

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CIVIL CASE NO. 157 OF 2008

HENRY K. TANUI.....PLAINTIFF

VERSUS

PAUL K. MATUMBI.....DEFENDANT

RULING

This court delivered a judgment in favour of the plaintiff against the defendant following a suit by the plaintiff based on a defamatory letter said to have been authored by the defendant. The suit was undefended because the defendant failed to enter appearance or file a defence within the prescribed period. There was an interlocutory judgment on record following default on the part of the defendant.

There is now before me an application by the defendant seeking orders of stay of execution and setting aside the proceedings leading to the said judgment. The defendant also seeks leave to file pleadings and documents to defend the suit against him. The thrust of that application is that he was not served with summons to enter appearance and therefore not aware of the suit against him. He only came to know about the judgment when he was served with the notice of entry of the judgment as well as a copy thereof.

It is his case that the process server lied that he served the summons to enter appearance because he may not have wanted to antagonize him. The application is opposed and there is a replying affidavit by the process server and also the plaintiff herein.

The application was canvassed by way of written submissions. The purpose of service of summons or any pleadings for that matter under Civil Procedure Rules is to alert the other party of any action taken or to be taken in any proceedings. In effect, it is to give notice to the party said to have been served of any matter that may ultimately affect him adversely. In the event the court is satisfied that summons to enter appearance in any litigation was properly served, then the consequences of default on the parties so served cannot be faulted.

On the other hand, if there is any doubt whatsoever that service was not effected or properly effected, the court is bound by the rules of natural justice to set aside any proceedings that may have taken place in the absence of the party claiming not to have been served.

The order sought is discretionary and several cases have addressed the issue of the court's discretion in that regard. It is true that the onus is on the plaintiff to prove that summons was properly served. – see **Lochab Brothers Limited vs. Lilian Mumbi Ng'ang'a & 2 Others (2014) e KLR**. In the event there is no proper service then there cannot be any regular judgment in default. Where however judgment is a regular one, then the court has the discretion to set it aside and any other orders that flow therefrom so as to achieve justice on the part of the parties. – see **Total Kenya Limited Vs. Supa Haulers Limited HCCC No. 939 Of 2002**.

The defendant has faulted the process server while the process server has demonstrated service upon the defendant not only of summons to enter appearance, but also other notices as shown in his replying affidavit. Under such circumstances, the defendant should have asked for cross examination of the process server to test his credibility. That notwithstanding, a court is presented with a situation where it is the word of the defendant against that of the process server.

That being the case, I am inclined to exercise my discretion and set aside the judgment entered against the defendant while observing that, in the event the plaintiff was correct in the evidence adduced leading to the said judgment, the court that shall be seized of the same proceedings hereafter may arrive at the same conclusion. Therefore the judgment delivered on 19th July, 2017 and all orders thereunder is hereby set aside. The defendant shall file and serve a defence within 14 days from the date of this ruling. The parties shall thereafter conduct pre-trial within 30 days so that the suit may be heard expeditiously. The costs shall be in the cause.

Dated, signed and delivered at Nairobi this 15th day of May, 2018.

A. MBOGHOLI MSAGHA

JUDGE