



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 1583 OF1985

CANNON ASSURANCE LIMITED.....PLAINTIFF

Versus

SILVESTER KURIA KINYANJUI

KATHERINE WAMBUI KURIA.....DEFENDANTS

RULING

This is an application by the 2nd defendant/applicant for orders that:-

- "1.The judgment and decree in this suit be set aside."
- 2.Such consequential order be made as this Honourable Court deem fit and just."
- 3.The costs of this application be provided for."

It is made under Orders IXA, IXB rule 8, XXXVI and V of the Civil Procedure Rules; section 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya; the inherent powers and jurisdiction of this court and all other enabling powers and provisions of law; and is grounded upon the affidavit of the 2nd defendant/applicant, Katharine Wambui Kuria.

On 31-5-85 the plaintiff/respondent herein filed Civil suit No. 1583 of 1985 by way of taking out originating summons under Order XXXVI rule 3A of the Civil Procedure Rules against Silvester Kuria Kinyanjui, 1st defendant, and his wife, Katherine Wambui Kuria, the 2nd defendant/applicant herein. According to this summons, appearance by the 1st defendant and 2nd defendant/applicant was to be within 10 days after service of the said summons. Service of the aforesaid summons was effected on the 1st defendant, Silvester Kuria Kinyanjui, by Patrick M. Miano, a process server, on 6th July, 1985 at about 1.15 p.m. According to this process-server, at the time of service of the summons aforementioned, the 1st defendant introduced himself to him and admitted that the 2nd defendant/applicant was with him and were living together as husband and wife. He (process-server) therefore served the summons upon the 1st defendant on behalf of the 2nd defendant/applicant but the 1st defendant refused to sign the above mentioned summons saying that he was living together with the 2nd defendant/applicant and they were away of their debt to the plaintiff/respondent. From the affidavit of Inder Jit Talwar, the director of the plaintiff/respondent, sworn by him on 8th January, 1986 and filed in this court on 9th January, 1986, it would appear that the 2nd defendant/applicant had by 30th July, 1985 received the originating summons referred to above but it is not clear on what date nor how she had received the said summons. However, neither the 1st defendant nor the 2nd defendant/applicant entered appearance in obedience to the aforesaid

summons. On 27th November, 1985 therefore, on request of the counsel for the plaintiff/respondent this court (Cockar, J.) granted to the plaintiff/respondent prayers 1, 2 and 3 of the originating summons and awarded costs to the plaintiff/respondent against both the 1st defendant and the 2nd defendant/applicant. From the proceedings of 27th November, 1985 it is indicated that the 1st defendant and 2nd defendant/applicant were served. Subsequently, a decree and an eviction order against the 1st defendant and the 2nd defendant/applicant issued. It is against the grant of prayers 1, 2 and 3 of the originating summons to the plaintiff/respondent together with costs as aforesaid that the 2nd defendant/applicant has made this application.

The 2nd defendant/applicant's principal contention in this application is that she was not served with the originating summons in accordance with the relevant provisions of Order V of the Civil Procedure Rules. The plaintiff/respondent's response to this contention is that the whole object of service is to bring to the person served notice that a suit has been filed against him. Here, the 2nd defendant/applicant received the summons and was therefore notified of the suit filed against her along with her husband.

Her admission of having received the summons was therefore sufficient proof of her having been served with the summons in question.

Order V rule 9(1) of the Civil Procedure Rules provides that:-

"Whenever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient." Rule 12 of the same Order provides that:- "Where in any suit the defendant cannot be found, service may be made on any adult member of the family of the defendant who is residing with him."

From the foregoing provisions, it is clear that service must be made on the defendant in person whenever it is practicable and where the defendant has an agent authorised to accept service, service on such agent is sufficient. Where, however, the defendant **cannot be found**, service can be made on any adult member of his family who is residing with him. The latter mode of service can only be effective when it is satisfactorily shown that the defendant cannot be found. Absence from his place of residence, business or work is not enough to warrant service on an adult member of the defendant's family on the ground that the defendant cannot be found. As was observed with approval in the case of **Waweru v Kiromo** (1969) E.A. 172 at page 174 letter H:

"A service without adequate enquiry that the defendant cannot be found would not be sufficient service."

See the Code of Civil Procedure, 3rd Ed., 1963 by Rao. Indeed as was observed by Harris, J. in the case **Elikanah Omuchilo v. Ayub Machiwa** (1966) E.A. 229 at page 231 letter E:

"The procedure of entering judgment in default of appearance....., is an arbitrary and drastic remedy the granting of which imposes upon the plaintiff the necessity to ensure that service of the summons with a copy of the plaint attached, has been duly effected in compliance with the rules."

With respect, I agree with this observation.

Paragraph 2 of the return of service in respect of the 2nd defendant/applicant filed in this court by the processserver, Patrick M. Miano, on 14-8-85 states as follows:-

"2. THAT on divers days and times I made several unsuccessful attempts to trace where the defendants in this case live.

Following direction from the plaintiff company I proceeded to Bernard Estate Mbaazi Road and opposite Ibegara Club, Nairobi and on the 6th day of July, 1985 at about 1.15 p.m. I

serviced by tendering upon Mr. Silvester Kuria Kinyanjui the husband of Mrs Katherine Wambui Kuria at his Gate, originating summons annexed with affidavit and also exhibits, requiring his signature on behalf of the defendant No. 2 but refused saying they are living together and they are award of the debt. The principal summons is returned duly served."

Paragraph 3 of the said return of service stated as follows:-

"3. THAT at the time of service Mr. Silvester Kuria Kinyanjui introduced himself to me and he admitted that Mrs. Katherine Wambui Kuria is his wife living together as husband and wife and he also admitted that they owe the money with his wife and they are making arrangement to pay in full."

In his affidavit sworn on 23rd December, 1985 and filed in this court on 9th January, 1986 the process-server, Patrick M. Miano, stated in paragraphs 4 and 5:

"4. That I went to the said house several times between 30th June, 1985 and 6th July, 1985. The house has a gate and there is a sentry at the gate and he stopped me from going in. I was afraid also that there may be dogs on the premises. The first and second defendants always entered and left the house by car and I could not serve the summons on the defendants." "5. That I went to the house at about 1.15 p.m. on 6th July, 1985 and waited at the gate of the house. The first defendant came to the house about that time and I presented one copy of the originating summons to the first defendant and he took the summons and signed in my presence. He stated to me that he was the first defendant and also mentioned to me that his wife was the second defendant. I then gave the originating summons to the first defendant to accept the originating summons on behalf of his wife. He took the summons but refused to sign the summons on behalf of his wife and told me that it was alright as they were both staying together and further told me that he and his wife were well acquainted with the debt owing by them to the plaintiff. He however said that he will make the necessary arrangements to pay the plaintiff."

It is quite clear from the foregoing that the process-server, Patrick M. Miano, made no enquiry whatsoever that the 2nd defendant/applicant could not be found when on 6th July, 1985 he served the 1st defendant, Silvester Kuria Kinyanjui, with the Originating Summons on behalf of the 2nd defendant/applicant. It may very well be that when all this was happening the 2nd defendant/applicant was in the house or within earshot. This kind of service as relates to the 2nd defendant/applicant cannot be said to have been in compliance with the provisions of Order V rule 12 of the Civil Procedure Rules as is set out above. This was therefore a defective service and it does not matter that at some date about or before 30th July, 1985 the 2nd defendant/applicant received the originating summons in question. To use the words of Travelyan, J. In the case of **Waweru v. Kiromo**, *supra*: "a bad service remains a bad service." and as was observed by Kneller, J.A. in the case of **Pithon Waweru Maina v. Thuku Mugiria**, Nairobi Court of Appeal Civil Appeal No. 27 of 1982 (unreported) following the cases of **Kanji Naran v. Velji Ramji**, (1954) 21 EACA 20 (CA-K) and Fort **Hall Bakery Supply Company v. Fredrick Muigon Wargoe**, (1958) E.A. 118 (K):

"The court has no discretion where it appears there has been no proper service; and the power to set aside the judgment does not cease to apply because a decree has been extracted:

In the instant application therefore, service of the summons having been defective for failing to comply with the rules of service, I need go no further than to follow the foregoing passage from the case of **Pithon Waweru Maina v. Thuku Mugiria** *supra* and allow the 2nd defendant/applicant's application, and order that this court's judgment dated 27-11-85 as concerns the 2nd defendant/applicant be set aside. The decree and all subsequent orders flowing from the aforesaid judgment as relates to the 2nd defendant/applicant are also set aside. She is given leave to appear and defend the suit against her. She will have 10 days from the date of proper service upon her of the originating summons to enter an appearance to the said summons and a further period of 10 days from such entry within which to file a replying affidavit to the aforesaid summons. Costs of this application shall be awarded to the 2nd

defendant/applicant. Orders accordingly.

Dated at Nairobi this 14th day of May, 1987.

J.E. GICHERU

JUDGE