allowed in terms of prayers (4), (5), and (b).

41. The application by the plaintiff dated 16th September 2017, seeking to punish the defendant for contempt of the decree of this court issued on 17th January, 2017 is found to be bad in law and dismissed.

42. Costs of both applications shall abide the outcome of the suit.

43. Orders accordingly.

Dated, signed and delivered in open court at Nyeri this 3rd day of October, 2018.

L N WAITHAKA

JUDGE

Coram:

Joseph Waitiki Ndegwa – plaintiff

Advocate absent

Nduta Kamau h/b for Dr. Kuria for the defendant

Court assistant - Esther