



REPUBLIC OF KENYA

IN THE CO-OPERATIVE TRIBUNAL AT NYERI

TRIBUNAL CASE NO. 439 OF 2019

BIASHARA SACCO SOCIETY LIMITED.....CLAIMANT

-VERSUS-

VERONICA WAIRIMU MWANGI.....RESPONDENT

RULING

1. The Respondent has filed A Notice of Motion Application dated **12th March 2021**, seeking orders to set aside the Judgment in Default of Appearance given by this Tribunal, and all orders consequential thereto. The facts are that the Respondent neither enter appearance, nor filed a Defence. They posit that they were never served with Summons to Enter Appearance.
2. The Civil Procedure Rules give two incidents where a Judgment in Default of Appearance may be tampered with:
 - (a) **Irregular Judgment** - Where service of Summons to Enter Appearance was inadequate; and
 - (b) **Regular Judgment** – Where service of Summons was effected, but there is an arguable Defence, and compelling reasons proffered as to why the same was not filed in tome.
3. The Respondent has not annexed a Draft Defence to demonstrate she does have an arguable case. Evidently, she is treading on thin ice, since, if this Tribunal were to find that service was procedural, the Respondent may not have a fall-back plan. So, we will restrict ourselves with the one limb presented to us: was service legally adequate?
4. Service of Summons to Enter Appearance is an imperative cog in the constitutionally enshrined right to a fair trial. Summons play the role of inviting the other party to state their case, in line with the principle of natural justice, *audi alteram partem*. It is therefore absolutely necessary that a party be served within the direction of **Order 5 of the Civil Procedure Rules**. Anything short of that is a miscarriage of justice.
5. Once a party has been served, they ought to enter appearance and file a defence. Again, absent of this would invite the court to make the necessary assumption that the defaulting party is disinterested in the case, and it must proceed without their presence.
6. Service of Summons to Enter Appearance is proved by way of an Affidavit of Service. In the present case, being personal service to an individual, there must be a plausible narration in terms of time, place and nature of service of Summons. A cursory look of the Affidavit of Service demonstrates a clear lack of service to the Claimant. There is no time of service; there are no particulars of the residence of the Respondent; no house number; but just the words '*her place of residence in Ruiru Town.*' Paragraphs 3 and 4 of the Affidavit of Service deposed by one Samuel Wachira dated **11th October 2019** leave a lot to be desired. The documents produced by the Respondent as proof of her residence are further proof that the process server did not visit the Respondent at her residence, as he would have even known the name of the apartments, or house number.
7. In the eyes of this Tribunal, the Claimant ought to have shown that service was effected, and effected effectively. All that is exhibited is an exercise of guesswork. The Process Server may as well have cast the Summons to Enter Appearance in the air. If inadequate service had a name, then this is the paradigm. We find that the Claimant misled the Tribunal to believe that service of Summons was done, and the said Claimants procured an irregular judgment in Default of Appearance. Had the Respondents sought to cross-examine the process server, there would be chances that this Tribunal would have found a clear case of perjury, or subornation thereof. But we will not go that far.
8. This Tribunal thus invokes the provisions of **Order 10 Rule 11** of the **Civil Procedure Rules 2010** which provide as follows:

“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.”

9. We therefore find that service of Summons to Enter Appearance was not done with strict compliance with **Order 5 of the Civil Procedure Rules**, and hereby declare that the Judgment in Default of Appearance was entered irregularly. Consequently, we hereby set aside our *ex parte* Judgment in Default of Appearance. In the interest of justice, tilted by the overwhelming evidence before us, we find that the Orders sought in the Application dated **12th March 2021** should be granted.

We direct that the Claim proceeds to full trial to ascertain the merits of the case.

ORDERS

We therefore Order as follows:

- (a) The Respondents' Applications dated **12th March 2021** be and is hereby allowed;
- (b) The Respondents to file and serve their Defence, witness statements and list of documents within 14 days from the date hereof;
- (c) The Claimant is granted leave to file and serve a supplementary list of documents and witness statements within 7 days from the date of service;
- (d) Parties to ensure strict compliance of Order 11 of the Civil Procedure Rules within 30 days hereof;
- (e) Costs be in the Cause;
- (f) Mention for directions on 2.12.2021.

Ruling signed, dated and delivered virtually at **Nairobi** this **7th** day of **October**, 2021.

Hon. B. Kimemia **Chairperson** **Signed** **7.10.2021**

Hon. J. Mwatsama **Deputy Chairperson** **Signed** **7.10.2021**

Mr. P. Gichuki **Member** **Signed** **7.10.2021**

Mr. B. Akusala **Member** **Signed** **7.10.2021**

Tribunal Clerk **R. Leweri**

Ms. Maina for Claimant/Respondent : Present

Veronica Mwangi: Absent