



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO.247 OF 2011

METRA INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

STANDARD CHARTERED BANK KENYA LIMITED.....1ST DEFENDANT

DIXON ESHIALWA OBATI.....2ND DEFENDANT

THE PRINCIPAL REGISTRAR OF TITLES.....3RD DEFENDANT

RULING

1. The application dated 10th April 2019 seeks orders for entry of judgment against the 3rd respondent herein, the Principal Registrar of Titles.
2. The application is supported by the affidavit of the applicant's advocate, **Martin Njeru Nyaga** who avers that the 3rd respondent, upon being duly served with the summons to enter appearance, entered appearance but has adamantly refused to file a defence.
3. The 2nd respondent opposed the application on the ground that the applicant did not serve the respondent with the summons as is required under Order 5 Rule 9 of the Civil Procedure Rules (CPR) and Section 13 of the Government Proceedings Act which requires that service be effected upon the Attorney General.
4. I have considered the instant application and the 2nd respondents response. Order 5 Rule 9 of the Civil Procedure Rule stipulates as follows:-

“Mode of service on the Government Cap .40 9.

(1) The provisions of this Order shall have effect subject to section 13 of the Government Proceedings Act, which provides for the service of documents on the Government for the purpose of or in connection with civil proceedings by or against the Government.

(2) Service of a document in accordance with the said section 13 shall be effected—

(a) by leaving the document within the prescribed hours at the office of the Attorney-General, or of any agent whom he has nominated for the purpose, but in either case with a person belonging to the office where the document is left; or

(b) by posting it in a prepaid registered envelope addressed to the Attorney-General or any such agent as aforesaid, and where service under this rule is made by post the time at which the document so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof.

(3) All documents to be served on the Government for the purpose of or in connection with any civil proceedings shall be treated for the purposes of these Rules as documents in respect of which personal service is not requisite.”

5. Section 13 of the Government Proceedings Act, on the other hand stipulates as follows:

“Service of documents

All documents required to be served on the Government for the purpose of or in connection with any civil proceedings by or against the Government in accordance with the provisions of this Act shall be served on the Attorney-General.

13 A. Notice of intention to institute proceedings

(1) No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing in the prescribed form have been served on the Government in relation to those proceedings.

(2) The notice to be served under this section shall be in the form prescribed in the Third Schedule to this Act and shall include the following particulars—

(a) the full names, description and place of residence of the proposed plaintiff;

(b) the date upon which the cause of action is alleged to have accrued;

(c) the name of the Government department alleged to be responsible and the full names of any servant or agent whom it is intended to join as a defendant;

(d) a concise statement of the facts on which it is alleged that the liability of the Government and of any such servant or agent has arisen;

(e) the relief that will be claimed and, so far as may be practicable, the value of the subject matter of the intended proceedings or the amount which it is intended to claim.

(3) The provisions of this section shall not apply to such part of any proceedings as relates to a claim for relief in respect of which the court may, by virtue of proviso(i) to section 16 (1), make an order declaratory of the right of the parties in lieu of an injunction.”

6. In the present case, a perusal of the court file shows that on 23rd September 2011 the Attorney General entered appearance in this case on behalf of the 3rd respondent.

7. Clearly therefore, the fact that the 3rd respondent was duly served with the summons to enter appearance and plead cannot be gainsaid. The fact that the Attorney General entered appearance in this matter clearly signifies that the 3rd respondent was duly served with the said summons and is therefore aware of the existence of this case.

8. Order 10 Rule 8 of the Civil Procedure Rules stipulates that:

“Judgment in default against the Government.

8. No judgment in default of appearance or pleading may be entered against the Government without the leave of the court and any application for leave shall be served not less than seven days before the return day.”

9. In the instant case, I find that the applicant has invoked the right procedure by seeking the leave of this court to enter judgment against the government.

10. It is however not clear if the instant application was served upon the Attorney General as contemplated under Order 10 Rule 8 as the affidavit of service filed on 11th June 2018 indicates that only mention notice was served upon the Attorney General.

11. I am therefore unable to find that the applicant fully complied with the law regarding the prayer for entry of default judgment against the Attorney General.

12. Consequently, I decline to grant the orders sought in the application dated 10th April 2019 which I hereby strike out with no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 21st day of November 2019.

W. A. OKWANY

JUDGE

In the presence of:

Miss Mwikali for Gathu for 2nd defendant

Mr. Munyau for Njeru for plaintiff

No appearance Amollo Gachoka for 1st defendant

Court Assistant – Sylvia