



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 53 OF 2017**

**JOSEPH MUNYOKI NZIOKA.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**1. RAINDROPS LIMITED**

**2. MUHAMMAD ABDULMUTALIB AZZINJIBARI**

**3. AZZA NZARA NASSARO**

**4. JOSEPH KIGWAGU**

**5. SHAIB HAMISI MTUWA**

**6. RAMI ABDALLAH AWADH**

**7. ABDALLA ALI TAIB.....DEFENDANTS**

**RULING**

1. There are two applications before this court for determination and both are dated **10<sup>th</sup> December, 2020** and filed on behalf of the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants by the advocate on record RBZ Advocates LLP.

2. The first application seeks stay of a **Ruling** delivered on the **8<sup>th</sup> February, 2019** by the Honourable Lady Justice Njoki Mwangi whilst the 2<sup>nd</sup> Application seeks to discharge **interlocutory Judgment** issued on **20<sup>th</sup> July 2020**. Since the two applications will attract different outcomes, they will be determined serially but refer to as the first and second application as outlined above.

**THE FIRST APPLICATION**

3. The application is dated **10<sup>th</sup> December 2020** and is brought pursuant to provisions of **Sections 1A, 1B, 3, 3A, 63 (e) and 95** all of the **Civil Procedure Act, Order 42 Rule 6, and Order 51** both of the **Civil Procedure Rules, 2010** and **Section 7** of the **Appellate Jurisdiction** and all other enabling provisions of law. By this applications, the Applicants seeks for the following orders:-

**a) Spent;**

**b) Spent;**

**c) This Honourable Court be pleased to order a stay of execution of any other consequential orders emanating from the decision of this Honourable Court and issue an Order of stay in respect of its order emanating from the Ruling of Honourable Lady Justice Njoki Mwangi dated 8<sup>th</sup> of February 2019, more specifically ruling and order dismissing the Defendants' preliminary objection dated 15<sup>th</sup> of August 2018, and any consequential orders that may be issued pending the hearing and determination of the intended appeal;**

**d) This Honourable court be pleased to gran leave to the Defendant/Applicants to appeal against the ruling of the Honourable Lady justice Njoki Mwangi dated 8<sup>th</sup> of February, 2019, more specifically the Ruling and order dismissing the defendants**

*preliminary objection dated 15<sup>th</sup> of August, 2018, if need be;*

*e) Spent;*

*f) The costs of this application be provided for.*

4. The application is supported by the **affidavit** of **Azza Nzara Nassaro** and on further adduced on its face. In her **affidavit**, **M/s Azza Nzara** has deponed that the Defendants had filed a **Preliminary Objection** dated **15<sup>th</sup> August, 2018** challenging this court's jurisdiction to entertain the suit as filed by the Plaintiff but the same was dismissed on **8<sup>th</sup> February, 2019**. That aggrieved by this court's ruling, the Defendants filed a notice of appeal dated **8<sup>th</sup> February, 2019** and stated that if stay is not granted on the execution of that ruling and the subsequent proceedings, then the intended appeal will be rendered nugatory and a mere academic exercise. Lastly, that the Plaintiff/ Respondent is unlikely to be able to compensate the Applicants on the damages and costs which abide to execution of an order and in any event the Defendants/Applicants are willing to deposit security for due performance of such orders as may be issued.

5. The application is opposed by the **affidavit** of **Joseph Munyoki**, the Plaintiff herein sworn on **23<sup>rd</sup> March 2021** and filed on even date. He has deponed that the Defendants had not satisfied the preconditions to granting the orders of stay as sought. Firstly that despite mere allegations, the Defendants have not demonstrated that they would suffer substantial loss in the event that the orders for stay are not granted. That the Defendants/Applicants are guilty of laches since the Ruling having been delivered on **8<sup>th</sup> February, 2019**, the instant application was filed almost two years later on **11<sup>th</sup> December 2020**. And lastly that the Defendants have not deposited any security with the court in performance of the orders issued against them.

6. Directions were issued that the application be canvassed by way of written submissions and both parties dutifully filed their submissions with the Defendant/Applicants filing their submissions on **16<sup>th</sup> April, 2021** whilst the Plaintiff/Respondent filed two sets of submissions dated **3<sup>rd</sup> May, 2021** and on the **19<sup>th</sup> May, 2021** respectively.

7. The gist of the Defendant/Applicants submissions is that the **Preliminary Objection** had challenged this court's jurisdiction and if the prayers sought herein are in the end granted, they will be fraudulent and unfounded in the event the appeal succeeds. As such, the defendants will incur unnecessary losses in costs of defending the suits. The delay exhibited is attributed to the Covid-19 Pandemic and lastly that the defendant is willing to furnish security as may be directed.

8. On the part of the Plaintiff, it is submitted that the order dismissing the **Preliminary Objection** is incapable of being executed and since it is a negative order, no party was directed to do or to refrain from doing anything. As such a court cannot stay a negative order. This argument is supported by excerpts from the cases of **Sonalux Limited & Another –vs- Barclays Bank of Kenya Ltd & 2 Others [2008]eKLR** and **Kanwal Sarjit Singh Dhiman-vs-Keshavji Jivraj Shah [2008]eKLR**.

9. Be that as it may, the Plaintiff submitted that the Defendants have not satisfied the conditions for stay of execution under **Order 42 Rule 6** of the **Civil Procedure Rules, 2010**. The submissions here do reflect the grounds in the replying affidavit and I wish not to duplicate the same here.

10. In the supplementary submissions, the Plaintiff argues that the Defendants have not made a case for the court to grant leave to appeal. It is argued that the instant application was filed late in the day after the time frame for appeal had lapsed hence the proper cause would be first seeking leave to extend the time for filing the intended appeal. As such the Defendants cannot be allowed to appeal from the back door.

#### **DETERMINATION OF THE FIRST APPLICATION**

11. I have considered the application at hand, the affidavits sworn in support and opposition of the same, the submissions made on behalf of the parties and the authorities relied thereon. I find that the only issue which the Defendants/Applicants have raised for determination is *whether in the circumstances, an order for stay of execution of the Ruling delivered on 8<sup>th</sup> February, 2019 by the Hon. Lady Justice Njoki Mwangi, pending the hearing of the intended appeal.*

12. The provisions of **Order 42 Rule 6** of the **Civil Procedure Rules, 2010** specify the circumstances under which the court may order for stay of execution of a decree or order pending an appeal. It provides that an Applicant must demonstrate the following:-

*a) Substantial loss may result to the applicant unless the order was made;*

*b) The application was made without unreasonable delay; and,*

*c) Such security as the court orders for the due performance of such decree or order as may ultimately binding on him has been given by the applicant.*

13. From the above provision, it is clear that the court must be satisfied that there is "sufficient cause" to grant a stay. Evidently, the three (3) prerequisite conditions set out in the said **Order 42 Rule 6** of the **Civil Procedure Rules, 2010** cannot be severed and must be met simultaneously.

14. Considering the above principles vis-à-vis the circumstances of this case, the Defendants seek to stay the execution of ruling delivered on

**8<sup>th</sup> February, 2019.** The subject of that ruling was the **Preliminary Objection** dated **15<sup>th</sup> August, 2018** challenging this court's jurisdiction to entertain this suit as a derivative suit. However, upon considering the merits of party's case, the court was persuaded that the case is properly filed and dismissed the preliminary objection.

16. In my humble view, that was a negative order incapable of being stayed as the Defendants now seek. By that Ruling, the court did not direct any party to do or refrain from doing anything. Therefore, there is nothing arising to be restrained by this court.

17. The Court of Appeal has expressed its jurisprudence with regard to negative orders in the case of **Kaushik Panchamatia & 3 Others – vs- Prime Bank Limited & Another [2020]eKLR**. As the court reiterated and which I fully adopt, that;

*“A negative order is incapable of being stayed because there is nothing to stay. It therefore, follows that in light of the above threshold we have no mandate to grant a stay order in the manner prayed for by applicants.”*

18. Similarly, in the case of **Western College Farts and Applied Sciences –vs- Oranga & Others [1976]KLR 63**, the court whilst considering whether an order of stay can be granted in respect of a negative order stated *inter-alia* that;

*“But what is there to be executed under the judgment, the subject of the intended appeal the High Court has merely dismissed the suit with costs. An execution can only be in respect of costs.....”*

*The High Court has not ordered any of the parties to do anything or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court Judgment for this court in an application for stay to enforce or restrain by injunction.”*

19. Accordingly, and in light of the above cited authorities, there is nothing to stay in the Ruling of **8<sup>th</sup> February, 2019** as the court merely dismissed the Defendant's **Preliminary Objection**. Possibly, the only execution which can flow from that Ruling is with respect to costs which were awarded to the Plaintiff.

20. The upshot is that, this court has no mandate to grant a stay order in the manner sought by the Defendant/Applicants and it would be moot to consider the other factor for stay of execution as provided under **Order 42 Rule 6** of the **Civil Procedure Rules**.

21. Consequently, it is this court's conclusion that the Defendant/Applicant's **Notice of Motion** application dated **10<sup>th</sup> December, 2020** (discussed herein above as the first application) is not merited and the same is hereby dismissed with costs to the Plaintiff/Respondent.

## **THE SECOND APPLICATION**

22. The second application is also dated **10<sup>th</sup> December, 2020** and filed by the 5<sup>th</sup> to 7<sup>th</sup> Defendants seeking for orders that;

*a) That the Honourable court be pleased to review, to discharge and/or vary and/or correct and/or amend and/or set aside its order issued on 20<sup>th</sup> July, 2020 by the Honourable Deputy Registrar, entering interlocutory judgment as against the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants.*

*b) That the Honourable court be pleased to review, to discharge and/or vary and/or correct and/or amend and/or set aside order issued on 20<sup>th</sup> July, 2020 by the Honourable Deputy Registrar, entering interlocutory Judgment as against the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants.*

*c) That the Plaintiff be ordered to serve upon the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants with summons to enter appearance together with the Plaintiff and other pleadings.*

*d) That the costs of this application be provided for.*

23. The application is supported by **three affidavits** of the 5<sup>th</sup> to 7<sup>th</sup> Defendants respectively and the main ground advanced is that there exist some mistake and error apparent on the record to warrant the review of the orders sought as there was no personal service upon the 5<sup>th</sup>, 6<sup>th</sup>, and the 7<sup>th</sup> Defendants as is alleged in the **Return of Service** of **Daniel M. Thoya** dated **29<sup>th</sup> November, 2020**. More specifically, the Applicants avers that they were not served as is required under **Order 5 Rule 8** of the **Civil Procedure Rules** and under **Section 20** of the **Civil Procedure Act, Cap 21**.

24. In the case of the 5<sup>th</sup> Defendant/Applicant, it is averred that he has never authorized any third party to receive service on his behalf as is intimated and on 28<sup>th</sup> November, 2019 which is the day it is alleged that he was served, he never saw anyone purporting to serve him with summons and all that is deposed by the Process Server is a bunch of lies.

25. The 6<sup>th</sup> and 7<sup>th</sup> Defendants have similarly deposed that on the 29<sup>th</sup> November, 2019 when it is alleged they were served, they were never contacted with any one or in any way informed of the court summons. The three deponents have besieged the court to find that those circumstances are compelling enough to warrant the grant of the orders being sought.

26. The Plaintiff/Respondent has opposed the application through his **Replying Affidavit** filed on the **23<sup>rd</sup> March, 2021**. He has deponed that under **Order 5 Rule 8** of the **Civil Procedure Rules, 2010** a defendant can be served through an agent empowered to accept service when personal service cannot be achieved. Hence the 5<sup>th</sup> to 7<sup>th</sup> Defendants were thus served through their agents and an **affidavit for return of service** by one, **Daniel M. Thoya** filed in court on the **16<sup>th</sup> July, 2020**. According to the Plaintiff, if the Defendants are disputing proper service, they ought to adduce evidence to the contrary.

27. It is further deponed that the alternative mode of service provided under **Order 5 Rule 8** of the **Civil Procedure Rules** are necessary when it is not practical to assess the Defendants like in this particular case, the 5<sup>th</sup> to 7<sup>th</sup> Defendants had travelled outside the country hence the necessity of serving them through their agents.

28. Lastly, it is averred that the Defendants have not established a proper case for granting orders for review since such orders can only be granted in circumstances of an error apparent on the record or where there is discovery of new facts and lastly when the surrounding circumstances of the case warrant the review of the orders in question. The 5<sup>th</sup> to 7<sup>th</sup> Defendants are said not to have met those grounds hence not befitting the exercise of this court's discretion in their favour.

29. The application was canvassed by way of written submissions. The Defendant/Applicant's submissions were filed on **16<sup>th</sup> April, 2021** whilst the Plaintiff/Respondents submissions were filed on the **3<sup>rd</sup> May, 2021**.

30. On behalf of the Applicant's, it is submitted that under **Order 5** of the **Civil Procedure Rules**, service is authorized for the Defendant or his agent. Rule 8 thereof permits service to an agent who is empowered to receive summons and without such authority, the Defendant is to be served personally. In this case, it is averred that the Process Server served some other third parties he described as agents of the 5<sup>th</sup> to the 7<sup>th</sup> Defendants. He (the process server) never inquired on whether the persons he served were authorized agents of the Defendants contrary to the procedure envisaged under the Civil Procedure Rules. It is even submitted that the process server never effected any service to the alleged third parties, that he only lied to have had served the summons.

31. Reliance is placed on the case of **Development Bank of Kenya Ltd –vs- Riva Oils Co. Ltd & 3 Others [2015]eKLR**, where the court held that service to agent not authorized to receive service is not proper service. Similar pronouncements were made in the cases of **National Bank of Kenya Ltd –vs- Puntland Agencis Ltd & 2 others [2006] eKLR** and **Yalwala –vs- Indumuli & Another [1989] eKLR**.

32. Lastly, it is submitted that the power of the court to set aside judgment as is requested herein is provided for under **Order 12 Rule 7** of the **Civil Procedure Rules, 2010** and the grounds upon which such judgment can be set aside are listed in the famous case of **Shah-vs-Mbogo & Another [1967]E.A** as, to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but not to assist a person who has deliberately sought to obstruct or delay the cause of justice. Similar findings were made in the cases of **Patel –vs- East Africa Cargo Handling Services Limited [1974] E.A** and **Maina –vs- Mugiria, Civil Appeal No. 27 of 1982**.

33. On part of the Plaintiff/Respondent, only two issues were identified for determination, that is whether proper service of summons was effected on the 5<sup>th</sup> to 7<sup>th</sup> Defendants and whether the court should set aside the interlocutory Judgment.

34. On the first issue, it is submitted that **Mr. Alex Mwikya** received service on behalf of the 5<sup>th</sup> Respondent while **M/s Selina Wawuda** received service on behalf of the 6<sup>th</sup> and the 7<sup>th</sup> Defendants. That the mode of service was resorted to after it had been confirmed that the 5<sup>th</sup> to 7<sup>th</sup> Defendants were out of the country. Be that as it may, the Plaintiff submitted that it is upon the Defendant to adduce evidence to show otherwise. This is in line with the court of Appeal's decision in the case of **Shadrack arap Baiywo –vs- Bodi Bach [1987]eKLR**, where it was held that;

*“There is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect.”*

35. It is submitted that the sheer renouncement of **Mr. Mwikya** and **M/s Selina** by the 5<sup>th</sup> to 7<sup>th</sup> Defendants is not solid reason to refute that proper service was effected upon them. In any event the veracity of the process server could have been tested through cross examination as provided for under **Order 5 Rule 16** of the **Civil Procedure Rules**.

36. Lastly, on whether the court should set aside the interlocutory Judgment, it is submitted that the discretion should be exercised rationally only when it is shown that the applicants have an arguable defence and they never intended to deliberately derail the cause of justice. In this case it is argued that the 5<sup>th</sup> to 7<sup>th</sup> have not annexed any defence to show an arguable case with triable issues. Reliance is placed in the cases of **Prime Bank Ltd –vs- Paul Otieno Nyamodi [2014]eKLR** and **Veronica Wangari Kabogo –vs- Julius Githome & 3 Others [2018] eKLR**.

#### **DETERMINATION OF THE SECOND APPLICATION**

37. I have considered the application fully and the submissions as filed by both parties. This is an application for setting aside interlocutory Judgment on the grounds that the 5<sup>th</sup> to 7<sup>th</sup> Defendants were never served with the summons to enter appearance. The only issue for determination therefore is *whether the 5<sup>th</sup> to 7<sup>th</sup> Defendant/Applicants have made a case for setting aside the ex-parte judgment entered against them in*

this matter on 20<sup>th</sup> July, 2020.

38. The jurisdiction of the court to set aside ex-parte Judgment for default of appearance and defence is provided for under **Order 10 Rule 11** of the **Civil Procedure Rules 2010** which provides:

*"Where judgment has been entered under this order, the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."*

39. The Court of Appeal in addressing the circumstances under which an ex-parte Judgment could be set aside stated in the case of **Gicharu Kimani And Associates Advocates –vs- Samwel Kazungu Kambi [2020] eKLR** as follows:-

*"Considering the circumstances of this motion, the facts regarding the merits or demerits of it one must take into account in exercise of discretion that it's within the ambit of the guiding principles laid down in the case of **James Kanyiti Nderitu & Another v Marios Philotas Ghikas & Another Civil Appeal No 6 of 2015 eKLR (Msa)**, the Court of Appeal stated as follows:*

*"We shall first address the ground of appeal that faults the learned judge for setting aside the default judgment and consequential orders in the circumstances of the case. From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest to set aside the default judgment, among other. (See Mbogo & Another v Shah (supra), Patel v EA Cargo Handling Services Ltd {1975} EA 75, Chemwolo & Another v Kubende {1986/KLR 492 and CMC Holdings v Nzioki {2004/1 KLR 173}). In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgement on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issues or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyango 0100 v Attorney General {1986-1989 1EA 456})"* (underlined emphasis added).

40. The argument brought forth in this case is that the 5<sup>th</sup> to 7<sup>th</sup> Defendants denied having ever been served with summons to enter appearance, the Plaintiff together with all the other accompanying documents and they stated that summons were purportedly served on third parties who were not authorized to receive service on their behalf. In other words, the Applicants position is that the interlocutory Judgment was irregularly entered and should be set aside *ex debito justitiae*. The underlying question therefore is whether the 5<sup>th</sup> to 7<sup>th</sup> defendants were properly served with summons to enter appearance.

41. By his affidavit sworn on 13<sup>th</sup> November, 2020, Daniel M. Thoya, the process server, deposes as follows:-

1) THAT I am an authorised Court Process server duly authorized to serve court processes.

2) THAT on the 28<sup>th</sup> day of November, 2019 I received instructions from M/s John Bwire & Associates Advocate to serve the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants herein with summon to enter Appearance issued by the court on 22<sup>th</sup> November 2019, Notice of Motion applicant under Certificate of Urgency all dated 10<sup>th</sup> April, 2018 bounded together with verifying affidavit all dated 5<sup>th</sup> November, 2019.

3) THAT on the same day 28<sup>th</sup> November, 2019. I proceeded to the Raindrops Limited situated at Malindi adjacent Red-cross offices along Malindi-Lamu road where the 5<sup>th</sup> Defendant works. Upon my arrival, I met the secretary at the reception whom I introduced myself and explained my purpose to visit to her. She introduced an officer. The officer introduced himself to me as one Mr. Alex Mwikya. He further informed that the Defendant has travelled. The officer made a call to the Defendant and informed about Court document. After their conversation, the Officer informed me that he was authorized to receive the Court document on his behalf. After about 2:40pm I served the documents mentioned in paragraph 2 above upon him by tendering copies thereof to him and requiring him to sign and stamp at the reverse of my principal copies. He acknowledged service and received the documents for and on behalf of 5<sup>th</sup> Defendant at the front of my principal copies, which I return her with duly served.

4) THAT On 29<sup>th</sup> November, 2019. I proceeded to Raindrops Limited. Mombasa branch offices along Nyali beach road where the 6<sup>th</sup> 7<sup>th</sup> Defendants works. Upon reaching, I was received by the secretary at the reception whom I introduced and explained the purpose of the visit to her. The secretary introduced herself to me as Ms. Selina Wewuda and informed me that she was the secretary to Rami Abdallah Awadh and Abdalla Ali Taib, the 6<sup>th</sup> and 7<sup>th</sup> Defendants respectively. At about 11:34am, I served the document mentioned in paragraph 2 above upon her by tendering copies thereof to her and requiring her to sign and stamp at the reverse of my principal copies. She accepted service by

***retaining copies on behalf of 6<sup>th</sup> and 7<sup>th</sup> Defendants herein but she declined to sign received at the reserve of my principal copies, which I return here with duly served.***

***5) THAT the said secretary one Ms .Selina Wawuda informed me that she has instructions to receive all Court documents on behalf of the 6<sup>th</sup> and 7<sup>th</sup> Defendants herein but not to sign.***

***6) THAT all what is stated herein is true to the best of my knowledge and belief.***

42. Clearly, the service deponed to by **Mr. Daniel Thoya** was not upon the 5<sup>th</sup> to 7<sup>th</sup> Defendants personally but upon their purported agents acting on their capacities as secretaries. For the case of the 6<sup>th</sup> and the 7<sup>th</sup> Defendants, it is averred that the summons were served upon **M/s Selina Wawuda** who introduced herself as the secretary for both the 6<sup>th</sup> and the 7<sup>th</sup> Defendants and receives service of summons on their behalf but declined to acknowledge receipt by signing. The 6<sup>th</sup> and the 7<sup>th</sup> Defendant have sworn an affidavit declining having authorized the said **M/ Wawuda** to receive any service on their behalf.

43. For the 5<sup>th</sup> Defendant, it is alleged that his secretary **Mr. Alex Mwikya** accepted service on his behalf and acknowledged the receipt by signing at the front page of the process servers documents. The 5<sup>th</sup> Defendant on his part denied that the said **Alex Mwikya** had authority to receive service on his behalf and swore an affidavit to that effect.

44. I would not hesitate to hold that personal service is not mandatory.

**Order 5, Rule 8(1)** of the **Civil Procedure Rules** states that;

***“Wherever it is practicable, service shall be made on the defendant in person unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient”.***

45. The above provision takes Cognizance of the fact that personal service may not be achieved in some circumstances. In the present case, it is averred that service on the 5<sup>th</sup> to 7<sup>th</sup> Defendants was frustrated by the fact that they had travelled out of country. The 5<sup>th</sup> to 7<sup>th</sup> Defendants on their part deny those allegations and assert that they were present in their offices on the material day but the process server never bothered to find out on that. A glance of the affidavit of service as reproduced above shows that the process server never mentions whether he asserted any efforts to serve the summons personally to the 5<sup>th</sup> to 7<sup>th</sup> Defendants. The allegations that the said defendants had travelled abroad is more or less submissions on the bar made by the Plaintiff’s advocates and there is nothing more adduced to buttress those allegations.

46. The court in the case of **Hon. Basil Criticos –vs- The Hon. Attorney General & 8 Others (2012)Eklr**, emphasized on the importance of service by stating thus;

***“But in our law, service is higher than knowledge and since the service here was frustrated.....I shall hold in accord with the existing law that there was no service.”***

47. In the case of **Boniface Ooko Ganda -vs- Stanlry Maina & Another [2005] eKLR** the court while citing with approval the case of **Kimeu -vs- Kasese [1990] KLR 32** stated as follows;

***“Whenever it is practicable, service of summons and any other process shall be made on the defendant in person unless he has an agent empowered to accept service, in which case service on the agent may be effected.”***

The court went to further state that:-

***“It is not the relationship of the person served to the Defendant but that he was in fact authorised to receive service. Also that the Affidavit of Service should specifically state that that person was authorised to receive service.”***

48. The learned Judge E.K. Ogola in the case of **Development Bank of Kenya Ltd –vs- Riva Oils Co. Ltd (supra)** had the following to say as regards the burden of prove as to whether summons were duly served:-

***“It is trite that the burden of proving service of summons upon the Defendant lies with the Plaintiff and it is the Plaintiff’s process server who should provide proof of service upon the Defendant. That burden of proof cannot in any way whatsoever shift to the Defendant. The Applicant has categorically stated that he was never served with the Summons to enter Appearance and the Respondent has failed to rise up to the challenge to prove service as by law required”***

49. The facts of the above cited cases were similar to the prevailing circumstances of the present case and I see no reason why I should depart from the findings therein. The 5<sup>th</sup> to 7<sup>th</sup> Defendants having denied service, it was upon the Plaintiff to show that the agents to whom the process server served the summons were authorized to receive service on behalf of the Defendant. The evidential proof shifted to the Plaintiff once service was denied. There is also nothing in record to show that **M/s Selina Wawuda** and **Mr. Alex Mwikya** were not merely secretaries but also authorized agents of the 5<sup>th</sup> to 7<sup>th</sup> Defendants to receive service of court documents.

50. Consequently, it is the finding of this court that the **Mr. Alex Mwikya** and **M/s Selina Wawuda** were not authorized agents of the 5<sup>th</sup>,

6<sup>th</sup> and 7<sup>th</sup> Defendants respectively, to accept service and therefore the purported service was not proper service.

51. Having established that the service of summons was improper, it follows that default judgment entered was irregular and against the backdrop of the Plaintiff's submissions. Further, the court is not mandated to venture into considerations of whether the intended defence raises triable issues or whether such a draft defence was indeed annexed to the application. The court has no option but to set aside such Judgement *ex debito justitiae* as the same prejudices the Defendant/Applicants who ought to be heard before an adverse decision is taken against them.

52. In the upshot, the second application dated the **10<sup>th</sup> December, 2020** and filed by the 5<sup>th</sup> to 7<sup>th</sup> Defendants is merited and the same is hereby allowed as follow:-

*a) The interlocutory judgment entered herein on 20<sup>th</sup> July, 2020 against the 5<sup>th</sup> to 7<sup>th</sup> Defendants and the subsequent and consequential orders and proceedings therefrom be and are hereby set aside.*

*b) That the 5<sup>th</sup> to 7<sup>th</sup> Defendants/Applicants to file their defence to this suit within 21 days from the day hereof.*

*c) The Plaintiff is directed to fix a mention date thereafter from the court registry to confirm compliance with order 11 of the Civil Procedure Rules on pre-trial.*

*d) That the costs of the second application shall be in the main cause.*

It is hereby so ordered.

**SIGNED AND DATED AT MOMBASA THIS 14TH DAY OF JULY, 2021.**

**D. O. CHEPKWONY**

**JUDGE**

**DELIVERED VIRTUALLY AT MOMBASA THIS 14TH DAY OF JULY, 2021.**

**A. ONG'INJO**

**JUDGE**