



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. 156 OF 2016

BANK OF AFRICA LIMITED PLAINTIFF

VERSUS

SET LIGHT SUPERMARKET LIMITED.....1ST DEFENDANT

FRANCIS KIIHIKO NJUGUNA2ND DEFENDANT

ISAAC MWANGI NJUGUNA3RD DEFENDANT

DAVID MACHARIA NJUGUNA4TH DEFENDANT

SIMON GASHWE NJUGUNA 5TH DEFENDANT

RULING

1. There is exparte judgment against the five Defendants entered on 14th March 2017. The Defendants seek to set it aside through a Notice of Motion dated 10th December 2019.
2. The Court will grant that prayer as a matter of right.
3. The Plaintiff approached this Court on 13th September 2016 for orders to serve the summonses to Enter Appearance, Plaintiff, Witness Statement, List of witnesses, list and bundle of Documents on the Defendants by way of substituted service. The Court granted that order on 12th October 2016. The Court ordered for substituted service through registered post and advertisement in the Daily Nation.
4. The exparte Judgment was entered on the strength of an affidavit of service by Edward Kipchumba Bett in which he attached a copy of a Notice published in the Daily Nation of 7th December 2016 and evidence of mail sent to all the Defendants by way of registered post on 16th November 2016 at a common Postal Address of P.O. Box 58366 – 00200 Nairobi.
5. In an affidavit in support of the current motion, Francis Kihiko Njuguna the 2nd Defendant, denies seeing or reading the newspaper advertisement. In regard to service through registered post, he says that he did not receive the letters because postal address No. 58366 – 00200 Nairobi was reprocessed by Postal Corporation of Kenya.
6. Personal service is always preferred to substituted service. The latter is only resorted to after a party has demonstrated that it has made sufficient effort at personal service but has been unable to trace the party which ought to be served.
7. Now it is common ground that after obtaining the Decree on the strength of exparte Judgment the Plaintiff took out Notice to show cause against the 2nd to 5th Defendants.
8. In Paragraph 12 of his replying affidavit Mr. Charles Waiyaki sets out how the Notice to Show Cause was served on the 2nd, 4th and 5th Defendants on 6th December 2019. He avers that:-

- i. The 2nd Defendant was served at his last known residence and that the Notice was received by the son of the 2nd Defendant.
- ii. The 4th Defendant was similarly served at his last known residence and the Notice received by his spouse.
- iii. The 5th Defendant was served at his last known place of business and the Notice received by his son.

9. As regards the 3rd Defendant, the averment is that the 3rd Defendant could not be located by the process server notwithstanding all means.

10. At the time of applying for leave to serve the summons by way of substituted service, the process server did not state that he had made attempts to trace the place of residence of the 4th Defendant. The 2nd Defendant states that his brother, the 4th Defendant, had changed his residence since May 2016. The process server should therefore have explained why he was unable to trace the residence in 2016 but was somehow able to trace it in 2019 when the NTSC was served.

11. As regards the 2nd Defendant, the process server said:-

“On several occasions, I visited the 2nd Defendant last known place of residence at Komarock Phase IV House Number 1007. However, I was not able to trace the 2nd Defendant at the said residence and I could not determine whether he resided there”.

This must be compared to the occasion when the NTSC was served. The process server Mr. Nyamai explains how he confirmed that the same House No. 1007 was that of the 2nd Defendant and how he eventually served the son of the 2nd Defendant.

12. Quite obviously, although the 2nd Defendant had not changed residence, the first process server was not as diligent as the second in effecting service.

13. In respect to the 5th Defendant, the first process server did not tell Court of any efforts he made to trace the 5th Defendant's place of business or residence but see how easily the second process server found his place of business:-

“11. THAT on the same day at around 13.52pm, I proceeded to Kikuyu Town where Mr. Simon Gashwe Njuguna the third Defendant (should be the 5th Defendant) herein operated a business next to Kikuyu Family Bank Branch and where I met a gentleman who informed me that he was the son of Simon Gashwe and who introduced himself to me as Mr. Danson Maina Njuguna attending to the shop upon which I introduced myself and the purpose of my visit.”

14. It would have been expected that the Plaintiff would have Mr. Bett (the first process server) swear an affidavit of any efforts he had previously made to trace the 5th Defendant's place of business.

15. This Court has to reach the conclusion that given the further information revealed by the service of the NTSC, the first process server does not seem to have in fact done enough to justify the grant of leave to substituted service and that leave was obtained on the basis of insufficient effort. This should not be allowed to prejudice the Defendants. The strength or weakness of the Defence does not matter. The Defendants deserve to be served by way of personal service and the exparte judgment obtained by way of substituted service is hereby set aside as a matter of right.

16. The Notice of Motion dated 10th December 2019 is allowed as prayed. The Defendants to file and serve their Statements of Defence within 14 days of this order.

Dated, Signed and Delivered in Court at Nairobi this 5th Day of October 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Ndirangu for Plaintiff.

Miss Gikonyo holding brief for Mohochi for Defendant.

