



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 123 OF 2015

PETER KOBIA MWERERIA.....PLAINTIFF

VERSUS

1. MUHIDIN ABDULKARIM MOHAMED

2. MUNYE ABDO MUNYE.....DEFENDANTS

R U L I N G

Outline of facts and historical background

1. On 28/9/2015 this court allowed the plaintiffs application dated 11/9/2015 *ex parte* after an affidavit of same by one MICHAEL OTIENO was filed to prove that the Defendants were on the 16/9/2015 served but had not filed any papers by the date set for hearing. That order gave to the plaintiff a temporary injunction pending determination of the suit.

2. Soon thereafter, on the 15/10/2015, the plaintiff filed yet another application this time round seeking the punishment of the defendant for being in disobedience and contempt of the court orders issued on the 28/9/2015. Having been certified urgent it was then fixed to be heard on the 23/11/2015. Come the 23/11/2015 there was still no representation nor appearance by the defendants and there was yet again another affidavit of by same MICHAEL OTIENO asserting for the third time that having visited the defendants business premises in the company of the plaintiffs representative, one Mwendwa Kanyiri Akule he did find the two defendants seated at the reception and served the application. Once again the application was never opposed by filling any papers and at the hearing no representation was made hence it was allowed by a ruling dated the 15/7/2016. It would appear that decision was brought to the attention of the defendants who then now came to court seeking an order of setting aside.

3. By a notice of motion dated the 12/10/2016 and supported by the affidavits by the two defendants, the defendant have sought order that the orders issued by court on the 28/9/2015 and all consequential orders thereto be set aside including the orders of 15/7/2016. The application is grounded on the assertion by the defendants that they were not served with the court papers and in particular the 1st defendant assets that he was outside Kenya having left on 8/9/2015 and came back on 23/8/2016.

4. There is also a protestation by both defendants/applicants that there is no order issued on the 1/10/2017 which the process server alleges to have served upon them and that the second defendant has no interest over the suit land.

5. The application was opposed by the plaintiff who filed a Replying affidavit and took the position that

the application lack merit for being supported by contradictory affidavits and without proof that the 1st defendant was out of the country when the alleged service of process was effected. On the assertion by the 2nd defendant that he has no interest over the suit property, the plaintiff has pointed out that the affidavit in support of the application at paragraph 11 has deponed that both the defendants derive daily sustenance from the suit premises hence the 2nd has an interest over the property.

6. The plaintiff further exhibited correspondence by advocates which show the 2nd defendant as a brother and co-owner of the suit property. The correspondence also show that the plaintiff had tendered rent for the premises but the defendants declined to receive the same.

Analysis and determination

7. The application by the defendants asks only one but very critical and important question. Were the defendants or any of them served with the court processes leading to the orders of 15/7/2016 by which the two were found to be in contempt? Service of process upon a party is the very foundation upon which the right to a fair hearing turns.

8. It is therefore important that every time a party impugns an order of the court on the basis of lack of service, the court is duty bound to interrogate all facts well aware that if there was never service or effective service then the party's right to be heard and be accorded a fair hearing would have been in dispute. However a court considering such an application must also seek to secure its process from the prospects of being abused by outright or possible design to delay and obstruct just and fair determination of the dispute at hand. See *Shah vs Mbogo & Another [1967] EA 116*.

9. In this matter the only attempt at showing that the defendants were not served, atleast the 1st defendant is the one page of his passport in which he displays a VISA and immigration to prove that he went out of Kenya on 8th September 2015 until 23rd August 2016.

10. On 20/3/2017 the application was adjourned at the instance of Mr. Gitonga Advocate for the defendants so that he gets the original passport and show same to court. However he did not make the document available. All he could do was to avail the same two pages of the passport and when asked by the court, his answer was that he was unable to get the passport.

11. By that act the Applicant created in the mind of the court an inference that he did not want the court to examine the whole passport and determine the entries therein. If that be true then this court makes the reference that had the passport been availed it would have presented a piece of evidence adverse to the 1st Applicant defendant. As against that inference the plaintiff did file affidavits of service which to this court detail how the service of summons, applications and court orders were served. One would have thought that if the Defendant was candid to the court he would have sought to discredit the process server by way of cross -examination. The applicant did steer very clear of such attempts and it gives the impression that such endeavour would not have been of any help to his course. That is another reason this court draws the inference that any cross examination would have yield adverse evidence to the defendant's case.

12. On the part of the 2nd defendant the position is taken that there is no order issued on 01/10/2015 and that he was never served with any court process as alleged by the process server and in particular, he was unaware of any order directing that the suit shop be opened. He grounded his application on the fact that he is not a proprietor of the property hence the court orders should not have been issued against him and that he was wrongly sued for which reasons he contends that the suit against him should be dismissed.

13. What is of note about the 2nd defendant is the fact that no attempt was made by him to challenge the affidavits by the process server that he was found at the premises. Infact he doesn't deny in explicit terms having been at the premises as alleged. To this court, the position by the 2nd defendant, just like that by the 1st is not forthright nor candid and I am hesitant to believe the two to be saying the truth. Instead I

take the view that the defendant are keen, as contended by the plaintiff to disposes him of the premises by overreaching the dictates of the law withstanding. And it is not difficult to see that scheme if the correspondence exchanged before the suit was filed is anything to go by. I am persuaded that the defendants/Applicants were duly served as shown in the affidavit of service but choose to ignore the process for own reasons.

14. In considering an application to set aside, even where the service is not disproved, as in this case, it is still incumbent upon the court to investigate if the defendant has a defence to the suit that would entitle him or them to defend. Even where service is perfect but the defendant shows a triable issue, the court would strive to accord him his day in court.

15. For this matter, no attempt at all has been made to display any manner of defence the defendant would wish to put forth after setting aside. It is therefore too difficult to justify setting aside. A court of law while appreciating that blunders do occur and that such blunders should not disentitle a party to the right to be heard also takes into account that there must be a purpose to be served by according a party who has squandered his right to be heard a second chance.

16. The upshot is that I find no merit in the application which I hereby dismiss with costs to the plaintiff/respondent. I direct that parties attend court on 15/06/2017 for the defendants to show cause as earlier ordered.

Dated and delivered at Mombasa this 05th day of May 2017.

HON. P. J. O. OTIENO

JUDGE