IN THE COURT OF APPEAL

AT KISUMU

(Coram: Nyarangi, Masime Jj A & Gicheru Ag JA)

CIVIL APPEAL NO 69 OF 1987

FILIMONA AFWANDI YALWALA.....APPELLANT

VERSUS

INDUMULI & ANOTHER.....RESPONDENT

JUDGMENT

March 14, 1989 the following Judgments were delivered:

Nyarangi JA. This is an appeal by the defendant against the judgment entered by Aganyanya J. on 31st July, 1936 in Civil Appeal No 90 of 1985 of High Court of Kakamega.

The appeal arises from a suit filed in court on 2nd March, 1984 in which the plaintiffs (the respondents here) claimed that during the year 1980 they jointly or severally planted cane on two parcels of land known respectively as E Wanga/Isongo/791 and E Wanga/Isongo/792. The first plaintiff planted cane valued at Kshs 871.30 and the second plaintiff's cane was worth Ksh 9,079.85. After the cane was mature, the plaintiffs contracted with Mumias Sugar Company Limited (the company) to sell the cane under two contracts. In the year 1982, claimed the plaintiffs, the defendant unlawfully and fraudulently and without permission converted the two contracts into his name thus making himself contractually entitled to receive the proceeds from the sale of the cane. The plaintiff's further averment was that the defendant acted fraudulently because he presented to the Mumias Sugar Company Ltd. false documents which the defendant claimed had been written by the plaintiffs jointly and severally authorizing the company to transfer the contracts into the defendant's name. The other act of fraud in the particulars of fraud is said to be that the defendant had no permission of any sort from the plaintiffs to convert the plaintiffs' contract. Also, that there was no consideration for the purported transfer of the contract and the plaintiffs did not sign any documents authorizing the company to pay any of the proceeds from the cane to the defendant.

The plaintiffs claimed that in 1983 the company cut their cane and paid the proceeds totaling Ksh 18,821.15/= to the defendant and prayed for judgment against the defendant for Ksh 18,821.15/=.

I can now shortly state the defence filed in court on 5th June 1985. First the plaintiffs' monetary claim was denied. In the alternative, the defendant stated that on 22nd August, 1981 a court broker and auctioneer advertised for sale land parcel numbered E. Wanga/Isongo/792 of acreage of 7.5, 4 acres of

which had cane, that the defendant bought the land at a public auction for Ksh 12,000/= and the land was transferred to him.

The written statement of defence had not been filed by May 18, 1984 on which date the plaintiffs obtained interlocutory judgment, there being no appearance nor defence. That was followed by a formal proof and a judgment after the proof. The defendant applied to have the *ex-parte* judgment set aside. His contention was that the summons was given to his son who did not hand it to the defendant and that that was the cause for his failure to enter appearance and file a defence within time. The learned Senior Resident Magistrate was not persuaded. Nor was the High Court which heard the defendant's appeal on 25th July 1986.

The appellant's grounds for challenging the decision of the High Court, in brief outline, are that the judge erred in law in not appreciating that Order 5 rule 12 of the Civil Procedure Rules (the Rules) allows for service of summons on an adult member of the family only where the defendant cannot be found, that the judge misdirected himself in holding that Order 5 rule 12 could be complied with before it was shown that it was not practicable for service to be made on the defendant and that it was an error for the judge to dismiss the appeal without considering if there was a defence on merits.

In his submission on behalf of the appellant, counsel has put his case in a number of ways. By his principal submission, he contends that by virtue of Order 5 rules 9 and 12 of the Rules, there was no valid service of summons to enter appearance and that therefore the proceedings *ex-parte* were null and void *ab initio*. Mr Wasuna's secondary submission is that even if there was proper service, there were sufficient reasons why the ower courts should have exercised discretion in favour of the appellant. It was argued that the lower courts should have made a finding as to whether the appellant in fact received the summons irregularly served on his son. The primary manner in which Mr Wasuna put the appellant's case is that the lower courts should have directed if there was a defence to the plaintiffs claim so that leave to defend could be given conditionally.

On behalf of the respondents reliance was placed on rule 9 of Order 5 and it was urged that the process server invoked rule 12 of the Order because having gone to the home of the defendant, he failed to serve him. As the son was served, the defendant father must have known about the service. Counsel asked the court not to penalize the respondents by ordering them to pay costs because if there be an error in the service, it would be that of a process server appointed by court.

In my opinion in the present case the first consideration is Order 5 rule 9 (1). On the evidence the defendant had no agent empowered to accept service. Therefore service of the summons had to be made on the defendant to the extent it was practicable. That is the ideal form of service. Before it is departed from, there must be circumstances which would reasonably support the departure. The words "wherever it is practicable" suggests that there would be occasions when it would not be practicable to effect personal service. Process servers must however not easily resign from personal service merely because of the alternatives of substituted service, or due to the availability of service on any adult member of the family. Service on an agent is essentially second hand; second best. Service of process is so crucial a matter in litigation that courts including Deputy Registrars must encourage the best of service; i.e personal service. It may not always be possible for the contents of the summons to be translated or explained to defendants. A defendant who is served personally has an opportunity to put questions to and seek clarification from the Court Process Server about the summons. The Return of Service under Order 5 rule 6 (1) of the Rules enjoins court process servers to make service on defendants or respondents. That is the the primary task. It is not expecting too much of court process servers to try and try again to serve the defendant before embarking on the other means of service. If a defendant is not found at his home or place of work, the process server ought to enquire as to his whereabouts. If there is information of the defendant's early return, there is no reason why the concerned process server should not wait. If a defendant has some other home, the process server should seek directions to that home with a view to personally serving the defendant. The growing tendency is for Court process servers to declare unto themselves that it would be bothersome to travel an extra five or ten kilometers to find the defendant and instead to serve one of the wives or one of the adult sons. In my judgment such attitudes and such service contravenes rule 9 (1) of order 5. The court process server simply must in general make more than one attempt before he can be

heard to say that it was not practicable to carry out personal service. The ordinary defendants in Kenya are not as hostile to process servers as is at times claimed. True, some defendants dodge service which would require that the process server uses his ingenuity and makes service on the particular defendant.

The clear risk in indulging in service other than personal service is that most of such service would be late. Take a defendant who is not found at his home but is reported to be away on "*safari*". If, as is the case with ordinary people he will have traveled by a *matatu* or bus, there can be no certainty as to the exact day of his return. There could be no certainty that whenever he returned home, the adult member of the family residing with the defandant on whom service was made would be there to inform him of the summons. True, if service is late, that would not be fatal to the defendant's case. But we should not cause delay; we should avoid it. The purpose of Order 5 rule 12 is to expedite service; not to delay it. Summons are not kept in files in offices in ordinary homes in Kenya. These are the Kenya circumstances which must be borne in mind in the very important matter of service of process. There is nothing wrong with our circumstances. That is the more reason why they must be borne in mind. Every country has its own peculiarities and courts everywhere are required to reasonably intelligently observe the ways of people they serve.

Applying the test thus propounded, service on any adult member of the family who is residing with the defendant under Order 5 rule 12 is valid only where there is reasonable ground to believe that the defendant, "cannot be found".

A quick, single hurried visit to the defendant's home in his absence would not reasonably justify a conclusion that he cannot be found. There must be information given to the process server after careful enquiry that defendant will be away from his home or home area for so long that service would be too late. Process servers must be slow to conclude that a defendant cannot be found for service on him except where, notwithstanding several attempts by the process server to meet the defendant, it has not been possible to meet him.

Service on an adult member of the family of the defendant who is residing with him should take account of which member of the family would ensure that the summons reach the defendant in time. The wife of a defendant (if she is the only wife) would do the trick. If a defendant has two wives the court process server must be cautious and use his good judgment as to who of the two or more wives would deliver the goods within time.

Before service on an adult male child of a defendant, the Court Process Server is well advised to find out the sense in which the son resides with his defendant father. A married adult male child would have his own house within the defendant's homestead. In those circumstances, that particular member of the family, although he resides with his father, may not be expected reasonably to meet his defendant father as often or as easily as order 5 rule 12 appears to suggest. A defendant to whom the summons does not reach in time can be heard to say that he had no knowledge of the summons. In my judgment, it would be perfectly proper and legitimate for court Process Servers to approach the service of summons on the basis of prevailing circumstances of a community. It is possible that the last word on Order 5 rule 12 has not been said yet.

There is no doubt that the process server received the summons on March 17, 1984 and on March 20, 1984 served a copy on Haruna Afahd. It is incorrect to say as the plaintiff's Advocate stated, that the defendant was personally served on March 20, 1984.

The Court is left in darkness as to what, if any, further attempts were made to find the defendant. The defendant had not been previously notified to wait for the arrival at his home of the Process Server. To hold that the defendant could not be found is not in my judgment possible. There is no evidence at all that the Court Process Server ever tried to find the defendant and it was therefore not open to the Process Server to conclude that the defendant could not be found. Only where the defendant cannot be found for personal service may a Court Process Server properly invoke Order 5 rule 12 and thereby simultaneously satisfy Order 5 rule 9.

If, as in my opinion the law requires it is necessary for the plaintiff to establish that the defendant could not be found, I do not think that the plaintiffs have done so. Accordingly in my view there was no valid service of the summons to enter appearance and therefore the proceedings *exparte* must be rendered null and void *ab initio*. That finding makes it unnecessary for me to consider the other grounds of appeal. I would therefore allow this appeal, set aside the judgment and order of the High Court and substitute therefore an order giving unconditional leave to the defendant, who has already deposited the decretal amount in the High Court, unconditional leave to defend the suit.

I would give the costs here and of the courts below to the appellant.

As Masime JA and Gicheru Ag JA agree, it is so ordered.

Masime JA. The respondents in this appeal filed suit against the appellant in the Resident Magistrate's Court at Kakamega on 2nd March 1984. The summons to enter appearance which was issued to the respondent's Counsel was handed over to a private Court Process Server on 17th March, 1984 for service upon the appellant. The said Process Server traveled to Mukunga Primary School and village where the appellant's home is situated on 20th March, 1984 and served the summons on the apellant's adult son Haruna Afandi who endorsed his signature on the back of the summons; a return of service was then made to the court. The appellant's son who was so served did not deliver the summons to the appellant who not surprisingly did not enter appearance. Consequently several weeks later on the application of the respondents an *ex parte* judgment was entered against the appellant. In due course the case was formally proved and final judgment obtained against the appellant on 29th January 1985.

When the appellant learned about what had transpired against him he on 30th April 1985 filed an application to set aside the interlocutory and final judgments against him. He swore an affidavit in support of his application and deponed that he was not served with the summons to enter appearance and was not aware of the suit. At the hearing of the application he admitted that the summons was given to his son who stays with him but said that son did not give the summons to him. On this evidence the learned Senior Resident Magistrate ruled that the summons had been properly served under Order V Rule 12 of the Civil Procedure Rules and dismissed the application. The appellant's appeal against that ruling was similarly heard and dismissed by the High Court hence this second appeal.

In his judgment the learned first appellate Judge set out Order V Rule 12 and the statements of the appellant and said:

> "Counsel for the appellant submits that before Rule 12 is applied Rule 9 must be exhausted. I agree with this but where the process server visits the defendant's home and does not find him but nevertheless finds an adult member of the family as in this case one who is prepared to accept service on behalf of his father how else does one wish rule 9 to be exhausted?"

He went on to hold that there was proper service.

Order V Rule 9 provides that wherever it is practicable service shall be made on the defendant in person, unless he has an agent empowered to accept service. An exception is made to this mandatory requirement by Order V Rule 12 which allows service on an agent of the defendant empowered to accept service or "on any adult member of the family of the defendant who is residing with him" where the defendant cannot be found. In view of the fact that this is a departure from the mandatory mode of service it is incumbent upon the process server to make a real effort before resorting to this alternative service. The return of service made to the court is clear that the process server just made one trip to the village and not finding the appellant served his son. The return is silent on what enquiries if any the process server made and from whom as to the whereabouts or if he was away his likely date of return to his home and why it was not practicable to effect personal service that is mandatorily required. I cannot in the circumstances agree with the learned first appellate Judge that service was properly effected on the appellant's son. That would be tantamount to permitting the process server to delegate his duty to that adult member of the defendant's family.

I therefore agree with my brother Nyarangi JA whose judgment I have had the advantage of reading in draft and which I wholly agree with that this appeal should be allowed and the *ex parte* proceedings be set aside as being null and void *ab initio*. The judgment and order of the High Court should therefore be set aside and the appellant be given unconditional leave to defend the suit. I would also agree to the order on costs proposed by Nyarangi JA.

Gicheru Ag JA. This appeal typifies the inherent danger of service of summons other than personal service where practicable, on a defendant who has no agent empowered to accept service as is required by Order V rule 9 (1) of the Civil Procedure Rules (the Rules). As Nyarangi, JA has correctly pointed out, service of process is so crucial a matter in litigation that courts must encourage the best of service – personal service.

In the instant appeal, the appellant, Filimona Afwandi Yalwala, in his application to set aside *ex parte* judgment entered against him in the Senior Resident Magistrate's court at Kakamega is recorded to have said:

> "The summons was given to my son not myself. He did not give it to me. The son is Aruna and he stays with me. Ask that *Ex parte* judgment be set aside."

He is finally recorded to have said:

> "I am staying with Aruna who is my son. I never received the summons."

The appellant admitted that the summons was received by his adult son who was residing with him but further said that this son did not give it to him. He (the appellant) denied having received the summons. Hence, despite service of the summons on an adult member of his family who was residing with him as is provided for by the relevant part of Order V rule 12 of the Rules, the appellant may well have not received the summons. As the appellant had no agent empowered to accept service and hence service on his adult son as is mentioned above, and since service of process is so primary to the initiation of litigation, a service of process in circumstances such as obtained to the appellant emphasizes the need for courts to encourage personal service.

No doubt a situation may arise where personal service is not practicable. Such a situation as is envisaged by Order V rule 12 of the Rules is where a defendant cannot be found. In such a situation and where a defendant has no agent empowered to accept service, service may be made on any adult member of his family who is residing with him. The words "cannot be found" as are used in the aforesaid rule must, as was observed in the case of *Waweru v Kiromo*,[1969] EA 172 at page 175 letter A, be given their due weight. The said rule can have no application unless it is shown that a defendant such as is mentioned above could not be found. Service on any adult member of his family who is residing with him is insufficient service if it is effected without adequate enquiry that he cannot be found. Simply because such a defendant is not at home when the process server went to effect service is an unsatisfactory reason for saying that he cannot be found. Indeed, as Nyarangi, JA points out, before a Process Server can be heard to say that personal service was not practicable, he must make more than one attempt to effect such service for where service is made on any adult member of the defendant's family who is residing with him, under Order V rule 12 of the Rules, such service is valid only where there is reasonable ground to believe that such a defendant "cannot be found".

In the circumstances obtaining to this appeal, no enquiry was carried out by the process server to establish that the appellant could not be found. Indeed, the Process Server made no more than one attempt to effect service on the appellant. Service on the appellant's adult son who was residing with him was therefore not adequate service. It was invalid. Accordingly, I agree that this appeal be allowed with orders made in terms proposed by Nyarangi JA.

Dated and Delivered at Kisumu this 14th March , 1989.

J.O NYARANGI

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JUDGE OF APPEAL

J.R.O MASIME

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JUDGE OF APPEAL

J.E GICHERU

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AG.JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR