



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gachuhi, Masime JJA & Gicheru Ag. JA)

CIVIL APPEAL NO 59 OF 1985

BETWEEN

NJOROGE.....APPELLANT

AND

KIARIE.....RESPONDENT

(Appeal from a Ruling and Order of the High Court at Nairobi, Mbaya J)

JUDGMENT

November 8, 1988 **Gachuhi, Masime JJA & Gicheru Ag JA** delivered the following Judgment.

On November 3, 1982 HCCC No 3568 of 1981 came before Hancox J (as he then was) for hearing by way of formal proof. It appeared then that the summons to enter appearance had been served upon the defendant's wife by a court process server but that no appearance had been entered ; a statement to that effect was on the court file. The learned judge enquired why there had not been personal service on the defendant whereupon the plaintiff's counsel stated from the bar that the defendant had been looked for but not found in Nairobi where he worked for the Post Office; he was therefore looked for at his country residence on the disputed land. The learned judge then recorded:

“Ct. The first attempt was unsuccessful and the plaintiff refused transfer. (sic) Service was good.”

The hearing then proceeded and judgment was entered against the defendant.

When the defendant learned about the *ex parte* judgment against him he on December 5 1983 filed an application to set aside that judgment. In support of that application the defendant filed two affidavits: one by himself and one by his wife, both of which denied the alleged service of the summons. In his ruling on that application Mbaya J (as he then was) said:

“Having studied all the documents relating to the pleadings and especially the affidavit attached to the return of service, I am satisfied that the applicant's wife was duly served with summons to enter appearance on April 24, 1982. I have no reason to believe that the process server lied.”

He, therefore dismiss the application to set aside the *ex parte* judgment with costs. This appeal has been preferred against that decision.

The statement of return of service shows that service is purported to have been effected in pursuance of order V rule 12 which provides:

“12. Where in any suit the defendant cannot be found, service may be made 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.”

The statement of service does not say that the process server could not find the defendant so that for that reason he chose to serve on the defendant’s wife. What is more is that there are affidavits from the defendant and his wife denying such service.

In such a situation order V rule 16 provides:

“16. On any allegation that a summon has not been properly served, the court may examine the serving officer on oath, or cause him to be so examined by another court touching on his proceedings, and may make such further enquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.”

In *Karatina Garments Limited v Nyanarua* [1976] KLR 94 this court held that where one party to proceedings denies having been served with a relevant document, it is proper for the court to look into the matter, if the court is faced with conflicting affidavits as to the alleged service process, it is proper that the deponents should be examined on oath in order to establish the truth. In the present case the court was faced not with conflicting affidavits but with the unsworn statement of the process server on the one hand and two affidavits of the defendant on the other.

Despite that the learned judge decided to prefer the unsworn statement of the process server to the affidavits of the defendant. In so doing he fell into error and we cannot say that he exercised his discretion judicially.

In the circumstances this appeal succeeds and we set aside the superior court’s order dismissing the application to set aside *ex parte* judgment.

We substitute therefor an order setting aside the *ex parte* judgment and giving the appellant 14 days within which to appeal and of the application in the High Court to set aside the judgment. Orders accordingly.

Dated and delivered at Nairobi this 8th day of November, 1988

J.M GACHUHI

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JUDGE OF APPEAL

J.R.O MASIME

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JUDGE OF APPEAL

GICHERU

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Ag. JUDGE OF APPEAL

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

DEPUTY REGISTRAR