



REPUBLIC OF KENYA



KENYA LAW
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**Waweru v Ogwella & another (Civil Case 4 of 2018)
[2024] KEHC 5649 (KLR) (15 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5649 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL CASE 4 OF 2018
RM MWONGO, J
MAY 15, 2024**

BETWEEN

PATRICK KANAI WAWERU PLAINTIFF

AND

GEORGE OGWELLA 1ST DEFENDANT

GEORGE OCHILO AYAKO 2ND DEFENDANT

RULING

1. By a Partial Ruling dated 5th November, 2020, the following observations and directions were issued by me in this matter:

“Observations:

- a. There is no evidence on record that Amaco Limited was the insurance company that had issued the policy in respect of the subject Motor Vehicle KAM 929 G.
- b. That Amaco Limited was represented in court by counsel Tom Onyambu Partner in Nyaundi Tuiyott Advocates.
- c. That service of process was allegedly effected in the matter by Jacob Okore process server.

Orders and Directions:

- a. Amaco Limited be and is hereby enjoined in these proceedings to produce and or confirm through contemporaneous documents the insurance policy in respect of KAM 929G, and the issuance of instructions to counsel to defend the suit.



In the alternative, Amaco Limited may produce the aforesaid information through their duly appointed counsel. This action shall be effected within thirty (30) days of today's date.

- b. Counsel Tom Onyambu of Tuiyott Advocates to file an affidavit to confirm acting for the 1st and 2nd Defendant in the suit vide Memorandum of Appearance dated 23rd November, 2009, and the filing of the Statement of Defence dated 25th January, 2010. This action shall be effected within thirty (30) days of today's date.
 - c. Jacob Okore, process server, shall appear before court for cross-examination on his Affidavit of service of process deposed on 9th October, 2009 and filed on 27th October, 2009.
 - d. A hearing for purposes of cross-examination of the process server shall be fixed within sixty (60) days hereof.
 - e. In light of the age of this matter no liberty to apply is granted until after the hearing is concluded.
 - f. Costs in the cause.”
2. I was then transferred from Naivasha in 2021. This file has followed me to my present station in Kerugoya. The proceedings in the file show that the time for compliance with the orders was extended due to illness of the process server.
 3. With regard to the orders and directions in Paragraph 2 (a) - (e) of the said Partial Ruling, none of the directions was complied with.
 4. The consequences are as follows:
 5. Although paragraph 2 (a) of the Partial ruling directed joinder of AMACO Ltd and that documentation be availed concerning the insurance policy for KAM 929G, and confirmation of issuance of instructions for defending the suit, none of the above documents or information is on file. As such none of the related issues can now be formally proved by records available in this case.
 5. Although counsel Tom Onyambu of Nyaundi Tuiyott was directed to, but failed, to file an affidavit to confirm whether he acted for the 1st and 2nd Defendant; and failed to confirm the filing by him of the Memorandum of Appearance dated 23 November 2009; and to confirm the filing of the Statement of Defence dated 25th January 2010; it is now disputed and uncertain as to who filed the said documents and upon whose instructions. Since the said documents were filed in SPMCC No. 292 of 2007, Naivasha, which file has not been availed to me, it is not possible to ascertain who the counsel, if any at all, was responsible for the said documents and upon whose authority.
 6. The proceedings of 14.7.2022 in the court file indicate that counsel Tom Onyambu filed an Affidavit sworn on 11.6.2021, and there is an indication that he could be cross-examined on it. However, the said affidavit is not on the file. Further, there was no appearance in court by the said Tom Onyambu.
 7. With regard to Paragraph 2 (c) and (d) of the directions in the Partial Ruling, what has been filed is an affidavit by C.N. Kihara Advocate. The affidavit ascertains the death of the Process Server Jacob Odoyo Okore, and exhibits a Death Certificate No. 0837622 indicating the date of death as 28.02.2021. Accordingly, the cross-examination of the said process server cannot be done, and hence verification



of his disputed Affidavit of Service of process allegedly deposed on 9th October, 2009 cannot be done. The affidavit remains disputed.

8. Accordingly, the overall situations concerning the verity of facts in issue resulting from and raised by the 2nd Defendant 's pending application is now more bleak.
9. In the Partial Ruling, I struck out and expunged as hearsay, several words in several paragraphs in the Affidavit of C.N. Kihara on the strength of the 2nd Defendant's Preliminary Objection dated 2nd December 2019.
10. Further, following the Plaintiff's Preliminary Objection dated 25th February 2020, I determined that, beyond technicalities, the substance of the matter before me was whether the 2nd Defendant was properly given an opportunity to be represented in the lower court suit before being adjudged as a judgment debtor in the said suit.
11. This naturally takes us back to the 2nd Defendant's application of 24.10.2019 in which they seek:
 - stay of the judgment and decree emanating from it dated 7th April 2016;
 - setting aside of the said judgment to enable the applicant to file their defense in the suit; and
 - recall, invalidation and setting aside of warrants of attachment, proclamation for recovery of the impugned judgment debt.
12. As earlier noted, this court sought to establish the veracity of the service by the process server to the applicant in the suit; confirmation that AmacoLimited had been enjoined in proceedings; evidence that they had issued an insurance cover for Motor Vehicle KAM 929G; and evidence that AmacoLtd had formally filed both the Memorandum of Appearance dated 23rd November 2009, and Statement of Defence dated 25th January 2010.
13. The upshot of all the foregoing is as follows:
14. Service of process of suit papers by the server cannot be verified through cross-examination due to the death of the process server.
15. No evidence has been availed, since issuance of the orders in the Partial Ruling, to show that Amacohas, or was, enjoined in the suit as ordered; or that through contemporaneous documents, they insured Motor Vehicle KAM 929G.
16. Accordingly, there is nothing produced or filed in court by any party, since the Partial Ruling, to prove at least on a prima facie basis, the ownership of Motor Vehicle Registration No. KAM 929G, and in particular the relationship between the said motor vehicle and the 2nd Defendant.
17. The court has noted various efforts by the Plaintiff's counsel to serve and elicit responses from AmacoLtd and Nyaundi Tuiyott & Co. Advocates. This includes a Summonses to Witness before court on 16th November 2022 to Tom Onyambu, which elicited his receipt "under protest" as he was scheduled to be abroad on the date stated. However, no follow up action subsequent thereto was taken by any party. This is despite the said Tom Onyambu stating as follows in his letter of 7th November 2022:

“In this regard I request to be excused And Be Allowed To Attend The Court On Another Date As Shall Be Advised By The Court”(Emphasis added).



Disposition

18. Taking into account all the foregoing, the critical question that remains is whether this court is satisfied, on balance, that the 2nd Defendant/Applicant was properly given an opportunity to defend himself in the trial court. On this question, I find that there is no verifiable evidence availed before this court affirming that the 2nd Defendant was lawfully and properly served. Thus, in this court's view, the judgment against him was reached without his due knowledge and or participation, which resulted in prejudice to him.
19. In the result, I think it would be entirely unsafe to allow the judgment against the 2nd Defendant to stand when it cannot be ascertained that the alleged judgment debtor was given a clear opportunity to be involved, and to defend himself.
20. Accordingly, I have no difficulty in allowing the applicant's application dated 23.10.2019, to set aside the judgement dated 7th April 2016, and all consequential orders flowing therefrom.
21. In the result, the orders of the court are that Prayer No. 3 in the Notice of Motion application dated 24.10.2019 is hereby allowed, with the consequence that all orders flowing from the said judgment are annulled. The 2nd Defendant shall be allowed to make his defence in the suit.
22. Costs shall be in the cause.
23. Orders accordingly.

DATED AT KERUGOYA THIS 15TH DAY OF MAY, 2024.

R. MWONGO

JUDGE

Delivered virtually in the presence of:

1. Kimani holding brief for Omollo for 2nd Defendant/Applicant
2. C. Kihara for Respondent
3. No representation for Nyaundi for 1st Defendant
4. Quinter Ogutu, Court Assistant

