



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KIAMBU**

**CIVIL APPEAL NO. 42 of 2016**

**FLORA DELIGHT LIMITED.....APPELLANT/APPLICANT**

**VERSUS**

**ROSE IKARIE EMURUTU.....RESPONDENT**

**JUDGMENT**

1. The facts of this case are undisputed. The Respondent was the Plaintiff in the Magistrate's Court. Through her lawyer, she filed a Plaint on 27/05/2015 and took out summons to enter appearance. The Appellant, a corporation, was the named Defendant in the suit. The Respondent instructed Elijah Onchuru Onsomu, a registered process server, to serve the summons and plaint on the Appellant.
2. The physical address of the Appellant is known and is not disputed. The Process Server travelled to those offices located in Kabuku on 02/07/2015 to serve the summons and plaint. At the offices, the Process Server found, at the front office, a "middle-aged lady". She accepted the documents but refused to sign to acknowledge receipt. The Appellant's advocates would later explain that she refused to acknowledge receipt because she had a misperception that it was improper for the Respondent to file suit before serving the Appellant with a demand notice – and she, apparently, was aware there had been no demand notice.
3. In any event, the lady was left with the summons and Plaint. It is undisputed that the lady must have handed over the documents to someone higher up in the Appellant corporation or at least informed them about the service – someone higher up to call up and convey the information to the corporation's lawyers, Mwenda & Tanui Advocates.
4. It would appear that this call to the corporation's advocates came on 14/07/2015. The Advocates took two steps: They filed a Notice of Appointment of Advocates on 17/07/2015. They then wrote to the Executive Officer at Limuru Law Courts on the same day to inform them of that they had filed their Notice of Appointment and request them to "kindly assist [them] with photocopies of the filed pleadings in this matter." They explained that this was to "forestall judgment in default being entered against [their] client."
5. There is no indication that the Appellant's Advocates did not get copies of the documents requested for.
6. The Appellant's Advocates, then, wrote another letter to the Respondent's Advocates dated 20/07/2015 requesting to be served with the court process to "enable [them] to take instructions from [their] client." The Respondent's Advocates obliged them by serving them with the Plaint and Summons to Enter Appearance on 22/07/2015.

The next action that the Appellant took was to file a Memorandum of Appearance and Defence on 11/08/2015. Meanwhile, on 03/08/2015, the Respondent's Advocates requested for an interlocutory judgment under Order 10 Rules 6, 9 and 10. In their request they allege that the "Defendant ...has been served and entered appearance but failed to file the Defence."

8. Suffice it to say that this request was irregular because it purported that the Appellant had entered appearance and failed to timeously file a Defence. However, the Appellant had not entered appearance at that point: all it had done was to cause its Advocates to file a Notice of Appointment of Advocates. Therefore, to this extent, the Request for Interlocutory Judgment was based on a misrepresentation.

9. In any event, I find it disturbing that the Respondent's Advocates would, in the face of the communication they were having with the Appellant's Advocates, request for interlocutory judgment without further reference to the Appellant's Advocates. There is nothing illegal in that but it reeks of "sharp practice."

10. Unfortunately, I do not think the Appellant's Advocates fared any better. It is quite obvious that they knew of the existence of the suit as early as 17/07/2015 when they filed their Notice of Appointment and requested for copies of the pleadings from the Court. Yet, they did nothing else to secure the rights of their client until 11/08/2015 – 24 days later. Their technical argument is that "proper" service did not happen until 22/07/2015 when the Respondent's Advocates finally served them with the Plaint and Summons to Enter Appearance. That is technically true: The provisions of Order 5 Rule 3 on service on a corporation are quite clear: service is proper when effected on an officer of the corporation – and any alternative means can only be employed after the stipulated method is not successful. Here, it is undisputed that service on the "middle aged lady" was not service on an officer of the corporation – and the affidavit of service does not depone to any fruitless efforts to trace and serve the corporation's officers. (Cases cited are in accord).

11. Yet, even if we are to go by the Appellant's Advocates technical arguments, they had until 06/08/2015 to enter appearance on behalf of their client. They did not do so. As such, they were out of time by five days when they finally entered appearance on 11/08/2015. There is no good reason why the Appellant's Advocates did not enter appearance even as they sought instructions as that would have given them an extra fourteen (14) days to file their Defence. They simply failed in their duty to keenly represent their client.

12. Where does that leave us? We have established that the request for, and entry of interlocutory judgment at the behest of the Respondent was improper and irregular. It was improper and irregular – both because it misrepresented that there was an entry of appearance and a failure to file a defence as well as the fact that, technically, there was no proper service on the corporation until 22/07/2015. I would have, if this were an appropriate case, distinguished the facts here from those presented in the three cases cited to me by the Appellants on the grounds that in those three cases, the corporations had no notice *at all* of the suits filed against them. As such, in these cases, the failure to properly serve the Defendant Corporations resulted in a substantive injustice. Here, there is ample evidence that the Appellant Corporation and its lawyers were aware of the suit but simply failed to enter appearance and file a Defence because they had determined that they wished to rely on the technical argument that the service was not proper.

13. While the entry of the judgment was improper and irregular as I have found above, I have also found that the Appellant was late in filing its Memorandum of Appearance anyway. Judgment could, therefore, have been properly entered on 06/08/2015.

14. In my view, this protracted litigation could and would have been avoided if both sides had exercised some professional courtesies to each other and acted reasonably: The Appellant, could have entered appearance and filed a Defence when it first learnt of the suit on 17/07/2015. It did not. Instead it filed only a Notice of Appointment. It could have timeously entered appearance after it was properly served on 22/07/2015. It did not. Instead, it waited until 11/08/2015 to do so. It is therefore left to rely on a technical argument in order to be permitted to file a Defence: that the interlocutory judgment entered was requested

ahead of time.

15. Similarly, the Respondent could, in the face of the Appellant's requests, simply have agreed to let it enter appearance and file its Defence. Instead it insisted on "throw away" costs even in the face of an irregular interlocutory judgment. In any event, since the Respondent's Advocates were fully aware that the Appellant's Advocates were on record, it might have been professionally courteous for them to serve notice on the Appellant's Advocates before requesting for an interlocutory judgment.

16. In the end, therefore, I find both parties blameworthy. Neither deserved to be awarded costs following the Learned Trial Magistrate's decision to set aside the interlocutory judgment. I would, therefore, vary the decision of the Learned Trial Magistrate awarding Throw Away costs of Kshs. 40,000 to the Respondents. At the same time, however, since I have found the conduct of the Appellant and its advocates to have been less than pious, I do not think it is entitled to the costs of this appeal. Consequently, I will also hold that there will be no order of costs on this appeal. Each party shall bear its own costs.

17. The orders of the Court, then, are as follows:

a. The Appeal herein is allowed. The part of the ruling and order the Honourable Magistrate ordering the Appellant to pay the Respondent thrown away costs assessed at Kshs. 40,000 is hereby set aside.

b. There will be no order as to costs for this appeal and the Application dated 04/09/2016 in the Trial Court. Each party will bear its own costs.

18. The lower Court file to wit Limuru SPM Civil Suit No. 146 of 2015 to be sent back to Limuru Law Courts for due hearing and disposal.

19. Orders accordingly.

**Dated and delivered at Kiambu this 9<sup>th</sup> day of January, 2017.**

**JOEL NGUGI**

**JUDGE**