



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 452 OF 2014

ANDERSON NYAGAAH WACHIRA....PLAINTIFF/RESPONDENT

VERSUS

SIMON NJUGUNA.....DEFENDANT/APPLICANT

RULING

1. The applicant filed a notice of motion dated 17th January, 2018 in which he sought the following prayers.

a. ...spent

b. ...spent

c. ...spent

d. That this honourable Court be pleased to order stay of execution against the defendant in respect of the judgment and the decree of the court herein and all the consequential orders and grant the defendant leave to defend the suit.

2. The applicant swore an Affidavit on 17th January 2018 and contends that he was not served with summons to enter appearance and that no notice of entry of judgment was served upon him before execution commenced as provided by law. That he is under threat of being arrested and committed to civil jail. The defendant/applicant also contends that he has a strong defence which raises triable issues and that he should be given an opportunity to be heard on merit.

3. The applicant's application is opposed by the plaintiff/respondent through a Replying Affidavit dated 22nd March, 2018. The respondent depones that his advocates called the Applicant through his mobile phone who promised to collect the summons at the Advocate's office but failed to do so despite his promise. The Respondent therefore applied to serve the summons by way of substituted service which application was granted after the court considered the fact that the Applicant had been convicted of assaulting him with a fire arm and thus the possibility of a personal threat. The Respondent therefore effected service through the standard newspaper. On the orders for stay of execution, the Respondent depones that as a condition for stay , the Applicant ought to provide security in which case he proposes that he be paid one half of the decretal amount to cater for his routine expenses and the other half be deposited in a joint interest earning account between both parties' advocates. On the Makadara criminal case, it is deponed that it vindicates his case since the Applicant was convicted of the offence of causing

grievous harm.

4. I have gone through the pleadings herein, the applicant's application as well as the affidavit of service which paved the way for hearing of the ex-parte proceedings. The issues which arise for determination are whether the defendant/applicant was properly served with summons to enter appearance, whether the execution process which was commenced was properly done and whether the stay of execution ought to be granted.

5. With regards to the issue of service, I have perused the court file and the affidavit of service by one Benjamin Ndunda Mutua sworn and filed in court on 13th October, 2015. On 29th May, 2015 justice Aburili delivered a ruling allowing the Plaintiff to effect service by way of advertisement in at least one newspaper of nationwide circulation and giving the defendant 21 days within which to enter appearance. In the said ruling she noted that, "...It has not been demonstrated that the Plaintiff has not been able to trace the defendant physically using the police contacts as the Defendant was charged by police and convicted for the offence of grievous harm, nonetheless the court is conscious of the fact that the Plaintiff having suffered near fatal shooting by the Defendant who may still have fire arm, the fear of approaching the defendant with summons physically is real." At paragraph 3 of the said affidavit of service, the process server states that on 11th September, 2015 he proceeded to the offices of The Standard Newspaper with instructions to place advertisement which he did and the same was advertised on the publication of 11th September, 2015. The said publication is annexed to the Affidavit.

6. **Order 5 rule 17 of the Civil Procedure Rules** provides for substituted service and paragraph 2 is clear that :-

"Substituted service under an order of the court shall be as effectual as if it had been made on the defendant personally"

7. I am satisfied that the Defendant was properly served with the summons. The court in issuing an order for substituted service considered the fact that the Applicant had shot the Respondent herein with a firearm and there was possibility that the Respondent was still holding on to the same hence the fear of physical attack was real. I therefore find that the defendant was served as required by law.

8. On the issue of notice of entry of judgment, the proviso to Order 22 rule 6 provides as follows:-

"Provided that, where judgment in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less than ten days of notice of entry of judgment has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution."

9. There was no notice of entry of judgment given as required. The Applicant has been served with a Notice to show cause why execution should not issue together with an application for execution. I have perused the Court file and noticed that no notice of entry of judgment was annexed to the application for execution. Therefore, I find that the provisions of Order 22 rule 6 were not complied with. The execution to be levied thereof is irregular.

10. I have looked at the Applicant's draft Statement of Defence. The Applicant avers that on the fateful day of the accident he was attacked by the Plaintiff who wanted to steal his valuables, including the fire arm and had to shoot to scare him and protect himself. In the judgment delivered in the criminal matter annexed to the Respondent's replying affidavit, the Applicant was found to have used excessive force and found guilty and convicted of causing grievous bodily harm. He did not appeal against the said judgment. It is trite law that the burden of proof in criminal cases is higher than in civil cases as the same is beyond any reasonable doubt. All the other averments in the draft Statement of Defence consist of mere denials. I do not see any triable issues which have been raised in the Defence.

11. In the end, I find that the summons to enter appearance were effectively served and the Applicant

therefore ought to have filed defence in time. I have perused the draft statement of defence and as explained in this ruling, the same does not raise triable issues to warrant granting of the prayer for leave to defend the suit. On the issue of the execution, as stated earlier on in this ruling, the law demands that a copy of notice of entry of judgment be served at least ten days before execution and the said notice be annexed to the application for execution. In this case, there is no evidence of such a copy having been annexed to the application. The respondent is nonetheless at liberty to serve the notice as required to regularize the position before he can proceed with execution.

12. In the end, I find that the application dated 17th day of January, 2018 has no merits and the same is dismissed with costs.

Dated, Signed and Delivered at Nairobi this 7th Day of June, 2018.

.....

L. NJUGUNA

JUDGE

In the Presence of

.....For the Applicant

.....For the Respondent