



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 10 OF 2017

TABITHA WAMAITHA MWANGI (suing as the personal and legal representative of the estate of

**SIMON WAMBUGU MATHU
(DECEASED).....PLAINTIFF/RESPONDENT**

VERSUS

HENRY MUSEMBI.....1ST DEFENDANT/RESPONDENT

SHANDRES BABARNEH.....2ND DEFENDANT/RESPONDENT

MODERN PRECAST (K) LIMITED.....3RD DEFENDANT/ APPLICANT

RULING

1. The applicant's Notice of motion application dated 15th February 2021 prays for the following orders;

- a. That leave be granted to the firm of Bore, Malanga & Co. Advocates to come on record on behalf of the 3rd Defendant/Applicant in the place of any other firm of advocates that may have previously filed notices and/or appearances purporting to represent the 3rd defendant/applicant.
- b. That pending the hearing and determination of this application interparties, there be temporary stay of execution of the judgement and Decree issued by the Honourable Court on 22/10/2019 and 25/09/2020 respectively.
- c. That pending the hearing and final determination of this application, there be stay of execution of the judgement and/or Decree issued and/or passed by the Honourable Court on 13/5/2020.
- d. That the Honourable Court be pleased to expunge from the record of the court any document filed by the firms of M/S Obura' Mbeche & Company Advocates, M/S Ahmednasir, Abdikadir & Company Advocates and M/S Kinyanjui Njuguna & Company Advocates to the extent that any and/or all such documents were purported to have been filed for and/or on behalf of the 3rd defendant/applicant.
- e. That all the proceedings conducted in this matter subsequent to the issuance of the summons to enter appearance issued on 9.3.2017 be set aside and the judgment and/or Decree issued and/or passed by the Honourable Court on 13/5/2020 be and are hereby varied, reviewed and/or set-aside and the Honourable court be pleased to allow the 3rd defendant/applicant to unconditionally defend the suit upon being properly served with valid summons to enter appearance.
- f. That costs of this application be in the cause.

2. The application was premised in the supporting affidavit of the applicant's director BABARIYA JIGNABEN sworn on 13th February 2021 and the following grounds;

3. That the plaintiff has started executing the decree dated 8.2.2021 emanating from a judgement of this court dated 13.5.2020 and has assigned M/S Nasioki Auctioneers who proceeded to proclaim the 3rd defendant applicant's movable assets. The applicant contends that he had never been made aware of the suit herein prior to 9.2.2021 when it was served with the warrant of attachment, the proclamation of attachment dated 9.2.2021 as well as the Auctioneers Bill of costs with an even date.

4. The applicant averred that none of the three defendants has ever been properly or at all served with the said summons to enter appearance and the summonses dated 9.3.2017 were allegedly served upon Xplico Insurance Co. Ltd which company never informed the applicant about the summons as they have also never had any relations.
5. The 3rd defendant/applicant averred that it has never instructed any of the said firms to wit M/S Obura Mbeche & Co. advocates, M/S Ahmednasir, Abdikadir & Co Advocates as well as M/S Kinyanjui Njuguna & Co Advocates to act for it in any forum and more specifically in this suit.
6. The applicant further averred that all proceedings in this suit subsequent to the issuance of the summons to enter appearance are irregular and must be set aside. He also averred that he has a good defense to the plaintiff's suit and should be allowed to present the same in a properly and/or regularly conducted proceedings.
7. Since the application was filed under a certificate of urgency the court directed on the 16th day of February 2021 that there be a temporary stay of execution against the applicant pending interparties hearing on the 26th February 2021.
8. The plaintiff /applicant on the other hand filed her Notice of Motion dated **23rd February 2021** in which she sought for a stay of orders of injunction issued on the 16th February 2021 staying execution against the 3rd defendant and that the court do issue an order allowing the plaintiff/applicant to proceed with the execution of the decree issued on the 13th May 2020 and that the costs of this application be provided for.
9. The application is premised on the grounds thereof and the sworn affidavit of the plaintiff dated 23rd February 2021. She said that the applicant obtained a judgement against the defendants for the sum of Kshs. 10,910,461 after which she obtained warrants of attachment of the defendant's movable property in execution of the decree. The 3rd defendant and its insurance company were served with the summons to enter appearance together with the pleadings and an affidavit of service was filed.
10. Throughout the entire hearing, the defendants were adequately represented by various firms and finally by the firm of Ahmednasir Abdikadir and Co. Advocates. The applicant stated that the 3rd defendant has through misrepresentation and concealment of material facts obtained stay of execution of the decree issued on 13th May 2020 and therefore it is in the interest of justice and fairness that this Court does set aside and or discharge the orders issued on the 16th February, 2021.
11. She went on to state that the 3rd defendant/applicant's application is made in bad faith and is meant to derail and delay the course of justice thereby denying her the fruits of the decree and the same should be dismissed as it is also an abuse of the court process.
12. The applicant further averred that the 3rd defendant /applicant is guilty of laches since it has brought this application with inordinate delay considering that it is one year since judgement was delivered and the defendant has not given any reason for the delay. The applicant has only been roused into action by the warrants of attachment hence the delay is inexcusable and the court should dismiss its application with costs.
13. The 3rd defendant also in the further affidavit insisted that they were not served and that the purported affidavit of service allegedly dated 12.05.2017 by Danson G Mungai is obviously contrived and manufactured document created specifically to respond to the 3rd defendants' application as it had never existed in the court file before.
14. The 3rd defendant averred that the company has never had an office in Balgon Building in Nyahururu and that the company has never employed anyone by the name Kiragu and so he is a total stranger to the company.
15. When the matter came up for directions the court ordered the parties to file written submissions which they have done.

Plaintiffs written submissions

16. On the issue that the 3rd defendant has never been served, the plaintiff submitted that a detailed affidavit of service by one Danson Mungai sworn on the 12th May 2017, evidences that the defendants were duly served. The process server indicated that the person who received service by the name Muli gave his mobile phone and when they met he was able to identify him since he had the 3rd defendants' company service car.
17. The auctioneers too, contacted the said Mr. Muli who though he indicated that he had ceased working for the 3rd defendant, directed to the 3rd defendant's premises. The detailed letter dated 23rd February, 2021, from M/s Nasioki Auctioneers reveal how the same contacts in the process server's affidavit, helped him to trace the 3rd defendant.
18. The plaintiff relied on Order 5 Rule 1 of the Civil Procedure Rules which provides that ***“subject to any other written law, where the suit is against a corporation the suit may be served upon (a) on the secretary, director or other principal officer of the corporation...”*** and submitted as evidenced by the affidavit of service that the summons was received by the general manager.
19. The plaintiff submitted that the Police Abstract indicates that Xplico Insurance C. Ltd were the insurers of motor vehicle KCH 424 P, having insured the same from 10th September 2016 to 9th October 2017. Therefore, at the time of the accident, to wit, 16th September 2016, the motor vehicle was under their cover and the plaintiff was right to give them notice in accordance to **S. 10 (2) of the Insurance (Motor vehicle Third Party Risks)**.
20. Further the plaintiff submitted that the defendant cannot wish away its insurers and or the advocates appointed by the insurers to represent it. The insurer is statutorily bound to represent it in any claim that arises from the policy. She placed reliance in the case of **Uganda**

Transport Co Ltd v Kewaza and another [1975] E.A 276 wherein it was held in pertinent part thus; -

“the insurance company had been appointed the agent of the appellant for purpose of accepting service of summons.”

21. The plaintiff submitted that equity demands that he who seeks justice must come to court with clean hands. The 3rd defendant however, has misrepresented facts in order to delay and deny the plaintiff enjoyment of her fruits of the decree. If the defendant is not pleased with the way its insurer conducted his defence, then it should have filed a cause of action against it seeking to be redressed for the losses it had incurred, and not purport to coerce advocates, who are not even parties to the suit to file their responses to misconceived applications.

22. The plaintiff submitted that in the course of proceedings evidence was tendered in the form of a motor vehicle search certificate and a sale agreement that revealed that the 3rd defendant was the registered owner of the suit motor vehicle at the time of the accident. Further the certificate of insurance annexed in the statutory declaration of Sally Mbeche Advocates, reveals that the 3rd defendant was the insured of the suit motor vehicle at the time of the accident and as such the 3rd defendant shouldn't purport not be the registered owner of the suit motor vehicle.

23. The plaintiff submitted that the 3rd defendant shouldn't purport that it has no relations with the two defendants. If at all it didn't have any relationship, then the 3rd defendant didn't have any business appearing in a traffic case in Naivasha through the 2nd defendant where he was charged in **Traffic Case Number 484/17** for failing to keep the records of his driver, the 1st defendant herein, who was driving the suit motor vehicle at the time of the accident.

24. Since it had already been established that the 3rd defendant's said motor vehicle was insured by Xplico Insurance Co. Ltd, the said insurance is bound by **contractual obligations and Statutory Provisions under Section 4,5 and 10 of the Insurance (Motor Vehicle Third Party Risks)** to provide legal representation to it's insured. The insurance company was thus bound to defend the interest of it's insured, the 3rd defendant and where judgement is entered against it, to settle the claim. The said representation is through an advocate's retainer. It is trite law that a retainer binds an advocate to act for his or her client in a manner as to protect his or her client's interests and not to jeopardize the same and if he jeopardizes, then the insured can only file a cause of action against any such or all of them and not the plaintiff since the plaintiff was not privy to the contract between the parties.

25. The plaintiff submitted thus that the execution proceedings cannot be turned into an enquiry into the statutory liability between the insurance and the insured as the question is not the same as the cause of action between the plaintiff and the defendant.

26. The plaintiff averred that the 3rd defendant/applicant has not offered any plausible reason to invoke the unfettered discretion to warrant stay. Its application is replete with falsehoods and contradictions and it is evident that the applicant is attempting to maneuver the court process in a manner incompatible with the administration of justice.

27. The plaintiff submitted that she has proved her case on a balance of probabilities and judgement was rightfully entered in her favour, thus it would be an abuse of the court process to entertain the defendant's application which is not based on any plausible reasons. She prayed that the 3rd defendant's application be dismissed with costs to be borne by the defendant and the plaintiff's application seeking to set aside the orders obtained by the defendants, through misrepresentation of facts, be allowed as prayed.

3rd Defendant's written submissions

28. The 3rd defendant submitted that it had never instructed and/or appointed the firms of M/s Obura Mbeche, Ahmednasir Abdikadir and M/s Kinyanjui Njuguna, hence whatever actions those advocates may have purported to do in this suit are their own actions and not the actions of the 3rd defendant. The 3rd defendant was never served with summons to enter appearance and it also never participated in the proceedings leading to the judgement sought to be set aside.

29. The 3rd defendant relied on the case of **Msaiwale Chigawa (Dr.) v Yunus Abu Mussa, Malawi Supreme Court of Appeal Civil Appeal No. 13 of 2006** and submitted that Xplico Insurance Company, and any other person for that matter, could not purport to appoint advocates on behalf of the 3rd defendant without the knowledge, consent and/or acquiescence of the 3rd defendant. It submitted that the firm of Kinyanjui Njuguna could not have been properly on record given the undated memorandum of appearance it filed on 27/09/18. In essence, the 3rd defendant denied having instructed any of the firms to enter appearance on its behalf.

30. It went on to submit that summons to enter appearance were never served upon any of the defendants and especially the 3rd defendant. It relied on the Supreme Court case of **Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR** and submitted that the affidavit of service of one **Arasa Kinara** is unsigned, undated and uncommissioned hence cannot be considered by this court as an affidavit of service at all. The 3rd defendant submitted that the affidavit by **Danson Mungai** sworn on 12.5.2017 is a manufactured document as it never existed in the court record before it was specifically manufactured to respond to the application dated 15.2.2021.

31. It contended that if at all the summons were served on 14.3.2017 as purported in the defective affidavit of Arasa Kinara, the same summons would not be available to be given to Danson G. Mungai the following day on 15.3.2017. The affidavit of service thus must be rejected as not proving any service. It urged the court to allow its application dated 15th February 2021

ANALYSIS AND DETERMINATION

32. I have looked at the record of the court, the applications filed by both parties, the affidavits and the submissions by the parties to this suit. The only issue in dispute is whether or not the 3rd defendant was served with summons before the suit proceeded. This is actually the crux of the matter.

33. The 3rd defendant avers that it was not served and contended that it is the insurance company (X-plico insurance Company) that was served. The 3rd defendant contended that it had no dealings with X-plico Insurance Company. However, the court has perused through the record, and indeed from the motor vehicle search and the sale agreement attached by the plaintiff, it is clear that the suit motor vehicle **KCH 424 P** was registered in the name of Yaya Car Sales Limited. It should however be noted that the suit motor vehicle was sold to the 3rd defendant herein on 23rd June 2016 as evidenced by a copy of the sale agreement and confirmed by a letter from Yaya Car Sales Limited advocates dated 4th July 2019.

34. The accident herein occurred on 16th September 2016 way after the suit motor vehicle had exchanged hands and according to the police abstract issued in respect to the said accident, the same was insured by Xplico insurance Company Ltd. There is also a receipt on record showing that the 3rd defendant made annual premium payments in respect of the suit motor vehicle on 10th September 2016 and a certificate of insurance dated 9th October 2016 issued by Xplico Insurance showing the 3rd defendant as the policy holder. Therefore, the 3rd defendant's averments that it doesn't have any dealings with Xplico does not hold water.

35. There is no doubt that the insurer was served and a return of service by Arasa Kinara dated 14th March 2017 filed in court. In the case of **Gathua Elizabeth v Cyrus Ombuna Machini & another [2021] eKLR Chitembwe J** defined the relationship between an insurer and the insured as follows *"The relationship between an insurance company and its insured is well captured Under Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act Cap 405, which provides that an insurance company which has issued a motor vehicle policy against 3rd party risks is under a mandatory legal duty to satisfy any judgment entered in favour of a 3rd party against the owner of the motor vehicle in question who is its insured. While Section 10 (2) of the same Act provides that the insurer will only be liable to satisfy the judgment entered against its insured if it was notified of the proceedings in which the judgment was delivered before or within 14 days of the commencement of the proceedings. In view of the foregoing, it was proper for the plaintiff to serve the insurance Company with summons and a notice of intention to sue."*

36. It is worth to note that upon service, Xplico Company ltd being an agent of the defendants by dint of having insured them, appointed advocates to act on behalf of the defendants since an insurer is supposed to take care of the interests of the insured. Reliance is placed on the case of **Gathua Elizabeth v Cyrus Ombuna Machini (supra)** where the court stated thus;

"The law requires that a statutory notice be served upon the insurance company in a claim for damages. Upon service of such a notice, the insurer's interest on the claim crystallizes. If the policy is in force, the insurer will ultimately be called upon to satisfy any judgment granted against its insured. It would be a fallacy to expect the insurer to remain indolent and wait to be given a copy of a judgment by its insured without taking an active role in the dispute at the initial stage."

37. There is on record evidence of a Memorandum of Appearance by the firm of M/S Obura Mbeche and Company Advocates and later the firm of M/S Ahmednasir Abdikadir which took over from the firm of Obura Mbeche and Company Advocates as evidenced by the notice of change of advocates dated 11th April 2018. The firm of M/S Ahmednasir Abdikadir & Co Advocates as always been on record for the defendants as evidenced by this court's record. It is the same firm of advocates that filed a defence in this suit, cross-examined the plaintiff witnesses, filed submissions on behalf of the defendants and argued the bill of costs on behalf of the defendants. The firm of M/S Ahmednasir Abdikadir & Co Advocates may have been instructed by the insurance company as an agent of the 3rd respondent and therefore the 3rd defendant is estopped from purporting not to have instructed the said firm of advocates at the time when the plaintiff has commenced execution process to reap the fruits of her judgement.

38. There is also on record a return of service by one Danson G. Mungai dated 12th May 2017 and filed in Court on 16th June 2017. In the affidavit the process server averred that he was given a number of the general manager of the 3rd defendant one Mr. Muli and that they met at Ruai By-pass where he was able to serve him copies of the plaint and summons to enter appearance. He said that he was able to recognize him because he was using the Company service car. This is therefore, concrete evidence that the 3rd defendant was indeed served.

39. The 3rd defendant has however, contended that the affidavit of service by Danson G. Mungai was manufactured by the plaintiff after the 3rd defendant filed its application herein. The 3rd defendant's sentiments are not true since the record bears witness that the affidavit was indeed filed in court on 16th June 2017 and it is the same affidavit that was relied upon during taxation which was done before the 3rd defendant filed this application.

40. If indeed the 3rd defendant had doubts about the said affidavit of service nothing stopped it to request the court to have Danson Mungai appear in court and have him cross-examined on the contents of the said affidavit. Since such cross-examination was not done and the 3rd defendant didn't follow through, it must be presumed then that the Process Server's averments are indeed correct, in line with the decision of the Court of Appeal in **Shadrack Arap Baiywo vs. Bodi Bach [1987] eKLR**, 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. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service."

41. There is also enough evidence from the affidavit of Sally Mbeche an advocate in M/S Obura' Mbeche & Company Advocates dated 23rd February 2021 and which clearly indicates that it is the 3rd defendant who instructed the firm of Obura Mbeche & Co. Advocates to defend them. In her affidavit Mrs. Sally has attached photos of the suit motor vehicle after the accident, correspondences between her and the 3rd defendant and receipts showing payment of legal fees received from the 3rd defendant herein. The said receipts were not controverted by the 3rd defendant hence they remain to be enough evidence that there was communication between the said firm and the 3rd defendant hence the payment for legal fees. This could not have happened if at all the 3rd defendant had not been served or had no knowledge of the suit whatsoever.

42. It was the 3rd defendant's contention that Muli the person who received the documents on their behalf is a stranger to the Company.

However it is through the same contacts and assistance of the said Mr. Muli that the plaintiff's auctioneers were able to serve warrants upon the 3rd defendant. It beats logic for the 3rd defendant to state that they never received summons from Mr. Muli but through the same contacts of Mr. Muli they were able to receive warrants of attachment and came rushing to court to seek for a stay after finding out that there was eminent execution against them.

43. Upon taking into account all the foregoing factors hereinabove, I am persuaded that the 3rd defendant was properly served, that all along it was aware of the proceedings herein as it was well represented by the firm of M/S Ahmednasir Abdikadir & Co Advocates up to the last stage of taxation and it should not be allowed to turn around and deny the said service. Considering the totality of circumstances hereto, the prejudice that would be occasioned to the plaintiff if the application is allowed would outweigh all other factors. The plaintiff has in her hands a decree, ready to execute, with expectation of getting fruits of the judgement, then that expectation is dashed by setting aside the judgment, for no good reasons. This would not in my view be in the interest of justice. Justice is a two-way traffic and the interests to both parties must be considered.

44. For the foregoing reasons, the 3rd defendant's application dated 15th February 2021 is hereby dismissed, the interim orders of stay of execution are discharged and the plaintiff's application dated 23rd February 2021 is allowed. The plaintiff shall have the costs of the two applications.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 15TH DAY OF JULY 2021.

H. K. CHEMITEI

JUDGE.