



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 250 OF 2014

SUCHAM INVESTMENTS LTD

T/A TIWI BEACH RESORT.....PLAINTIFF

- VERSUS -

TRIDENT INSURANCE COMPANY LIMITED.....1ST DEFENDANT

GATEWAY INSURANCE COMPANY LIMITED.....2ND DEFENDANT

RULING

1. The 2nd Defendant, **GATEWAY INSURANCE COMPANY LIMITED**, is seeking the setting aside of the Judgement which was issued on 24th November 2014.
2. The 2nd Defendant has also sought an order of stay of execution of the Decree. It became necessary to seek stay of execution because the plaintiff Decree-Holder, **SUCHAM INVESTMENTS LTD Trading As Tiwi BEACH RESORT**, had commenced the process of attaching the applicant's assets.
3. It was the applicant's position that it was never served with the Plaint and Summons to Enter Appearance. However, the plaintiff has insisted that service had been duly effected.
4. The records show that the court rejected the first Affidavit of Service filed in court on 26th August 2014.
5. However, the court accepted the second Affidavit of Service, which was filed in court on 7th November 2014. Pursuant to that affidavit, the Plaint and Summons were served at the offices of **GATEWAY INSURANCE COMPANY LIMITED**, which are located at **GATEWAY PLACE, MILIMANI**, in Nairobi.
6. The process server deponed that he effected service by leaving the Summons at the offices of Gateway Insurance Company. He did so on 16th September 2014 after he had failed to get access to any Director or any member of the 2nd defendant's senior management team.
7. The process server had been to those same offices on 15th September 2014, seeking to serve the Plaint and the Summons on either a Director or upon the senior management.
8. The receptionist named Jane told the process server that neither the Directors nor the senior management were available. Jane told the process server to effect service upon the 2nd defendant's "*Legal office*" which was located at **REHANI HOUSE**.
9. When the process server insisted that service had to be effected upon either a Director or on a member of the senior management, Jane told him to return on the following day. It is because of that fact that the process server returned on 16th September 2014.

10. I can well understand why the process server then rejected Jane's advice, to serve the Plaintiff and Summons at the 2nd Defendant's "Legal office" at **REHANI HOUSE**. I say so because when the process server had, on 4th August 2014, served the Plaintiff at **REHANI HOUSE**, the court was not satisfied with the mode of service. It would therefore have been an exercise in futility.
11. Does that mean that the Plaintiff and Summons were served in the proper manner, as provided for in law?
12. The 2nd defendant is a limited liability company. Therefore, it should be served by delivering Summons to any of its Directors or to the Company Secretary. In the alternative, service could be effected at the company's registered office.
13. In the affidavit of service, there is no indication whether or not the process server left the Plaintiff and the Summons at the Registered office of the 2nd defendant.
14. To that extent, there was a shortcoming in the service.
15. In the result, the judgement which was granted was irregular, and should therefore be set aside, as a matter of right.
16. But if the service of the Summons was regular, could the judgement still be set aside?
17. The plaintiff acknowledges, (*and rightly so, in my considered view*) that even when a judgement was granted regularly, after the defendant had failed to file a Defence, the Court still had an unlimited discretion to set aside the said judgement.
18. In this case, the applicant was not guilty of inordinate delay in bringing the application to set aside the judgement.
19. Secondly, the applicant has put forth a line of Defence which gives rise to an arguable Defence. In so holding, I am not overlooking the plaintiff's contention, that the draft defence does not raise any triable issues. I am alive to the plaintiff's assertions that;
 - i. **The applicant cannot be heard to contend that the cause of fire was an exempted peril, when the applicant had, in its own words, settled other claims emanating from the same fire;**
 - ii. **The applicant cannot be taken seriously when it wishes to disregard the recommendations of its own loss-adjusters. Those are experts in their field.**
 - iii. **Notice was given to the applicant about the fire, which led to the appointment of the loss-adjusters, by the applicant. Therefore the applicant cannot allege that it had no Notice of the fire.**
 - iv. **The plaintiff provided to the applicant the proof of values of the various electronic goods destroyed in the fire; and that therefore the applicant cannot assert otherwise.**
 - v. **There cannot be any unjust enrichment on the part of the Plaintiff when the other payments made by the applicant were in relation to other losses which arose from the same fire.**
20. All those submissions put forward the plaintiff's position in an eloquent manner. Indeed, the plaintiff's thought-process is such as to suggest that the draft defence could be overrun by the might of the arsenal in the plaintiff's war-chest.
21. Therefore, the plaintiff does not see any need of setting aside the judgement when the Defence which the applicant will thereafter mount, will be destroyed within no time.
22. It may well be that the plaintiff has overwhelming evidence, in their assessment. And it may even be possible that after the court gives due consideration to the competing legal positions taken by the 2 parties, the plaintiff could be successful.
23. But it must be appreciated that, a defendant need not prove the efficacy of his Defence before the court can grant him an opportunity to put forward his said Defence.
24. If, on a *prima facie* basis, the Defence was arguable, the Defendant should be allowed to file it.
25. In the result, the judgement against the 2nd defendant is set aside. The 2nd defendant is given **SEVEN (7) DAYS** from today to file and serve its Defence.
26. As regards the costs of the application I order that the same shall be in the cause. The reason for not awarding costs to the 2nd defendant at this stage, though their application is successful, is that the employees of the applicant appeared intent on frustrating the process server.
27. The party who ultimately succeeds in the substantive suit will also be awarded the costs of this application, as well as the thrown-away costs.
28. For now, therefore, the Court Broker who commenced the execution process will be paid by the

plaintiff and the applicant. Each of them will meet one-half of those costs. However, the successful party will be entitled to reclaim such payment from the other party.

DATED, SIGNED and DELIVERED at NAIROBI this 16th day of July 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Mrs. Radoli for Lwanda for the Plaintiff

No appearance for the 1st Defendant

Karanja for Juma for the 2nd Defendant

Collins Odhiambo – Court clerk.