



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 643 OF 2015

PETER KIVOLONZI.....PLAINTIFF

-VERSUS -

ALICE WANJIKU KARIUKI.....1ST DEFENDANT

HASS CONSULT LTD.....2ND DEFENDANT

RULING

1. On 11th April 2016 the learned Deputy Registrar of the Commercial & Tax Division of the High Court, at Milimani Nairobi, entered judgement in favour of the plaintiff, following the failure of the 1st Defendant to enter appearance.
2. The 1st defendant has now asked the court to set aside the said judgement, because she says that she was never served with any Summons.
3. The applicant noted that on the date when she was allegedly served she was not at her office.
4. The Process Server, **STEVENSON MWENDWA MULWA** had deponed in his affidavit of service that he served a lady named **VERONICA**, in the presence of her colleague named **MR. ANYANZWA**.
5. Before he effected service, Mulwa was told by Veronica that she had been duly instructed/authorized by the 1st defendant, to accept the court documents on her behalf.
6. However, Mulwa did not personally talk to the 1st defendant, as the latter refused to talk to the process server.
7. The 1st defendant has sworn an affidavit, denying the process server's contention that she, (*Alice Wanjiku Kariuki*) had instructed Veronica to accept service of court papers on her behalf.
8. The 1st defendant challenged the process server to provide proof that she had instructed Veronica to accept service.
9. In answer to the application, the plaintiff swore an affidavit, insisting that the 1st defendant had been properly served by Stevenson Mwendwa Mulwa on 8th April 2016.

10. As it is the plaintiff who swore the replying affidavit, he did not respond to the factual matters which were raised by the 1st defendant.

11. Perhaps it is only the process server who could have explained how and why he was convinced that the 1st defendant had duly authorized Veronica to accept service on her behalf.

12. In the absence of an explanation from the process server, the plaintiff failed to respond to the challenge handed down by the 1st defendant.

13. It is possible that Veronica did receive the court papers from the process server. However, unless it was possible to demonstrate to the court that the 1st defendant had given authority to Veronica to accept service on her behalf, the propriety of such service could still be challenged.

14. Pursuant to Order 5 Rule 8 (1) of the Civil Procedure Rules;

“Whenever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent is sufficient”.

15. In this case, I have no proof that the 1st defendant had empowered Veronica to be her agent, for the purposes of receiving the court papers.

16. In the circumstances, the judgement entered against the 1st defendant on 11th April 2016 was irregular. Accordingly, I now set it aside, forthwith.

17. I also set aside all consequential orders or steps taken pursuant to the said judgement.

18. Leave is give to the 1st defendant to, unconditionally file and serve her Defence within the next 10 days.

19. The costs of the application dated 30th August 2016 are awarded to the 1st Defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 16th day of February 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Wena for the Plaintiff

No appearance for the 1st Defendant

No appearance for the 2nd Defendant

Collins Odhiambo – Court clerk