

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 102 OF 2003

TITUS MUSEMBI.....PLAINTIFF

VERSUS

1. RURERI WAHOME

2. C.MURINGU

3. JULIUS M. NKANATA T/A ZEBRA SAFARIS LTD.

4. ALI AHMAD ALI AL-AHDAL.....DEFENDANT

RULING

1. In the cause of preparing the Judgment herein it came for the attention of the court that the default judgment obtained by the plaintiff against the 1st, 2nd & 4th defendants on 17.6.2009 was so obtained on the basis of the affidavit of service (affidavit in support) Sworn by the plaintiff's advocate itself grounded on the fact that substituted had been allowed by the court on 20.8.2008.

2. A perusal of the court file reveal that no such order was ever applied for nor made on the 20.8.2008 or indeed on any other date. That assertion in the affidavit had the effect of circumventing the need to effect personal service of the summons to enter appearance as is mandatory under the provisions of order 5 Rules 5,6,7 & 8 of the Civil Procedure Rules.

3. Service of summon or indeed any process is the foundation of the right to a fair hearing which must be enforced at all times and is incapable of being limited.

4. It has bothered this court what to make of the plaintiff's action of taking out summons and serving same in a manner unsupported by court records and on the basis of such affidavit obtaining a judgment which it now insists on. It has equally bothered the court whether the plaintiff can insist on the rights that accrue out of such an erroneous affidavit.

5. The court of appeal in a **Yalwala -vs- Indimuli [1989] eKLR** when faced with such a scenario held that failure to effect proper service invalidated all the subsequent proceedings which then become *null* and *void* and of no effect. That decision has been followed severally with the understanding that if it is public duty for citizens to obey the law, then it is a bigger obligation on the courts of law, if not for anything else, but for purposes of enforcing the law to avoid perpetuating acts of illegality. To allow an act performed contrary to the law to stand is in effect a perpetuation of the illegality see **Wilson Ndolo Ayaa -vs- National Bank of Kenya Ltd [2009]eKLR**.

6. I am saying all the foregoing to sum up my finding that there was never leave under order 5 Rule 17 for the service of summons in this matter to be effected by substituted service and therefore to the extent that service by registered post was made on the erroneous and untrue assertion that the court had sanctioned the same, it was misleading and unsustainable.

7. I order that the *ex parte* default judgment dated 17/6/2008 be set aside *ex debito justitiae* and that the

summons be served afresh. For avoidance of doubt I direct that the summons issued pursuant to the court order 5.12.2008 be extended for a period of six months to enable the plaintiff serve the 4th Respondent. I limit my direction to the 4th Respondent noting that the summonses were issued against the 1st, 2nd & 3rd defendant way back on 25.8.2004 and I have not seen a record to show that the same were ever extended or reissued. I do not understand the law to say that when the court ordered the joinder of 4th Defendant, that order had the effect for reissue of summons against the 1st & 2nd defendants who were already parties to the suit and against whom summons had long issued.

8. Upon service let the matter be listed before the court for taking of directions.

Dated, signed and delivered at Mombasa this 2nd day of September 2016.

P.J.O.OTIENO

JUDGE