



**MacCrathy (Suing as a Legal Representative of the Estate of James
McCarthy (Deceased)) v Aberer & 6 others (Civil Case 110 of 2016)
[2024] KEHC 11702 (KLR) (Civ) (24 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11702 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL CASE 110 OF 2016
AN ONGERI, J
SEPTEMBER 24, 2024**

BETWEEN

**PATRICIA MCCARTHY PLAINTIFF
SUING AS A LEGAL REPRESENTATIVE OF THE ESTATE OF JAMES
MCCARTHY (DECEASED)**

AND

**RONALD ABERE 1ST DEFENDANT
PAUL KIILU MUTUA 2ND DEFENDANT
JOHN BOSCO KHAYEKA 3RD DEFENDANT
TRADE WINDS AVIATION SERVICE LIMITED 4TH DEFENDANT
KAPTUMOISE INVESTMENT LIMITED 5TH DEFENDANT
MJEMBE STEPHEN LEONARD 6TH DEFENDANT
MAGMA AVIATION LIMITED 7TH DEFENDANT**

RULING

1. The two applications coming for consideration in this ruling are dated 5/2/2024 and 15/11/2023 seeking the following prayers;

Dated 15.11.2023

- i. This application be certified as urgent and service of this application be dispensed with in the first instance.



- ii. Judgment in the sum of kshs.6,609,240 entered on 10th March, 2022 against the 4th defendant be set aside.
- iii. The 4th defendant be granted unconditional leave to defend this suit and the annexed draft defence be deemed as duly filed and served upon payment of the requisite court filing fees.
- iv. Pending the hearing and determination of this application, there be a stay of execution of the judgment, decree, taxation and all processes against 4th defendant/applicant.
- v. Costs of this application be awarded to the 4th defendant.

Dated 5/2/2024

- i. This application be certified urgent and be heard ex-parte in the first instance.
 - ii. A stay of execution of the judgment and decree herein entered on 10th March 2022 and all consequential orders thereto, including taxation of the Party and Party Bill of Costs herein dated 25/4/2023, be granted pending hearing and final determination of this Notice of Motion.
 - iii. The ex-parte Interlocutory Judgment on liability entered herein in default of appearance, the subsequent ex-parte proceedings, final judgment and decree entered on 10th March 2022 and o all consequential orders thereto, be set aside and the 3rd Defendant/Applicant be granted leave to appear and defend the suit.
 - i. The 3rd Defendant/Applicant be granted leave to enter appearance and file and serve their Statement of Defence within 14 days of the orders of the Court.
 - ii. Willis Agayi, the Process Server who purportedly effected service of the Summons to enter appearance upon the 3rd Defendant/Applicant herein be summoned for cross-examination on the contents of his Affidavit of Service sworn on 30/9/2014, which is riddled with blatant and deliberate untruths intended to mislead the Court.
 - iii. Any other or further orders the Court may deem fit and just to grant.
 - iv. Costs of this application be borne by the Plaintiff/Respondent.
2. The two applications are opposed by the plaintiff Patricia Mccarthy in which she deponed that the applicant was physically served with summons and pleadings as evidenced by the affidavit of service sworn by Willis Agany on 30/9/2014 at the 4th defendant's office.
 3. She further deponed that the chamber summons application dated 22/5/2017 seeking to strike out the names of Mwonga Patrick and Hassan Ibrahim and substitute them with Kaptumoise Investment Ltd and Jembe Stephen Leonard as the 5th and 6th defendant respectively was allowed and the amended plaint dated 1/3/2018 was filed on 1/3/2018. The amended plaint was served on 15/6/2018 which service was through advertisement in Daily Nation Pursuant to orders granted on 6/4/2018 by this court.
 4. The mater proceeded for formal proof hearing where the plaintiff testified and summoned one witness in support of her case. Judgement was delivered in favour of the plaintiff on 10/3/2022. The applicant could not be traced by the process server even upon investigations being carried out on his whereabouts.
 5. She deponed that she will suffer prejudice since that matter has been in court for 11 years having been filed on 10/12/2013 and it is prudent that it remains dispensed with and justice served. despite knowing that there was a suit the applicant did not care to know and or find out its outcome. The application



herein is therefore a sham as the applicants defence does not raise any new issued warranting the setting aside of the interlocutory judgement entered on 10/3/2022.

6. The parties filed written submissions as follows; the applicant submitted that 3rd defendant/applicant and 4th defendant/ applicant were never served with any court papers in this matter. The affidavit of service by Willis Agayi is riddled with blatant and deliberate lues intended to mislead the court into entering an irregular judgement ex-parte. The 3rd defendant never met Willis Agayi and has never worked within his employer's office being a long distant transit driver. The applicant further contended that the 4th defendant/applicant offices were at the time situated inside JKIA on the 1st floor of unnamed building/hanger, where all document are received by an authorized officer and stamped and definitely not on the 2nd floor at freight building along 2nd freight road.
7. The applicant argued that it is apparent that the ex parte judgement was obtained on the strength of false and non existed service. They further contended that they were never served with any notice of judgement and were never served with any hearing notices for trial either. The 3rd and 4th defendant/ applicants were deliberately denied an opportunity to defend themselves. In HCCC No. 1622 of 1998 Lazarus Chomba Vs. Zakayo Gitonqa & Another it was stated;

“...The matters to be considered in deciding the application were discussed in Jamnadas V.Sodha v Gordandas Hemraj (1952) ULR. In that case, AINLEY, J. said as follows:-

“The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the Plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the court”
8. Lastly the applicants submitted that they have a good defence and it is only just and equitable that the ex-parte entered herein be set aside and the 3rd and 4th defendant/applicants be granted leave to defend the plaintiff's claim and an opportunity to be heard on the merits in the aforementioned circumstances.
9. The respondent alternatively submitted that the 3rd defendant was physically served with summons and pleadings in this matter as evidenced by the affidavit of service dated 30/9/2014 at the 4th defendant's office and it was duly received.
10. The respondent argued that it was at all times the responsibility of the 3rd defendant to apply for the process server to be summoned to attend court for cross examination. In default of that, the process server's affidavit of service was thus not sufficiently challenged.
11. The respondent further argued that the 3rd defendant alleged that he was employed as a transit driver by the 4th defendant and never worked within the employers' office but the said allegations are not supported by any evidence. That it is trite law that he who alleges must prove his case.
12. The respondent submitted that the 4th defendant/applicant was physically served at its office twice with court documents in this matter. Order 5 rule 3 (b) (i) of the Civil Procedure Rules 2010 recognize that a corporation is deemed to be properly served when the documents are left at the office of the corporation, if the process server is unable to find any of the officers of the corporation mentioned in Rule 3 (a). That further from the affidavit of service by Willis Agayi sworn on 1/11/2023 the 4th defendant was served with taxation Notice dated 18/11/2023 and Party and party bill of costs.



13. The respondent argued that the 3rd and 4th defendants were well aware of the proceedings but they did not care to know or find out its outcome. By failing to defend the claim the 3rd and 4th defendant waived its constitutional right to be heard and to prosecute the matter.
14. The respondent further submitted that the failure to serve the 10 days' Notice of entry of Judgement is not fatal because the 3rd and 4th Defendants/ Applicants were made aware of the entry of judgement against them on 1st November 2023 when they were served with Taxation Notice and the Bill of Costs.
15. The sole issue for determination in the two applications is whether the exparte judgment should be set aside.
16. I find that there is evidence that the 3rd and 4th defendants were served and affidavits of service filed which have not been challenged.
17. The 3rd and 4th defendants did not seek leave to cross-examine the deponents of the affidavits of service.
18. It has not been disputed that the 4th defendant/applicant was physically served at its office twice with court documents in this matter.
19. Order 5 rule 3 (b) (i) of the Civil Procedure Rules 2010 recognizes that a corporation is deemed to be properly served when the documents are left at the office of the corporation, if the process server is unable to find any of the officers of the corporation mentioned in Rule 3 (a).
20. Further, from the affidavit of service by Willis Agayi sworn on 1/11/2023 the 4th defendant was served with taxation Notice dated 18/11/2023 and Party and party bill of costs.
21. I find that the parties were all served with the amended plaint by substituted means 15/6/2018. It is not in dispute that the amended plaint was served on 15/6/2018 which service was through advertisement in Daily Nation Pursuant to orders granted on 6/4/2018 by this court.
22. I find that service of summons in this case to all the parties was sufficient.
23. In the case of Kenya Finance Bank Ltd (in Liquidation) v Firmway Wood Industries Ltd & another [2009] eKLR, the court held as follows on the issue of substituted service;

“Under Order 5 Rules 17 substituted service is permitted if the court is satisfied that the summons could not be served personally. Leave having been granted to the Plaintiff to use the substituted method of service the Defendants have not been able to persuade me that service was defective”.
24. I find that such service is permitted by the law where the defendants cannot be traced and in the current case in addition to physical service, the advertisement is sufficient service in the circumstances of this case
25. The judgment was delivered after the suit proceeded to formal proof.
26. This case has been in court for a very long time. The defendants were all served with process and they have been indolent in bringing these applications.
27. There is no doubt that the delay in prosecuting this case has denied the respondent and her children justice.
28. The applications dated 5/2/2024 and 15/11/2023 are both dismissed with costs to the respondent.



**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
24TH DAY OF SEPTEMBER, 2024.**

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the 1st and 6th Defendant

..... for the 3rd and 4th Defendant

..... for the 7th defendant

