

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 335 OF 2012

CHINA WUYI (K) LTD.....APPELLANT

VERSUS

UJENZI WORKS LTD.....RESPONDENT

JUDGMENT

The respondent sued the appellant in the lower court claiming some money due and owing for some construction works said to have been carried out by the respondent at the request of the appellant. Summons to enter appearance were served but the appellant did not comply leading to an application for entry of interlocutory judgment in the sum of Kshs. 1,768,000/=.

Upon receiving notice of the said judgment the appellant filed an application to set aside the said judgment. That application was dismissed leading to the present appeal. Both parties have filed submissions and cited some authorities which I have noted.

The main contention, notwithstanding the many issues raised, is whether or not the appellant was served with summons to enter appearance. There is also the issue of whether or not the lower court should have ordered formal proof going by the pleadings before it.

The process server who is said to have served the summons upon the appellant had sworn a detailed affidavit as to how the said service was effected. The said affidavit was so detailed and specific in context that, it is hard to believe any contention that no proper service was effected. In the event the appellant was not satisfied with the said contents, as held in the case of **Katarina Garmanets vs. Nyanarua (1976- 80) 1 KLR 114**, where one party to proceedings denied having been served with a relevant document, it is proper for the court to look into the matter. If the court is faced with conflicting affidavits as to the alleged service of process, it is proper that the deponents should be examined on oath in order to establish the truth. An affidavit is evidence on oath and in the event the appellant was not satisfied with the contents thereof there was an opportunity to call the process server for cross examination.. That opportunity was not utilised.

The affidavit of the process server cited the telephone number of the appellant's representative which has not been denied by the appellant.

Just like any other trial in civil proceedings, proof is on a balance of probabilities. When the allegation of non-service is made as against the affidavit by the process server's, the process server affidavit tilts the scales in favour of the respondent. There is also an averment that the appellants goods have been sold in execution of the decree. Execution therefore is complete and no prejudice has been alleged has befallen the appellant.

On the issue of whether or not the lower court should have conducted a formal proof in the claim was for a liquidated sum. To arrive at that figure required mathematical precision. A demand had been made which did not elicit any reply from the appellant. The appellant should have asked for further and better particulars. If there was any, no information has been given by the appellant. Where there is a liquidated claim no formal proof is required. The lower court cannot be faulted on the basis of the appellant's contention.

This appeal must therefore be dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 12th Day of June, 2018.

A. MBOGHOLI MSAGHA

JUDGE