



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 132 OF 2014**

**PULIN H SHAH ..... PLAINTIFF**

**VERSUS**

**ROHIT K SHAH.....1<sup>ST</sup> DEFENDANT**

**AJIT K SHAH .....2<sup>ND</sup> DEFENDANT**

**THE CHAIRMAN LAND COMMISSION.....3<sup>RD</sup> DEFENDANT**

**THE REGISTRAR OF COMPANIES.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. Rohit K. Shah and Ajit K. Shah, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein, took out the motion dated 26<sup>th</sup> November 2014 in which they sought for the following orders:
  - a. *That the ex parte proceedings in this matter including interlocutory judgement against them and any subsequent orders be set aside.*
  - b. *The 1<sup>st</sup> and 2<sup>nd</sup> Defendants be granted leave to file their defence.*
2. The 2<sup>nd</sup> Defendant swore two affidavits in support of the motion.

When served with the application, Pulin H. Shah the Plaintiff herein filed a replying affidavit to oppose the same. Learned counsels in this matter recorded a consent order to have the motion disposed of by written submissions.

3. I have considered the grounds set out on the face of the motion and the facts deponed in the affidavits filed in support and against the application. I have also taken into account the rival written submissions of learned counsels. It is the submission of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants that they were not served with the summons to enter appearance, hence the interlocutory judgement entered in default of appearance was not justified. The Plaintiff has averred in the replying affidavit that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were served with the summons to enter appearance on 22.5.2014 at Kibera Law Courts when the duo attended court as accused persons in **Kibera P.M.C Cr. No. 2627 of 2011**. He further averred that he actually pointed out the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the process server. The defendants pointed out that the date the process server states he served was 28.5.2014 thus contradicting the Plaintiff. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants further argued that the aforementioned criminal case was adjourned from 22.5.2014 to 5.8.2014 hence they were not in Kibera on 28.5.2014 as alleged. I have critically examined the submissions of both sides and I

have formed the opinion that the credibility of the alleged service of summons upon the 1<sup>st</sup> and 2<sup>nd</sup> Defendants is in doubt. The apparent contradictions between the averments of the Plaintiff and those of the process server lends credence to the assertion that there was no proper service effected upon the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. With respect, I agree with the submission of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' counsel that the interlocutory judgement was irregularly obtained because there was no proper service of the summons to enter appearance. The same therefore, ought to be set aside.

4. The second ground raised and argued in support of the motion is

that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants is that they have a good defence with triable issues. The Plaintiff responded to this assertion by arguing that the draft defence filed herein is a sham and is meant to delay the final disposal of the dispute.

5. While considering the substance of an application such as this,

apart from determining whether or not there was service, the court is also required to consider whether the defence raises triable issues. In **C.A. Patel = Vs= Cargo Handling Services Ltd**, it was held *inter alia* that in exercising its wide discretion, the court will consider *inter alia* whether the defence raises triable issues. In the motion before this court, the defendants are saying they have a serious defence which should not be lightly taken. I have examined the draft defence attached to the supporting affidavit of Ajit K. Shah. It is apparent that the question as to whether or not the 1<sup>st</sup> and 2<sup>nd</sup> Defendants falsified and forged documents to alter or interfere with the shareholding of **Tosheka Kiosk Ltd**. A careful perusal of the Plaintiff's plaint dated 14.5.2015 will reveal that the Plaintiff's claim revolves around the shareholding of the Plaintiff, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the company known as Tosheka Kiosk Ltd whose shares the trio bought. The suit also involves the entitlement of the proceeds of a sale of a parcel of land known as **L.R. no. 209/1535 (Nairobi/Block 37/61)**, a property of the company being kshs.13.8m. due from the Government of Kenya as compensation for acquisition for purposes of constructing the Thika Super Highway. The parties do not deny that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are before the Kibera Law Courts to face a charge of forgery which are related to the same. It is clear in my mind that the draft defence raises serious issues which can only be determined via a trial.

6. In end, I am convinced that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have demonstrated that they were not served with the summons to enter appearance. They have also shown that they have a defence with triable issues. For the above reasons, I find the motion dated 26.11.2014 to be well founded. It is allowed as in terms of prayers (a) and (b). Costs shall abide the outcome of the suit.

Dated, Signed and Delivered in open court this 6<sup>th</sup> day of November, 2015.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

.....for the Defendant