



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 49 OF 2008

GOVINDMEGHJI.....1ST PLAINTIFF/RESPONDENT

TARSEM SINGH NYOTA.....2ND PLAINTIFF/RESPONDENT

GURDIAL SINGH GHATAUR.....3RD PLAINTIFF/RESPONDENT

-VERSUS-

M. AGGARWAL.....1ST DEFENDANT/APPLICANT

S.S. ROOPRAL.....2ND DEFENDANT/APPLICANT

RULING

1. There is before this court an application dated the 25.5.2016 seeking in the main, an order that the interlocutory and subsequent judgment entered in the file together with all consequent orders be set aside and the defendant be granted unconditional leave to defend the suit.
2. That application is grounded on several reasons but primarily on the reason that the defendant were never served with summons and further that a property belonging to a party not sued in these proceedings has been attached and ordered to be sold, a process the defendants contend was unlawful and irregular.
3. The application was supported by the affidavit of one Madan Aggrwal, 1st defendant who says his attention was drawn to the matter on the 14.4.2016 when the courts order of 17.3.2016 was sent to him by one Ghardial Gharanrhea.
4. Upon receipt of that information the advocate on record for him was instructed and upon perusing the court file an affidavit of service sworn on 26.3.2008 was brought to his attention and the allegation that summons were served upon one Alex Mbaya which allegation the 1st defendant contests on the basis that she has been residing in the United States of America an only visit Kenya occasionally. The deponent further denies having instructed the firm of Muriu Mungai & Co. Advocates. The deponent swears that he was never served and that had he been served he would have been able to defend the suit very successfully. He reiterated the fact that he lives in the United States of America most of the time and that as and when he visits Kenya he does not reside at Jabavu lane. The deponent then contends that the orders issued on 14.3.2016 ought not to have been given regard being had to the judgment on record as there is no money decree on record to merit sale of the property which in any event does not belong to the defendants.

5. There is then exhibited a draft defence and counter-claim which admit that there was an agreement to sell to the plaintiffs one share each in the company called SHUKRAN LTD but on condition that each of them was to invest kshs.150,000 by binding the cottages on the parcel of land which condition the plaintiffs did not meet in time and at all in that they did demolish the developments then erected on the land and commence a construction of the cottages which have not been completed to date, and proceeded to reap profit from the property of the company by letting incomplete structures and selling the fruits growing on the land. For that alleged use of the premises the defendants pray that the caveat registered on the land be removed and the plaintiffs be ordered to account for the benefits derived from the them for use of the asset.

6. That application was opposed by the 1st plaintiff who swore a Replying affidavit on behalf of the other plaintiffs and contended that the application was ill motivated and designed to delay the plaintiffs from reaping the fruits of the litigation. He took a position that the defendants were duly served and affidavits of service filed to prove service and that even an appearance was entered by Muriu Mungai & Co. Advocates dated 26.3.2008. There is then a concession made that although the matter was on several occasions fixed for formal proof the same did not proceed due to failure by the defendants advocate to attend till Judge Mwongo took evidence on 29/5/2012.

7. I have had the benefit of reaching the pleadings, the proceedings and judgment dated 31.7.2012 together with the submissions filed as well as the oral submissions offered by counsel. This being an application to set aside a default judgment the considerations are now well settled. The court is bound to interrogate whether or not there was effective and sufficient service of the pleadings first and foremost. If there was no service or if it was not an effective service then the defendant is entitled to an order for setting aside as of right. However even where there is due service but the defendant gives an explanation for default or just exhibits and shows a defense raising any single triable issue then the court reserves the discretion to set aside on terms as are deemed just and expedient to meet the ends of justice.

Was the defendants served

8. The need for service of process is a fundamental underpinning of the right to a fair hearing. One must be put in know whenever he is called upon to answer to any claim. For that reason Rules of service under Order 5 Civil Procedure Rules have been grafted in a way that demands that as much as possible service on an individual need to be personal. In the instant case the suit was against two individuals and therefore it behoved the plaintiff to effect service in accordance with the dictates of Order 5 Rule 8.

9. The affidavit of Pius Muli sworn on the 26.3.2008 alleges that the two individuals were 'situate' in Hurlingham Rose Avenue. To me this would suggest that the two were located and situate thereon as fixtures or permanent structures. There is no allegation that they were known to live or reside there and when the process alleges that he met Mr. Alex Mbaya, he does not indicate whether he met the person in the offices or residence of the two or any of them. Equally the affidavit of service does not shed any light how he came to know that Mr. Alex Mbaya was an employee of the second defendant or why he concluded that he was competent to accept service on behalf of any of the defendants. Not being a known member of any of the defendant family he could, only be competent to accept service on their behalf if he was an agent empowered as provided under Rule 8 (1) of Order 5.

10. My understanding of Rule of Order 5, Civil Procedure Rules is that there are mandatory matters that must be disclosed in the affidavit. Those matters include;

i. Evidence of service on the person to whom the summons are directed by endorsement on the summons.

ii. The manner service was effected and the place of service. The name of the person identifying the person served where he is not personally known to the process server.

iii. Where personal service cannot be achieved, the process server must state the number of attempts made at service and also disclose the relationship between the person served and the

defendant intended to be served.

11. Most important is that where the defendant cannot be found for service then summons may be served upon an adult member of his family residing with him.

12. It follows therefore that in the present case there being no disclosed the mandatory requirements in the affidavit of service, the affidavit of service filed in support of the Request for Judgment should not have been acted upon as a basis of entry of judgment for failure to file a defence within the provided time.

13. The process server must fully appreciate their obligations on this regard and take the lead of the court of appeal in the decision in **Yalwala –vs- Indimuli & Another [1989]eKLR** where the court advice:

“The Return of service under Order 5 Rule 6(1) of the Rules enjoins the court process server to make service on the defendant or respondent, that is primary duty. It is not expecting too much of the court process server to try and try again to serve the defendant before embarking on the other means of service. If the defendant is not found at his home or place of work, the process server ought to inquire as to his whereabouts, if there is information of the defendants early return, there is no reason why the process server should not wait. If the defendant has some other home, the process server should seek the direction to that other home with a view to personally serving the defendant. The growing tendency is for court process servers to declare unto themselves that it would be bothersome to travel an extra five kilometre to find the defendant and instead serve one of his wives or one of the adult sons. In my view such attitude and such service contravene Rule 9(1) of Order 5. The court process server must in general make more than one attempt before he can be heard to say that it was not practiceable to carry out personal service”.

14. Everything advised by the Court of Appeal in the above decision was clearly breached in this matter and I am left with no alternative but to say that the affidavit of service did not meet the thresholds of the law on service and therefore the judgment founded on it cannot stand. It is set aside.

15. Premium was placed on the fact that a firm of advocates called, Muriu Mungai & Co. Advocates did enter appearance for and on behalf of the two defendants. That is not in doubt, however, I note that the 2nd defendant has sworn on oath that, he has never dealt with that firm. That deposition has not been challenged and I am persuaded and accept it as the truth.

16. In any event, the defence filed by the defendants when looked at in the context of the documents the plaintiffs filed in support of their claim raises at least two three issues. The issues are that;

i. The contract was between the company, SHUKRAN LIMITED and the plaintiff. To that effect one would need to ask in what circumstances can the defendants be burdened by the terms of a contract they were not privy to.

ii. The said agreement obligated the plaintiffs to invest Kshs. 150,000 each and to complete construction of the cottages by the 15.6.1986. The defendants have contended that the cottages were started but left incomplete to date. That would beg the question whether or not the plaintiff did meet their part of the bargain. That is the second triable issue.

iii. The contract was entered into on the 5th December 1985 but the suit was not filed till 2008. At trial one would need to interrogate whether the suit being founded on breach of contract was filed within the timelines permitted by the law. That to this court is a third triable issue.

17. The mere presence of the said issues, even if they do not ultimately succeed, and the disclosed counter-claim dictate that the defendant be given a chance to defend. This finding of there being triable issues is yet another ground this court is directed by the ends of justice that the judgment be set aside.

18. Having set aside the defendant Judgment, it follows that all proceedings and orders made pursuant

and consequent to it must also be set aside. I therefore set aside the default judgment together with all proceedings, judgments and orders emanating therefrom.

19. By way of case management, let the defendant do file their defence to the suit within 14 days from the date of this ruling together with any witness statements and bundles of documents they may wish to rely upon at trial.

20. This matter shall be mentioned on 4/10/2017 to confirm compliance and for case conference if compliance shall have been made.

21. However if there shall be a default to file a defence as aforesaid, the plaintiffs shall be at liberty to request for judgment as appropriate upon the expiry of the 14 days.

22. On costs, I direct and order that the costs of this application shall be costs in the cause.

Dated at **MOMBASA** this **21st** day of **July 2017**.

P.J.O. OTIENO

JUDGE