IN THE COURT OF APPEAL

AT KISUMU

(CORAM: NYARANGI, PLATT & APALOO JJA)

CIVIL APPEAL NO 122 OF 1986

SHADRACK ARAP BAIYWO …… APPELLANT

VERSUS

BODI BACH …….....…..RESPONDENT

(Appeal from the High Court at Kisumu, Butler-Sloss J)

JUDGMENT

Platt JA The appellant, Shadrack Arap Baiywo, had been sued by the respondent Bodi Bach, for damages, because the appellant had first sold to the respondent half of the appellant's shop on Plot No 3 Kapugorian Market in 1971, and then in 1981 had forcefully repossessed the shop. It appears that the respondent did not sue for the eviction of the appellant but merely for damages (a) for the value of the half-shop which was lost, (b) compensation for improvements and (c) loss of profits through interruption of business.

The respondent, Bodi Bach, brought his suit on November 12, 1985. The summons to the appellant was allegedly served on November 13, 1985. It

appears from the proceedings that on December 23, 1985 the respondent applied for judgment in default of the appellant entering an appearance or filing a defence. The form of the application appears to follow order IXA rule 5 of the Civil Procedure Rules, whereby interlocutory judgment was prayed for, pending the matter being set down for the assessment of damages. That application was acceded to and interlocutory judgment was entered on March 13, 1986. On the same day the damages were assessed, and on April 8, 1986, judgment was given for Kshs 210,000.

According to the appellant, when he came to his Ibanja village home in Nandi district, he found his wife with a notice of taxation. This notice had been served on May 2, 1986. It was now May 5, 1986 when the appellant received the notice. On May 17, 1986, the appellant came to the High Court, Kisumu, and found that judgment in default had been entered under order IXA rule 10. What is stated here is gained from the appellant's affidavit dated May 12, 1986 in support of the chamber summons filed on May 13, 1986.

At the hearing it was contended that order 5 rule 12 of the rules had not been complied with. The learned judge considered that it had been; he did not call upon Mr Owuor; and forthwith, on June 19, 1986 held that service had been proper and that judgment was duly entered. The judge dismissed the application and the appellant appeals against that dismissal.

The issue taken on this appeal in grounds 1, 2 and 3 (grounds 4 and 5 having been abandoned) are that firstly the service of summons to enter appearance was irregular. Secondly, it is said that the learned judge ignored the fact that judgment had been obtained *ex parte*, so that the appellant, as defendant, had never been able to present the merits of his case to the court. Thirdly it is said that the learned judge relied only on the affidavits, and ignored the facts given by the defendant's counsel in chambers. On this last issue, it is not clear what matters were ignored, but in general the judge should rely principally upon the affidavits; and if there is important information for consideration it ought to be put on affidavit, unless the other side has clearly agreed to the inclusion of information to which he may wish to rely. It is curious that ground 3 has been raised at all, and as it is not clear with what it is concerned, it is left aside and grounds 1 and 2 are taken as those principally in issue.

The first ground emphasizes that if there is no service, then *ex debito justitiae*, the judgment by default must be set aside. Of course, judgment by default can only be entered if there has been an initiating process, concerning which the defendant is in default. (*Kanji Naran v Ramji*, (1954) 21 EACA 20 to which Mr Njuguna referred). In what way was the summons declared as unserved? Mr Njuguna relied upon *Waweru v Kiromo* (1969) EACA 172 for support for the proposition that the service was defective because the process server had not shown that the defendant, who is now the appellant, could not be found. He protested that order 5 rule 12 of the Civil Procedure Rules made service conditional on the process server really ascertaining that the defendant could not be found, and secondly that the adult member of the defendant's family who had been served was a member who was actually residing with the defendant. Rule 12 provides as follows:-

"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."

It is to be noticed that the argument presented to the learned judge, is recorded as concerning the issue whether Mr John Kipkemboi Murbor, the son-in-law of the defendant, and who resided with him, was a family member. The learned judge thought that he was, and he must surely be right. But the present contentions of Mr Njuguna were not put to the learned judge, as far as the record reveals, and his attitude to them is not known.

That raises the preliminary issue, as it were, of the role of this court. The decision of the House of Lords in *Evans v Bartlam*, [1937] 2 All ER 646 has been the foundation of the approach of the courts in East Africa to the present problems for some time, and it was greatly relied upon in those two leading East African Cases *Mbogo v Shah*, [1967] EA 116 and *Patel v EA Cargo Handling Services Ltd* [1974] EA 75. The House of Lord's decision has nourished the views in succeeding decades of English lawyers up to modern times, so that May, LJ was still to find the source of the role of the Court of Appeal in the opinion of Lord Wright (at page 654 in *Evan's* case) which he explained in *Amin Rasheed Shipping v Kuwait Insurance Co* [1983] 1 All ER 873, Lord Wright's observations were:

"It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction, unless he is shown to have applied a wrong principle. The court must, if necessary, examine anew the relevant facts and circumstances, in order to exercise by way of review a discretion which may reverse or vary the order. Otherwise, in interlocutory matters, the judge might be regarded as independent of supervision. Yet an interlocutory order of the judge may often be of decisive importance on the final issue of the case, and may be one which requires a careful examination by the Court of Appeal."

Lord Wright then went on to approve of the opinion of Bowen, LJ (in *Gardner v Jay* (1885) 29 CH D 50) that the discretion must be exercised according to common sense and according to justice. That is in the same spirit as the approach in *Mbogo v Shah* (supra) where it is said that the discretion is to be exercised:

> "…. In the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed."

In the light of these principles it is the duty of this court to review all the circumstances whether or not they were all taken before the High Court. In those circumstances, it will be fitting to state the facts here. The process server's return of service comprises in short form what happened.

"2. On November 23, 1985 being unable to find the defendant Mr Shadrack KA Baiywo at his home, I served Mr Jason Kipkembo Murbor who introduced himself to me as Mr Baiywo's son-in-law and they stay together; with a true copy of the summons together with the copy of the plaint at Kaptumo at 11.30 o'clock in the forenoon by tendering a copy thereof to him and requiring his signature on the original summons. The said Mr Jason Kipkembo Murbor accepted service by signing on the reverse side of the original summons in the presence of Mr John Rono and Mr Sammy Baiywo, the son of the defendant."

On this statement order 5 rule 12 would apply and the question is what must the process server do to satisfy the court that the defendant could not be found.

The process server enlarged the details of service in his affidavit dated May 16, 1986 in reply to that of Mr Baiywo. The latter affidavit dated May 12, 1986 is comprised of three important statements. Mr Baiywo lives at Kesses area in Uasin Gishu district, and at Ibanja in Nandi district. Secondly he came to find the notice of taxation with his wife at Ibanja.

He had never seen the summons to enter appearance. Thirdly Jason Kipkembo Murbor was not known to him and did not live with him.

Mr Abwao answered that his friend Mr John Rono, the appellant's son Sammy Arap Baiywo and the Assistant Chief Naphtali Kemboi all informed him that Jason Kipkembo Murbor was the son-in-law of the appellant and lived with the latter. It was the appellant's wife Ziporah Baiywo who had confirmed to Mr Abwao the process server, that the appellant had received the summons and plaint in November 1985, and she wondered why the appellant had not settled the matter as he had said he would. On the strength of these affidavits it would seem that in fact the appellant had not been present at his home in Ibanja, the inference being that he had been at his other home in Kesses. The service on Jason Arap Murbor would appear to have been proper, as an adult member of the family jointly residing with the appellant, and finally that service had indeed been effected in November 1985.

There is a qualified presumption in favour of the process server recognized in *M B Automobile v Kampala Bus Service*, [1966] EA 480 at page 484 as having been the view taken by the Indian Courts in construing similar legislation. On *Chitaley and Annaji Rao; The Code of Civil Procedure* Volume II page 1670, the learned commentators say:

"3. Presumption as to service – There is a presumption of services as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross examination given to those who deny the service."

In this case, as these matters were not raised before the learned judge, the method suggested (and adopted in the *Kampala Bus Service* case in 1966) did not arise. All the judge had to do was to decide whether or not a sonin- law was a member of the family. All that can be concluded is that the appellant had the burden of proof to disprove service, and on the strength of the return of service and affidavit of the process server, the burden of proof was not discharged by the appellant's mere denials. The affidavit of the process server appears much the stronger evidence.

On that basis, it must be accepted that the process server did serve Mr Jason Arap Murbor, who was shown to be the son-in-law of the appellant and residing with him. But that does not conclude the matter, because the affidavit of the process server is uninformative about his inability to find the appellant. Mr Njuguna is right to point out that the affidavit is almost studiously silent on this question. A process server is required to make reasonable inquiries in order to serve the summons on the defendant

personally.

On the other hand the opinions quoted in *Waweru* strike an odd note. In *Erukana Kavuma v ST Mehta* [1960] EA 305 Sir Audley McKisack, CJ, Uganda criticized the process server for revealing a "most inadequate ground" for saying that he could not find the defendant whom he had been told had gone to India. One wonders what more the process server would have done. In *Pirbhai Lalji & Sons Ltd v Hassanali Devji* [1962] EA 306, Sir Audley McKisack again criticized the process server who had gone to the defendant's house on several occasions when he had called there on two consecutive days. It was said that the process server ought to have done more to establish the fact that the defendant could not be found.

The process servers will face different situations. They will meet on occasion hostility; they will often face people determined not to tell them anything; they will face defendants intent on avoiding being found. They will also face co-operative people, and when they do, they should try and find out if the defendant has more than one address, or when he is expected home, and try to meet him. It seems that in the Uganda cases, rather too much was expected of the process server, whilst in the instant case, with so many co-operative people rather more information could have been elicited. Nevertheless it would be rather better for the court to take clear responsibility, criticise the process servers less and direct them more as to what is required. That power is given in order IXA rule 10.

Another aspect of *Waweru's* case is also unsatisfactory. It is not correct to say that a service which is not entirely satisfactory and by itself might have to be set aside, cannot ever become a good service. It may be that the object of this type of service was achieved, in that the adult member of the family may have given the summons to the defendant within time for the defendant to act. If that was the case, that would be equivalent to personal service, and the irregularity in not inquiring after the defendant would be cured. The scheme of the rules is clear from order V rule 10 onwards. Personal service is the ideal, but it may not be possible to achieve. Rule 9 commences with the words "whenever it is practicable'" before providing for personal service. Then there is rule 17 providing for substituted service. These rules illustrate that defendants may make it impossible or very difficult to effect personal service. Process servers are not detectives, but are simply required to take reasonable steps, and if a summons gets to the hands of a defendant in time, that is the object of the whole exercise. Of course, if service is late, the defendant can either appear and defend late *(Robinson v Aluoch* [1971] EA 376 at page 378) or he can seek to set aside the process, at which time the court has power to adjust the rival claims according to common sense and according to justice, under rule 10.

In the present case, the appellant's wife told the process server that the appellant had received the summons in November 1985, and he had said he would go to Nandi town to meet the respondent and settle the dispute. That has not been contraverted by evidence in a reply to the process server on that point. The process server must therefore be accepted in what he says. In the result, the service was effected and so any short comings in stating what inquiries were made, were cured. The service was proper.

On the second limb of the case, no defence was put forward by the appellant. He simply said he had a good defence. What was it? This court has often quoted the explanation of Lord Atkin in *Evans v Bartlam* (supra) on the point.

"The discretion is in terms unconditional. The courts however have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that, when the judgment was obtained regularly, there must be an affidavit of merits, meaning that the appellant must satisfy the court that he has a prima facie defence.…

The principle obviously is that, unless and until the court has pronounced a judgment upon the merits, or by consent, it is to have the power to revoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure."

That is a definitive statement. If there are merits in the defence, it would be unjust not to allow them to be

heard, even if judgment had been obtained regularly. On the other hand if there are no merits, judgment should stand. Hence the practice grew up to set out the defence on affidavit sufficiently to indicate a *prima facie* defence. The appellant has not done so.

Looking at all the circumstances, there is no ground upon which this court should exercise its discretion to vary or discharge the judgment entered by default. I would dismiss the appeal with costs.

Apaloo JA. I also agree. Platt JA has set out the facts and the relevant matters for consideration with his usual clarity. An examination of the facts and those matters, carry to my mind, the clearest conviction that although the appellant was not present when the process server sought to serve the plaint on him, it was delivered to him shortly afterwards by his son-in-law with whom the process server left it.

Unless there is a statutory definition of a member of family, common sense suggests to me that a son-in-law who lives with the appellant and who is not shown to be an infant, answers the description of "an adult member of the family". It seems to me that the appellant had no answer to the respondent's case on the merits. Had he one, he would not have sought to set the judgment aside, on what strikes me as a bare technicality.

Whether on the material presented to him the judge should have set the judgment aside and reopened the matter, was entirely for his discretion. The learned judge exercised that discretion against the appellant. What should be the attitude of this court when invited to review a judge's discretion has been settled for years. The relevant judicial decisions both here and in England have been referred to in the full judgment of Platt JA.

It is sufficient for me to say that I find no ground to interfere with the judge's discretion and indeed, think on the facts; he exercised this discretion correctly and arrived at an eminently just result. Like my brothers, I also think that this appeal fails and should be dismissed with costs.

Nyarangi JA. I agree. The question for consideration is whether the process server served the appellant's son-in-law who was residing with the appellant at the time. Notwithstanding strenuous argument to the contrary, there was overwhelming evidence in support of valid service.All in all, the appellant failed wholly to show that the decision of the High Court should be interfered with.

As Apaloo JA also agrees, the appeal is dismissed with costs as Platt JA proposes.

Dated and Delivered at Kisumu this 24th November, 1987

J. O. NYARANGI

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JUDGE OF APPEAL

H. G. PLATT

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JUDGE OF APPEAL

F. K. APALOO

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JUDGE OF APPEAL