



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Case 58 of 1999

SANITAM SERVICES (E.A) LIMITED.....PLAINTIFF

VERSUS

RENTOKIL (K) 1ST DEFENDANT

KENTAINERS (K) LIMITED 2ND DEFENDANT

RULING

Before me is a Notice of Motion dated 5th March, 2012 brought under Order 7 Rule 17 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Rules. The said application seeks leave of court to effect service of an order upon the 1st Defendant and its Directors Patrick Nyaga and Simon Mwago by advertisement in the print media of national circulation. The grounds upon which the said motion is grounded is that the 1st Defendant and the named directors have been elusive in receiving service of court process.

The application is supported by the Affidavit of Samson Kamau Ng'ang'a sworn on 5th March, 2012. The Applicant swore that on 28/7/06 the Court of Appeal in Nai. CA No. 228 of 2004 issued various orders against the Defendant, that the same was served upon the Defendant and Simon Mwago one of its directors on 6/10/06, that the Applicant later filed contempt proceedings on 5/5/09 culminating in a ruling of Koome J (as she then was) on 16/7/10, that the issue in the said application turned on whether or not the Defendant and its directors had been served with the orders, that the same reservations had been expressed by the Court of Appeal in Nai CA No. 294 of 2010. That the order of the Court of Appeal of 28/7/06 was again served on 16/2/12 upon the Defendant and its directors but they refused to acknowledge receipt. The Plaintiff therefore prayed for the application to be allowed.

Mr. Kariuki, learned Counsel for the Plaintiff submitted that both the High Court and the Court of Appeal had expressed reservations about service of the order dated 28/7/06. He admitted that the said order which had been issued by the Court of Appeal was however not exhibited to the application. Counsel urged the court to allow the application.

The 1st Defendant filed a Replying Affidavit by Patrick K. Nyaga sworn by Patrick K. Nyaga on 18/4/12, the 1st Defendant contended that there was no evidence to show that the 1st Defendant had avoided the service of a court orders, that in the Affidavit of Samson Kamau Ng'ang'a of 29th May, 2009, it had been sworn that service had been effected, that the Plaintiff cannot probate and reprobate at the same time, that the provision under which the application was brought was for service of summons and not orders and that therefore the application was incompetent, that since the issue of service of the order had been an issue for determination in an application dated 29th May, 2009 in the High Court and subsequently in the Court of Appeal, that the matter was therefore res judicata and this court is functus officio.

Mr. Simiyu, learned Counsel for the 1st Defendant submitted that the order that was being sought to be served was not before the court, that there would be cost implication in advertising the order and that the application was being brought in bad faith and was only meant to embarrass the 1st Defendant. Counsel urged that the application be allowed.

I have carefully considered the Affidavits on record and the submissions of Counsel. This is an application for leave to effect service of some undisclosed court process upon the 1st Defendant and its named directors by advertisement in the print media. The first short coming of the application is that nowhere in the motion itself does the Plaintiff disclose the court process that it wishes to effect service by advertisement. It is only after a careful, perusal of the Supporting Affidavit of Samson Kamau Ng'ang'a that one is able to discern that the Plaintiff is concerned with inability to effect service of some order made on 28th July, 2009 by the Court of Appeal in Nai CA No. 228 of 2004.

The other issue of concern is that the alleged order for which leave is being sought for it to be served through advertisement was not exhibited. The question that any court will ask itself is, does that order really exist. In my view, having in mind that the said order was allegedly made by the Court of Appeal in Nai CA No. 228 of 2004, it was imperative that the same should have been exhibited and produced to this court for confirmation of its existence and ascertainment of its terms. I do not think there is a court that can make orders regarding an order that is not before it. In the same way, it might not be proper to make orders regarding an order that is not proved to exist and/or not before the court.

As regards the 1st Defendant's Objection to the application on the ground that the order under which the application has been brought concerns summons, I do not think that could be a ground to refuse the application. In my view, on a proper application, a court can properly order for service of an order by advertisement.

The other objection is that the matter is res judicata that the issue has been determined by the High Court and the Court of Appeal. I do not think so. There was no evidence to show that a similar application has hitherto been dealt with conclusively or otherwise by this court or the Court of Appeal.

As regards the contention that the application was being made in bad faith, I did not see any evidence of bad faith. A party is entitled to seek any relief that is beneficial to it provided there are good grounds for seeking such a relief. In the present case, had the Plaintiff identified the order sought to be served, produced the same in the Affidavit, adduced acceptable evidence of failed or attempted service of such order by way of detailed Affidavit of service as well as evidence of avoidance of service by the 1st Defendant and/or its directors, in my view, the Plaintiff would have been entitled to the orders sought. In my view, there was no bad faith only that the application is fatally defective and incompetent.

For the foregoing reasons, I find that the Plaintiff's Notice of Motion dated 5th March, 2012 is unmeritorious and I dismiss the same with costs to the 1st Defendant.

DATED and delivered at Nairobi this 6th day of July, 2012

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A. MABEYA

JUDGE