REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 155 OF 1988

LOICE WANJIRU ……..……...APPLICANT.

VERSUS

GRACE WANJIKU MWANGI …..…..…….RESPONDENT

RULING

By her application dated 9th December, 1988, filed in court on 14th December, 1988, the defendant applies to set aside the interlocutory judgment entered in this suit on the 12th day of April, 1988 and the assessment of damages consequent thereon. The date given in the application is wrong. Nothing however turns on that. The interlocutory judgment was entered on 12/4/88 and the award of quantum of damages was made on 20/5/1988.

The application is based on alleged wrongful mode of service employed by the process server. The defendant's complaint is that she was never served with the summons to enter appearance and that there was in fact no affixing of summons on the outer door of her house.

I have no hesitation in saying that the mode of service of summons on the defendant, as employed, was not proper. The process–server is bound to make, in my opinion, at least three attempts to serve the summons on the defendant. Failing that and if he cannot find the defendant at home he can then serve the summons on an adult member of the defendant's family, if such member accepts service on behalf of the defendant. Had the matter stood without entry of appearance on behalf of the defendant by her then advocates D N Ngatia & Company I would have not even proceeded with the assessment of damages.

In this case M/s D N Ngatia & Company entered appearance for the defendant on 9th March, 1988. Entry of an appearance, unconditional, as is the case here was the irregularity of service. It has done so here. I do not therefore propose to go into conflict of evidence (per affidavits) as regards service of summons, save to say that I prefer to accept what the plaintiff says in her affidavit filed in court on 10th January, 1989. I am prompted to say this only because appearance was entered on behalf of the defendant by a firm of advocates.

My attention was drawn to the affidavit sworn by Mr Mwaura on 30th March, 1990 (filed in court on the same day) wherein Mr Mwaura depones to the alleged fact that the defendant informs him that she did not instruct Ms D N Ngatia & Company to enter appearance.

I cannot accept that advocates would pick up a summons stuck on someone's door and enter an appearance. I wonder why the defendant herself has not sworn to this fact and I wonder why she has left it

to her advocate to so depone from information. May be because that is not the truth.

I therefore find that the irregularity of service was cured by entry of unconditional appearance. The defendant's application to set aside the judgment on grounds of non-service or bad service therefore fails. I must therefore turn to merits or demerits of the defence because it is the duty of courts to give a chance to the defendant as far as possible and within reason, to be heard.

The defendant states in her affidavit that she did not assault the plaintiff and that the alleged injuries could not have been caused by her. The purported defence is of a complete and total denial of assault.

I must consider, for the purposes of the present application, the alleged defence, to arrive at a just decision. The defendant stands convicted, by a court of competent jurisdiction, of the offence of causing grievous bodily harm to the plaintiff contrary to section 234 of the Penal Code. Under Section 47A of the Evidence Act that is evidence of a nature which entitles a civil court to find the defendant liable if the civil claim arises out of the same facts. Such is indeed the case here. The defence open to the defendant, in the absence of any appeal against the conviction, is that of contributory negligence or provocation. As the defendant denies assaulting the plaintiff at all, even that defence is not open to her.

So the only other defence open to the defendant is that of she (the defendant) not having injured her, or that the severity of injuries is not as such as the plaintiff would want the court to accept. I would not want to comment on that aspect at this stage as there was only one medical report produced at the time of assessment of damages. I am fully aware of decisions of our Court of Appeal in CA No 27 of 1982, *Pithon Waweru Maina vs Thuka Mugiria* (page 14 of volume II of KCA unofficial reports) and CA No 64 of 1982 *Joseph Ngunge Waweru vs Joel Wilfred Ndinga* (page 77 of the same volume). As I said earlier the court ought to give, as far as possible, a chance to the defendant to be heard. But this can be done by keeping interests of both parties in mind.

I need not dwell at length into celebrated and often quoted authorities like:-

(a) *Peter vs EA Cargo Handling Services Ltd* (1974) EA 75

(b) *Shah vs Mbogo* (1967) EA 116

(c) *Shabin Din vs Ram Parkash Anand* 22 EACA 48

The court has an almost unfettered discretion to set aside *ex-parte* judgment after removal of the words "sufficient cause" from order 9A rule 10, the previous provisions being under Order 9 rule 24.

I feel that the defendant has not been candid enough with the court. I am satisfied that the interlocutory judgment entered on 12/4/88 in default of defence was proper and I decline to set that aside. I also decline to set aside that judgment in view of the conviction of the defendant and in light of her absolute denial of assault.

However, I am prepared to give a chance to the defendant to reopen, only the assessment of quantum of damages as I feel inclined to believe that M/s D N Ngatia & Company may not have informed the defendant of the date for assessment of damages, hearing notice whereof was served on Messrs D N Ngatia & Company on 4th May, 1988, the assessment of damages having been listed for hearing on 16th May, 1988. It is also probable that about that time Mr Ngatia was having his own problems. In order therefore to give to the defendant a chance to challenge the nature or severity of injuries I set aside the assessment made by me on 20th May, 1988 and give liberty to the plaintiff to set this suit down for assessment of damages at a date to be fixed at the registry but I do this on condition that the defendant pays to the plaintiff the plaintiff's thrown away costs occasioned by this setting aside order and also the costs of this application all of which I assess at shs 3,000/- inclusive of court fees and plaintiff's expenses. I have to assess these costs as the plaintiff has been at times been represented by counsel and at times she has conducted the suit by herself. If the defendant fails to pay this sum of shs 3,000/- to the plaintiff by the end of this month the assessment of damages made by me on 20/5/ 88 will stand without any further

ado.

The orders therefore are as follows:-

1. That the interlocutory judgment entered on 12/4/88 do stand;

2. That the assessment of damages made on 20/5/88 be and is hereby set aside but on condition that the defendant pays to the plaintiff a sum of shs

3,000/- as costs and disbursement by the end of this month;

3. That in default of payment of the sum of shs 3000/- aforesaid the assessment of damages as made on 20/5/98 do stand.

Dated and Delivered at Nairobi this 5th Day of April 5, 1990

A.B. SHAH

…….……..

JUDGE OF APPEAL