



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

**CIVIL CASE NO. 12 OF 2014**

**ECO BANK LIMITED.....PLAINTIFF/RESPONDENT**

**VERSUS**

**DAVID NJOROGE NJOGU.....1<sup>ST</sup> DEFENDANT**

**ANN WANJIRU NJOGU.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

On 23<sup>rd</sup> May, 2014 the plaintiff filed a claim by way of a plaint against the defendants for the sums of Kshs, 2,141, 311.76 and Kshs.334, 987.57 respectively plus interest at the rate of 28.5% per annum. It also sought for the costs of the suit and interest thereof.

In his affidavit of service sworn on 1<sup>st</sup> July, 2014 and filed in court on 2<sup>nd</sup> July, 2014, Tom Murangiri Nkonge, a court process server, stated that on 29<sup>th</sup> May, 2014, he proceeded to “Discount Butchery and Restaurant” at Karatina where he served copies of the plaint and the summons to enter appearance upon the 2<sup>nd</sup> defendant.

The 2<sup>nd</sup> defendant is said to have been pointed out to the process server by the plaintiff’s manager, one Stephen Kariithi. At the time of service, the 2<sup>nd</sup> defendant is said to have confirmed that she was the wife of the 1<sup>st</sup> defendant and that she accepted service of the summons on her own behalf and on behalf of the 1<sup>st</sup> defendant; she, however, declined to sign on the process server’s copies to acknowledge the service.

On 2<sup>nd</sup> July, 2014, the plaintiff sought for an interlocutory judgment against the defendant as prayed in the plaint and on 7<sup>th</sup> July, 2014, the deputy registrar obliged and entered judgment as requested. Notices of entry of judgment were served on the 2<sup>nd</sup> defendant at her business premises, “Discount Butchery and Restaurant”, aforesaid. As it was with the summons to enter appearance, the notices are said to have been received by the applicant on her behalf and on behalf of the 1<sup>st</sup> defendant.

Besides personal service, at least as far as the 2<sup>nd</sup> respondent is concerned, the notices of entry of judgment were sent to the defendants’ last known addresses by registered post on 14<sup>th</sup> July, 2014. Certificates of posting in this respect were exhibited on the affidavit of service sworn by the same process server, Tom Murangiri Nkonge.

Despite the fact that judgment had been entered against the defendants, the 2<sup>nd</sup> defendant filed a memorandum of appearance on 5<sup>th</sup> August, 2014 and a statement of defence on 1<sup>st</sup> September, 2014. On 9<sup>th</sup> October, 2014 she filed a notice of motion of the even date seeking a stay of execution of the

judgment against her and also for the setting aside of the same to enable her defend herself against the plaintiff's claim.

The application was supported by her own undated affidavit in which, amongst other things, she conceded that the summonses to enter appearance were left at her business premises on 4<sup>th</sup> August, 2014 but with her employees and not served upon her in person as alleged by the plaintiff; nevertheless, on 5<sup>th</sup> August, 2014 she instructed her advocates to enter appearance and file defence on her behalf.

The applicant has also sworn that she only became aware of the interlocutory judgment on 1<sup>st</sup> October, 2014 when her advocates perused the court file after they were served with a bill of costs and a taxation notice on 30<sup>th</sup> September, 2014.

At the hearing of the motion counsel for the applicant contended that the affidavit of service sworn by the process server is false and that it does not comply with **Order 5 rule 15** of the **Civil Procedure Rules**. Counsel submitted that at the time of service the applicant and the first defendant had been separated for five years thereby implying that she could not have received summons on behalf of the 1<sup>st</sup> defendant.

In response to the applicant's counsel's submissions, counsel for the respondent disputed the applicant's claims and in particular submitted that if the summons to enter appearance had been left with the applicant's employees as alleged then they ought to have filed an affidavit indicating when they received the summonses. Counsel also submitted that since the process server had not been summoned for cross-examination counsel for the applicant could not be heard questioning the truthfulness of his affidavit of service.

The 2<sup>nd</sup> defendant entered appearance and filed a defence; it is not suggested anywhere in those documents that the summons to enter appearance was received in protest for the reason that it was served upon the 2<sup>nd</sup> defendant's employees rather than upon the defendant in person. But even taking the applicant at her own word and assuming that the summonses were indeed served upon her employees, her positive response by entering appearance and filing defence would only imply that her agents were duly authorised to receive the summonses on her behalf. This presumption is not far-fetched; it is contemplated in **rules 8 (1) and 13** of **order 5** of the **Civil Procedure Rules**. Rule 8 (1) states:-

***8. (1) Wherever 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 shall be sufficient.***

And on its part **rule 13** states:-

***13. Where a duplicate of the summons is duly delivered or tendered to the defendant personally or to an agent or other person on his behalf, the defendant or such agent or other person shall be required to endorse an acknowledgment of service on the original summons:***

***Provided that, if the court is satisfied that the defendant or such agent or other person has refused so to endorse, the court may declare the summons to have been duly served.***

Service of the summons upon an agent rather than on the defendant personally is therefore not an alien concept in civil proceedings as long as it can be demonstrated that it was not practicable to serve the defendant personally and that the agent who was served had the requisite authority to accept service on the defendant's behalf. In my humble view, these conditions are of no consequence when a defendant who, without any protestation against the manner of service, enters appearance and files defence in response to summons to enter appearance received on his behalf. But they will be important factors to consider when a request for a judgment in default of appearance is made; in such circumstances the deputy registrar must satisfy himself before entering judgment, that the person served had authority to receive the summons on behalf of the defendant who ought to have been personally served in the first place but who, for practical reasons, could not be personally served.

My appreciation of the applicant's application and the arguments put forth by her counsel is that the manner of service of summonses was initially not an issue and that is why appearance was entered on her behalf and a defence filed irrespective of the fact that she was not personally served. In my humble view, the entry of appearance and the filing of the defence was not only an acknowledgment of the service of the summons to enter appearance but it was also in compliance with order 6 rule 1 and order 7 rule 1 of the **Civil Procedure Rules** which bound the applicant to file the pleadings within a prescribed period of the date of service of the summons to enter appearance. It is necessary to reproduce these rules here for better understanding; order 6 rule 1 provides:-

***Where a defendant has been served with summons to appear, he shall unless some order be made by the court, file his appearance within the time prescribed in the summons.***

**Order 7 rule 1** states:-

***1. Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.***

These rules are clear that the entry of appearance and the filing of the defence presuppose that the defendant has been duly served with the summons to enter appearance; it would be illogical, therefore, in my humble view, for a defendant to enter appearance and file defence and turn around to question the manner of service of the summons to enter appearance.

From the applicant's stand point, the memorandum of appearance and the defence were filed under the mistaken impression that the 1<sup>st</sup> respondent was within time to file these pleadings; her concern was not, and should not have been, whether she had been served. Considering the pertinent rules under **order 6 and 7** of the Civil Procedure Rules I have referred to hereinabove, the moment the memorandum of appearance was entered and the defence filed the question whether the summons to enter appearance was served was *fait accompli*.

The only question whose answer should unravel the dispute between the parties herein is whether the summons was served on 4<sup>th</sup> August, 2014 as alleged by the applicant. In this regard, the applicant deposes in paragraph 3 of the affidavit in support of her motion as follows:-

***“That the Summons to Enter Appearance were(sic) left at my place of business, Discount Butchery with my employees on 4<sup>th</sup> August, 2014 and I immediately on 5<sup>th</sup> August, 2014 instructed my current Advocates on record who entered appearance on the same day and filed a statement of Defence and other documents on 1<sup>st</sup> September, 2014. I annex a photocopy of the Memorandum of Appearance and Statement of Defence marked A/158/1 and A/158/II respectively.”***

It is not clear from this paragraph or any other part of the applicant's affidavit who it was that left the summons with her employees; neither is it clear from that affidavit who the applicant's employees were. It is also uncertain whether these employees collectively received the summons and in the same manner handed it over to the applicant. More importantly, none of these employees has sworn any affidavit to corroborate the applicant's allegations and, in the least, shed some light particularly on the question of when they received the summons on behalf of the applicant.

Again although the applicant says that the summons were received in her business premises on 4<sup>th</sup> August, 2014, and the memorandum of appearance was subsequently filed the following day, she has not denied receiving a notice of entry of judgment which was sent to her together with the 1<sup>st</sup> defendant by way of registered mail on 14<sup>th</sup> July, 2014. The certificate of posting shows that the notice was sent to the defendants through their last known address. In the absence of any rebuttal or contrary evidence that the notice of entry of judgment was sent to the applicant and her co-defendant, it is presumed that they

received the notice and therefore they must have been aware that by the time the memorandum of appearance was being filed on 5<sup>th</sup> August, 2014 judgment had already been entered against them and that the memorandum and the defence that was subsequently filed were of no consequence.

I would also add that if the notice of entry of judgment was sent on 14<sup>th</sup> July, 2014, the applicant cannot be heard to say that it is only 3<sup>rd</sup> October, 2014 that she became aware of the judgment against her.

I am compelled to conclude that in these circumstances, there is nothing in the applicant's application that suggests that the applicant was not served with the summons to enter appearance at the time and in the manner described in the affidavit of service of the serving officer. Counsel for the applicant faulted that affidavit and in this regard cited **order 5 rule 15** of the **Civil Procedure Rules**; that rule provides:-

***15. (1) The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons.***

The affidavit of service is clear that the serving officer served the summons on the applicant 29<sup>th</sup> May, 2014 at 11.55 a.m. The applicant was at her business premises at the material time. The applicant, according to the depositions in the affidavit, was pointed out to him by Stephen Kariithi who, in his affidavit in response to the applicant's motion, swore that he was in the company of the process server at the time of service. The affidavit, in my view, substantially complies with the foregoing rule.

The Court of Appeal decision in **Civil Appeal No. 161 of 2000, Municipal Council of Meru versus National Housing Corporation & Others** cited by the applicant's counsel is of little help to the applicant's cause. In that case the judgment of the superior court was overturned because, amongst other things, the learned judge in that court failed to consider the explanation proffered for the absence of the appellant's witnesses in court when the suit came up for hearing. The Court of Appeal also faulted the decision of the superior court because on the date of the hearing of the case, the learned judge entered judgment against the appellant on an application from the bar and without evidence in proof of the counter-claim contrary to the provisions of **order IXB Rule 4(1) and (3)** of the **Civil Procedure Rules**. The amount awarded was also in excess of what had been prayed for in the counter-claim. In those circumstances, that case is obviously distinguishable from the case at hand where judgment was entered on a liquidated claim and in default of appearance and not for want of prosecution or in default of attendance by the defendant on the hearing date.

Setting aside of a judgment entered in default of appearance or an ex parte judgment is ordinarily at the discretion of the court and the decision most cited on principles governing the exercise of the court's discretion is the High Court decision in **Shah versus Mbogo (1967) EA 116** where Harris, J. said:-

***“The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist a person who had deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice”.*** (See page 123).

There is no indication and neither did the applicant attempt to demonstrate that failure to enter appearance or file defence in time was out of an accident, inadvertence, excusable error or mistake; instead she sought to justify this failure by urging that she was not personally served; for the reasons I have given, I am less persuaded by the reasons given for this failure and I am inclined to reject her application. It is hereby dismissed with costs.

**Dated, signed and delivered in open court this 10<sup>th</sup> July 2015**

Ngaah Jairus

**JUDGE**