



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL SUIT NO.7 OF 2020**

**FORMERLY KIAMBU HCC NO. 21 OF 2019**

**SPINNERS AND SPINNERS LIMITED.....PLAINTIFF**

**VERSUS**

**KIMILILI WHOLESALERS (K) LIMITED.....DEFENDANT**

**RULING**

1. **KIMILILI WHOLESALERS (K) LIMITED** (the applicant) is by a notice of motion dated 13<sup>th</sup> December, 2019 and an affidavit sworn by **MANISH J. SHAH** seeking orders that:

- a) There be an order directing **KALYA AUCTIONEERS** to return to **KIMILILI WHOLESALERS (K) LIMITED** all the attached goods unconditionally pending the hearing of this application inter parties.
- b) There be an order of stay of sale of the attached goods herein and stay of any further execution against the defendant pending the hearing of this application inter parties.
- c) The ex-parte judgment and all the consequent orders herein be set aside.
- d) The Defendant be granted unconditional leave to file a defence against the plaintiff's claim.
- e) There be an order that the Defendants goods were unlawfully attached by Kalya Auctioneers.
- f) The costs of the auctioneer and costs of this application be borne by the auctioneers and the plaintiff

2. The application is based on the grounds that:

- a) the defendant's goods have been unlawfully and unprocedurally attached by Kalya auctioneers on the instructions of the plaintiff.
- b) the defendant has never been served with any summons to enter appearance herein nor any document relating to this case.
- c) the Defendant only learnt of this case when auctioneers descended on his shop and carried away all his goods thereby shutting down his business premises.
- d) there was no proclamation of the Defendant goods as required by law before the goods were carried away.
- e) the defendant has a good defence to the plaintiff's suit and unless the orders sought are granted, the Defendant will continue to suffer irreparable loss.

3. The applicant deposes that or about the 9<sup>th</sup> of December 2019 while in the defendant's shop, auctioneers came to the shop and started loading the shop's goods onto trucks. On inquiry, he was told that they had warrants of attachment and sale from this court yet he was never served with any documents in respect of the present case. That the only time he came to learn of this matter is when the auctioneers came to the shop and carried away goods and took a motor vehicle. Further, that the process of obtaining Judgment and warrants of attachment and sale against the defendant is unlawful in the sense that he was never served with any summons to enter appearance.

4. The applicant's Managing Director laments in the supporting affidavit that the auctioneer refused to give him a copy of the warrants of attachment and sale, nor has he been given a copy of inventory of the attached goods. That he was only served with a copy of the proclamation, which gave him 7 days' notice, and he has already lodged a complaint against the auctioneer at the Auctioneer's Licencing Board.

5. The application is opposed through a replying affidavit sworn by **JOSEPH MAINA** the plaintiff's sales representative on the grounds that the defendant was duly served with summons to enter appearance as per the affidavit of service on record. That the defendant has admitted his indebtedness to the plaintiff (**SPINNERS AND SPINNERS LIMITED**) by issuing cheques totaling to **Kshs. 3, 960, 000** which were dishonoured on presentation to the bank.

In view of the dishonour of the said cheques the plaintiff was left with 17 more cheques totaling to Kshs. 16, 915, 000 which he could not bank to avoid further bank charges.

6. **MERCY BOIYON T/A KALYA AUCTIONEERS** states that on 19<sup>th</sup> December, 2019 she received warrants of attachment which she served upon the defendant's shop manager. Attempts to attach the proclaimed goods was unsuccessful since she could not gain access to the defendant's shop until when he got police assistance. It is her contention that she complied with the relevant legal provisions in carrying out the executions.

7. The application was canvassed by written submissions.

8. The applicant submits that the failure to enter appearance in this matter was because it was never served with summons to enter appearance or any other document relating to this case, and only came to learn of this matter when the auctioneers went to its shop and carried away goods and took away the motor vehicle belonging to the defendant's manager. It is also pointed out that the affidavit of service clearly states that the service was through registered post yet the plaintiff was conversant with the location of the defendant's shop. This court is urged to find that the *ex parte* judgment herein is irregular because the defendant failed to enter appearance and file defence as it never received any summons to enter appearance.

#### **Issues and Determination**

9. The issues to be determined are

- a. Whether the applicant was duly served, failed to enter appearance and can only have itself to blame for the consequences that ensued.
- b. Whether this court should grant orders sought to set aside the *ex parte* judgment.
- c. Whether the court should stay the sale of the attached goods and order their unconditional release to the applicant
- d. Who should bear the auctioneer's costs as well as the costs of this application

#### **SERVICE:**

10. The affidavit of service dated 17<sup>th</sup> September 2019, filed by **RICHARD OTIENO** clearly states that he effected service by way of registered post. **Order 5 Rule 1 (1) of the Civil Procedure Rules, 2010**, provides that when a suit has been filed, summons shall issue to the defendant ordering him to appear within the specified time. Order 5 rule 10 further addresses the issue regarding service on agent by whom defendant carries on business [**Order 5, rule 10.**]

**(1) In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the court from which the summons is issued, service on any manager or agent, who at the time of service personally carries on such business or work for such person within such limits, shall be deemed good service.**

The process server has not demonstrated that he made any efforts to effect service on the defendant's manager or director it is also not denied that the plaintiff's decision to effect service via registered post was without the leave of the court.

11. The plaintiff/respondents have not demonstrated any difficulties they experienced in effecting physical service of the summons upon the defendant as a result of which they opted for service by registered posts. The plaintiff does not deny that it knew where the defendant's shop is situated but failed to serve him personally

#### **SETTING ASIDE JUDGMENT:**

12. The provisions dealing with setting aside a default judgment is set out under **Order 10 Rule 4(1) of the Civil Procedure Rules, 2010** to the effect that:

*where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the date fixed in the summons or all the defendants fail to so appear, the court shall, on request of in Form 13 of the Appendix A enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of judgment, and costs.*

13. The respondent contends that the case of *Shah vs Mbogo (1967) EA 166*, held that:

*“this discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”*

25. Also in *Patel vs E.A. Cargo Handling Services Ltd (1974) (supra)* the Court held that:

*“That where there is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean a defence that must succeed. It means a ‘triable issue’ that is on issue which raises a prima facie defence which should go to trial for adjudication.”*

31. Similarly in *Tree Shade Motors Ltd vs D.T. Dobie & Another (1995-1998) IEA 324*, it was held that:

*“Even if service of summons is valid, the judgment will be set aside if defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff’s claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside.”*

14. I have perused the proposed statement of defence, and can do no better than these judicial precedents have pronounced, it has raised a reasonable defence to the respondent’s claim, and coupled with the fact that the service of summons was irregular, I find merit in granting the prayer and directing that the *ex parte* judgement entered be and is hereby set aside

#### 15. THE APPLICANT’S GOODS:

He who makes his bed must lie on it. The service of the summons was irregular, so any other subsequent act or resultant action was improper and must be halted and undone. The intended sale of the goods is stayed and the goods shall be returned to the applicant unconditionally

#### WHAT IS THE APPROPRIATE ORDER FOR COSTS?

16. In *Morgan Air Cargo Limited V Evrest Enterprises Limited [2014] eKLR* the Court stated as follows with regard to what is meant by the word “event” and quoted the literally work by Kuloba, J (as he then was) in his text **Judicial Hints on Civil Procedure 2<sup>nd</sup> edition at page 99** as follows:

*“The words “the event” mean the result of all the proceedings to the litigation. The event is the result of entire litigation. It is clear however, that the word ‘event’ is to be regarded as a collective noun and is to be read distinctively so that in fact it may mean the “events” of separate issues in an action. Thus the expression “the costs shall follow the event” means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it. An issue in this sense need not go to the whole cause of action, but includes any issue which has a direct and definite event in defeating the claim to judgment in the whole or in part”.*

17. Indeed, in *Joseph Oduor Anode v Kenya Red Cross Society Nairobi High Court Civil Suit No 66/2012 eKLR* the Court held as follows:

*“...in matters of costs, the general rule as adumbrated by the statute [the Civil Procedure Act] is that costs follow the event unless the court is satisfied otherwise. That satisfaction must however be patent on record. In other words, when the court decides not to follow the general principle the court is enjoined to give reasons for not doing so”*

18. In the present case, the respondent is the author of where matters have reached. If it had been patient enough and effected proper service, then undoing the entire process would have placed a burden on the applicant. As matters stand, he who rushes to gulp the entire plate of grains, often ends up gritting a lot of pebbles and sand... that is exactly what the respondent must contend with. Consequently, the respondent shall bear the auctioneer’s costs plus costs of this application.

The upshot is that the defendant/applicant application has merit and is allowed in the following terms.

- a) The ex-parte judgment and all the consequential orders herein be and are hereby set aside.
- b) The Defendant be and is hereby granted unconditional leave to file a defence against the plaintiff’s claim.
- c) The annexed draft defence shall be deemed as properly filed and served upon payment of the requisite court fee
- d) The Defendants goods were unlawfully attached by Kalya Auctioneers and shall be unconditionally released forthwith.
- e) The costs of the auctioneer and costs of this application be borne by the auctioneers and the plaintiff/respondent

**E-Delivered and dated this 21<sup>st</sup> day of July 2020**

**H. A. OMONDI**

**JUDGE**