



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**CIVIL CASE NO 767 OF 1987**

**CITY SERVICE STATION..... APPLICANT**

**VERSUS**

**JAMRECK PETER NJUGUNA ..... RESPONDENT**

**RULING**

This is an application by the defendant in the suit that the *ex-parte* judgment entered against him on 25/2/88 be set aside on the grounds that he was never served with summons to enter appearance and that he does not owe the plaintiff the sum claimed. The application is supported by affidavit of the applicant sworn on 19/9/88 in which he depones *inter alia* that he has never been served with summons to enter appearance; that it is on 30/8/ 87 when court broker came to his office when he first came to know about the case; that he bought two vehicles from respondent – Reg No KTQ 566 and KTB 109 and his employer paid for the two vehicles; that in respect of the 3rd vehicle KTM 104 which he bought from respondent for Shs 70,000/- the deal was cancelled and plaintiff took back the vehicle. In his affidavit Kassamali Mohamed Noorani – a partner in the plaintiff company depones among other things that the amount claimed from defendant/applicant in respect of a bond and chattels transfer; that applicant incurred a debt of shs 4,790/- in respect of motor vehicle KTM 104 which respondent paid on his behalf and also that plaintiff has expended a further shs 20,000/- in respect of the vehicle; that motor vehicle KTM 104 is in plaintiff's possession but cannot fetch more than shs 40,000/- if sold and that defendant has no defence to the claim.

In a supplementary affidavit filed on 27/9/88, applicant depones that Kassamali Mohamed Noorani went to applicant's home on 7/5/87 and told him *inter alia* that as applicant was going on transfer to Nairobi, applicant should sign a document in respect of amount he owed in respect of purchase of motor vehicle KTM 104; that applicant was led to office of Kasamani advocate where he was shown a document and where to sign which he did without reading it; that he thought that document had nothing else except the dealing with motor vehicle KTM 104; that except for the price of KTM 104 – which is shs70,000/- he does not owe plaintiff any other money nor has plaintiff sold any other goods other than the three motor vehicles nor advanced any money to the applicant.

Regarding the issue of service of summons to enter appearance applicant depones that he was never served. Mr Kassamali Mohamed Noorani does not in his affidavit mention the issue of service. Mr Kasmani for respondent however referred to return of service and said that service was proper. There is a return of service filed by Mr Dickson Aura Etabale a process server in Nairobi. He states that on 29/1/88 and on 1/2/88 he went to defendant's place of work at Kenya Airways. He did not find the defendant. He again went to defendant's place of work on 3/2/88 and did not find him or anyone to serve and he served the summons "by affixing with pins on the table in the defendant's office at his place of work in presence

of Mr Alfred a workmate of the defendant.”

The position in law is that there is a presumption of service as stated in the process server’s report and the burden lies on the party questioning it, to show that the return is incorrect – see *Shadrack K Arap Baiywo v Bodi Bach* – Court of Appeal Kisumu Civil Appeal No 122 of 1986. In the same case Platt JA held and the other members of the court agreed with his Lordship that if there is no service, then *ex debito justitiae*, the judgment in default must be set aside. It would appear from the process server’s report that service was done in accordance with Order V rule 14 of the Civil Procedure Rules which states:-

“Where the serving officer, after using all due diligence cannot find the defendant, or any person on whom service can be made, the service officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain and shall then return the original to court from which it was issued together with a return of service.”

Mr Macharia Muhuni for the applicant argues that as Kenya Airways is a corporation, where if one officer is not present another takes over, it cannot be said that, that was the place of work of the defendant. Mr Macharia Muhuni further argues that Order v rule 14 service is personal where individual is involved and if one cannot be found where he works, he should be followed where he resides.

In *Eliakaman Omuchilo v Ayub Machiwa*, [1966] EA 229, High Court of Kenya held following the decision in Uganda case of *Erukana Kavuma v Mehta*, [1960] EA 305, that before a process server can validly effect service by affixing a copy of the summons to the premises must use “all due and reasonable diligence” to find the defendant or any of the persons mentioned in Order 5 r 9, rule 11 and rule 12 and it is only then, after using such diligence, none of them can be found, that he can fix a copy of summons on the premises and that full particulars of such premises should be given.

In the present case, the process server went to defendant’s place of work at Jomo Kenyatta International Airport on three occasions and on the 3<sup>rd</sup> occasion not finding the defendant, he pinned “a copy of the summons and plaint on the table in the defendant’s office at his place of work”.

It would appear that the defendant is a public officer employed in a public office. There are no sufficient details in the Return of Service regarding the defendant’s place of work. The process server does not say where in the complex Jomo Kenyatta Airport, the defendant’s place of work is located. He does not say if the defendant’s office is in a pool office or is a separate office. If it is a separate office, perhaps it has a door number which process server has not given. If it is a separate office, the process server does not say if he found the office open or state how he got access to the office. He does not state that on any of the three occasions he waited for the defendant and defendant failed to turn up. As Mr Muhuni says, in an office which belongs to a corporation, when one officer is not present, another takes over his place. In my opinion in a complex place like Jomo Kenyatta Airport, the process server was bound to make inquiries about the defendant’s whereabouts from his senior officers who may know where he is before he would say that he could not find him. The process server made the second visit after 2 days interval and the third visit after one day’s interval from the second visit. He therefore made all the three visits within a period of five days. For all practical purposes, the defendant could have been sent on a mission or could have been shifted to another place by his superior even without the knowledge of his workmate or that matter he could have been on leave. If the process server made inquiries from defendant’s superior officers, he would have known where the defendant was as he was bound to report for work.

In the circumstances of this case, I am not satisfied that the process server used all due and reasonable diligence to find the defendant. Further, considering that defendant was a public officer and was bound to report for work, I am not satisfied that he could not have been found. The plaintiff had another mode of service to fall back upon. As the defendant is a public officer, he could have asked the court to serve him through the defendant’s boss as provided in Order V rule 19 instead of pinning the summons and plaint on a table in an office.

Mr Kasmani argues that the defendant has no defence to the claim. He has annexed a bond signed by the defendant in which defendant agreed that he was indebted to the plaintiff in the sum of shs 196,600/-. The defendant has deponed as to the three transactions he had with the plaintiff in respect of purchase of motor vehicles. He says that the plaintiff was fully paid for two motor vehicles. The plaintiff does not deny that. Defendant wonders what the debt in the bond is about. Plaintiff has not given details of the claim of shs 196,000/- and merely relies on the bond as the foundation of the claim.

It is true that a bond being a document under seal, no consideration is required. Defendant however, says that the contents of the bond are not true and that he signed it in ignorance of its contents. That in circumstances, is, in my opinion, reasonable defence. Mr Kasmani further submits that as the claim of shs 70,000/- is supported by the chattels transfer which defendant signed, the defendant has no defence to the claim. The chattels transfer show that the shs 70,000/- debt is in respect of motor vehicle sold by plaintiff to the defendant. Para 5 of the plaint states that the plaintiff has been unable to trace the vehicle which it sold to the defendant. The defendant on the other hand depones that the deal about the sale of motor vehicle KTM 104 was mutually cancelled and the plaintiff took back the vehicle.

Mr Kassamali Mohamed Noorani states in para 5 of his affidavit that the vehicle KTM 104 is in the plaintiff's possession but plaintiff has not been able to sell it and that if sold, it is not likely to fetch more than shs 40,000/-. He further depones that on sale of the vehicle, the judgment debt due will be credited with the amounts realized. It is clear that the contents of para 5 of the affidavit contradicts para 5 of the plaint in that contrary to the averment in the plaints, the plaintiff has possession of the vehicle which has a value of about shs 40,000/- which value should be credited to the defendant. It is not correct therefore to base the claim of shs 70,000/- on the chattels transfer are apparently not true.

I also conclude that defendant has shown a reasonable defence to the claim of shs 70,000/-. I am satisfied that there was no valid service of the summons to enter appearance and the plaint and in any case the defendant's affidavits disclose a good defence on the merit.

I allow the application, set aside the *ex-parte* judgment entered on 25/2/ 88 and the execution thereon. The defendant to enter appearance within 7 days and file defence within 7 days after entry of appearance plaintiff to pay the defendant the costs of this application.

Dated and Delivered at Mombasa this 24<sup>th</sup> Day of April, 1989

**E.M.GITHINJI**

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**JUDGE**