



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 142 OF 2018**

**PRIME BANK LIMITED.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**D. J LOWE & COMPANY LIMITED.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**GUARDFORCE SECURITY (K) LTD....2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

1. The defendants/Applicants moved this Court vide notice of motion dated 24<sup>th</sup> August 2018 seeking orders that:

**1. Spent**

**2. That pending the hearing of this application inter-partes an order of stay be issued to stay the order issued on 23<sup>rd</sup> July, 2018.**

**3. That the ex-parte proceedings conducted on 23<sup>rd</sup> July, 2018 together with the consequential order that was issued on 23<sup>rd</sup> July 2018 be set aside.**

**4. That Musyoka Musyimi, Process Server who swore the Affidavit of Service dated 20<sup>th</sup> July, 2018 and filed in these proceedings be ordered to attend the Court for cross-examination on his said Affidavit of Service.**

**5. That the costs of this application be provided for.**

2. The application is premised on the grounds inter alia that none of the defendants have been served with these pleadings; that the issuance of a mandatory order ex parte amounts to a clear miscarriage of justice. Further that only the 2<sup>nd</sup> defendant was served with the ex parte order issued on 23<sup>rd</sup> August 2018.

3. The application is supported further by the affidavit of Ruksana Khalid Abdul Karim. She denied that the 1<sup>st</sup> defendant has offices at Oriental building. She deposed that the affidavit of service of Musyoka Musyimi is a fraud and urged the Court to suo moto set aside the orders as prayed in the application.

4. The application is vehemently opposed by the plaintiff vide grounds of opposition dated 9<sup>th</sup> November 2018 to wit that the applicants have come to Court with unclean hands. Secondly that the affidavit in support of the motion is incompetent and ought to be struck out.

5. The application is further opposed by the replying affidavit sworn by Husa Silveira. Ms Husa deposed she was informed by their advocates that the defendants were duly served. Ms Husa also blames the 1<sup>st</sup> defendant of indolence on time taken to bring the present application. That the 2<sup>nd</sup> defendant also took no interest in the matter inspite of being made aware of the order in August 2018.

6. Ms Husa deposed further that Ms Ruksana swore several affidavits in respect of MSC ELC Misc No 29 of 2016 where judgment was delivered on 25<sup>th</sup> April 2017 which judgment paved the way for the plaintiff to be registered as the owner of the suit property. That the 1<sup>st</sup> defendant never complied with the terms of stay issued in that judgment and therefore the defendants have been unlawfully occupying the suit property. For this reason, the plaintiff pleads that the defendants have not disclosed adequate grounds for the application to be allowed.

7. What is before the Court for consideration is whether the defendants were served with summons to enter appearance as prescribed under the Civil Procedure rules. From the replying affidavit of the plaintiff, it appears it already knew the 1<sup>st</sup> defendant's interest in the suit property as there was previous pleadings undertaken in JR No 29 of 2016 where the 1<sup>st</sup> defendant had attempted to stop the withdrawal of the restriction registered on the title. There is also a mention of civil case No 35 of 1997 which the plaintiff states was struck out. The 1<sup>st</sup> defendant is thus not a stranger to the plaintiff.

8. In the affidavit of service of Musyoka Musyimi dated 20<sup>th</sup> July 2018, Mr Musyimi deposed that he served the 1<sup>st</sup> defendant on 20.6.2018 at Oriental Building along Nkrumah Road. That at the said Oriental building he met a man not previously known to him and who declined to reveal his name. The documents were left to the said man who declined to put a stamp on the service copy. In the affidavit dated 27<sup>th</sup> July 2018, Mr Musyoka deposed that he served the order dated 23<sup>rd</sup> July 2018 at the suit property located along links road. At paragraph 3 he deposed thus *"upon arrival, I met a security guard of the 2<sup>nd</sup> defendant in uniform manning the gate. I introduced myself and stated the purpose of the visit and he allowed me entry. I proceeded to an old house within the compound where I had earlier served summons and other documents in June and where a representative of D. J. Lowe & Co. Ltd resides". (emphasises more)*

9. At paragraph 4, the process server continued that at the old house he met an old Asian lady whom he had met before when he served the summons in the matter back in June 2018 but the old lady declined to reveal her name. This lady was also left with the documents but she declined to sign the service copy.

10. From the first affidavit of service, a man is stated to have been served on behalf of the 1<sup>st</sup> defendant at Oriental Building. In the second service now it turns out the summons were served in June upon an old lady residing at the suit property located along links road. This is as per the process server's own deposition that the same lady was served twice. This begs the question as to who was served with the summons to enter appearance and where was the service effected? The 1<sup>st</sup> defendant asked that the process server does attend Court for cross – examination to explain who he served. He chose not to appear on the hearing date.

11. It is trite law that where service of summons is not effected, the Courts do generally set aside any orders obtained ex parte ex debito justicie. The question raised by the plaintiff that there are no valid grounds to warrant the grant of the orders of setting aside are premature at this stage. First because it is the plaintiff who sued the defendants. By law the defendants are entitled to be served with summons to enter appearance so as to answer to the claim. Before a party is notified of the existence of a suit, you cannot state that they have no defence to that suit. Secondly the plaintiff stated that the 1<sup>st</sup> defendant had failed to comply with the terms of stay issued in the previous suits. Those issues can only be delved into after the party has been served and fails to file a defence within the time provided then later comes to Court for exercise of discretion to be allowed to defend such a suit.

12. I need not say more where there is clear doubt raised and proved on service of summons to enter appearance. Because of the questionable service of summons to enter appearance am satisfied that the application dated 24<sup>th</sup> August 2018 is merited. I do hereby allow it in terms of prayer 3. The ex parte proceedings of 23<sup>rd</sup> July 2018 together with the consequential orders issued on 23.7.2018 be and are hereby set aside. Prayer 2 of the motion is overtaken by the success of prayer 3 while prayer 4 was spent when the process server failed to appear in Court on the date set for hearing of the application i.e. on 27.11.2018. The costs of the motion are awarded to the defendants/applicants.

**Dated, signed & delivered at Mombasa this 28<sup>th</sup> February 2019**

**A. OMOLLO**

**JUDGE**