



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC. NO. 264 OF 2018**

**MVITA BOTTLERS LIMITED.....PLAINTIFF**

**VERSUS**

**SUNCANVAS LIMITED.....1<sup>ST</sup> DEFENDANT**

**CARGO MOVER LIMITED.....2<sup>ND</sup> DEFENDANT**

**MOHAMED TAHIR SHEIKH SAID.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. By a notice of motion dated 12<sup>th</sup> February 2019 and brought under Order 22 Rule 22, Order 45 Rule 1 and Order 51 of the Civil Procedure Rules and Section 3A, 1A, and 1B of the Civil Procedure Act and all enabling provisions of the law, the 1<sup>st</sup> and 3<sup>rd</sup> defendnats are seeking orders:

**1. That this application be certified as urgent and due to the circumstances of this case, service of the same be dispensed with and it be heard ex-parte in the first instance for the purposes of granting interim orders hereunder.**

**2. That pending the hearing and determination of this application inter-parties, this Honourable court be pleased to order a temporary stay of execution of the ruling of 14<sup>th</sup> January 2019 and all consequential orders and warrants emanating therefrom.**

**3. That this honorable court do review and set aside the ruling delivered on 14<sup>th</sup> Janaury 2019 and order issued on 15<sup>th</sup> January 2019 by Honourable Justice C.K. Yano and set aside, vacate and or discharge the same forthwith *ex debito justiae* together with all the consequential orders arising therefrom.**

**4. That this Honourable court be pleased to direct the Director of Public Prosecutions to commence criminal actions and/or institute criminal charges against Urbanus Kioko Musyoki (CPS No.00283) process server, for perjury, giving false information and interference with the administration of justice and also direct the chief Registrar of the Judiciary to commence disciplinary proceedings against the above mentioned court process server.**

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

2. The application is premised on the grounds on the face of the motion and supported by the affidavit and supplementary affidavit of Mohamed Tahir Sheikh Said. The Applicants aver that substantial loss will be occasioned to them if a stay is not granted as it involves the deprivation of their rights to fair hearing, natural justice and access to justice as enshrined in the constitution. That the Plaintiff is guilty of misleading the court and material non-disclosure by proceeding ex parte without having served the Applicants with the pleadings and motions filed herein. It is deponed that the orders obtained by the Plaintiff against the Applicants are irregular for having been obtained without effecting service of the motion as required under the law. The Applicants aver that they were not aware of the suit and proceedings herein until 29<sup>th</sup> January 2019 when an order of 14<sup>th</sup> January, 2019 was dropped at the 2<sup>nd</sup> Defendant's premises who shared the same with the Applicants.

It is the Applicant's case that the Plaintiff is attempting to steal a match against them which amount to an abuse of the process of the court and administration of justice. The Applicants maintain that they were not served with a hearing notice nor the motion itself and therefore the orders resulting and emanating therefrom are irregular, a nullity in law and ought to be set aside and/or discharged forthwith *ex debito justiae*. The Applicants aver that the orders of 14<sup>th</sup> January 2019 were issued on account of fundamental mistake and/or error apparent on

the face of the record which order were procured by the Plaintiff with the assistance of the court process server through wilful and deliberate deceit, fraud and trickery. In the supplementary affidavit, the 3<sup>rd</sup> defendant avers that he was away in Nairobi from 27<sup>th</sup> November, 2018 and has annexed a copy of a ticket and invoice.

3. The Application is opposed by the Plaintiff through a replying affidavit sworn by Nurein Tahir Sheikh Said on 21<sup>st</sup> February, 2019. It is deponed that it is ironic that the Application seeks extreme orders against the Process Server who is not a party to the suit. The Plaintiff has annexed an affidavit by Jared Arani, a clerk who states that he attended the ELC registry on 28<sup>th</sup> November, 2018 to fix the Notice of Motion dated 2<sup>nd</sup> November 2018 for hearing on 17<sup>th</sup> December 2018, and called the Process Server who came on 29<sup>th</sup> November, 2018 to take the pleadings for service on the Defendants. That he only came to learn the allegations that the date was fixed on 5<sup>th</sup> December, 2018 when the present Application was served on the Plaintiff Advocates. He attributes the entry of 5<sup>th</sup> December 2018 in the proceedings to an error by the registry.

4. It is the Plaintiff's contention that the Applicants are attempting to latch on an error in the recording of dates to suggest that they were not served yet the process server has explained in great detail in his affidavit sworn on 14<sup>th</sup> December, 2018 all the Defendants were served despite the threat to violence. The Plaintiff urged the court to note that the 2<sup>nd</sup> Defendant has not contested that it was served with an application fixed for hearing on 17<sup>th</sup> December, 2018 neither has it contested that one Mr. Ghulab is its employee, nor that it had a male receptionist. The Plaintiff further urged the court to note that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants are not contesting the events stated in the affidavit of Urbanus Kioko but the complexion of the 3<sup>rd</sup> Defendant yet there is nothing presented to show that the 3<sup>rd</sup> Defendant is not a 'light skin gentleman' as stated by the process server. It is the Plaintiff's contention that there is nothing irregular, fraudulent, illegal or malicious in the manner in which the Applicants were served with the pleadings, adding that the notice of motion dated 2<sup>nd</sup> December, 2018 had already indicated the hearing date as 17<sup>th</sup> December 2018 and therefore there was no requirement to issue a separate hearing notice. The Plaintiff contends that the Applicants were given adequate opportunity to attend court and defend themselves but chose not to participate and therefore cannot now be heard to say they have been condemned unheard. The Plaintiff argued that in setting aside orders the court exercises discretion which should be done judiciously. That it would not be a judicious exercise of discretion if the orders are set aside yet there is no discernible issue to take to trial because the Applicant have intimated to the Plaintiff's agent (Nairobi Homes (Msa) Limited) that they will no longer collect rent for the suit premises from the 2<sup>nd</sup> Defendant and informed the 2<sup>nd</sup> Defendant to directly deal with the said agent.

5. Although the 2<sup>nd</sup> Defendant had filed a replying affidavit sworn by Barke Farouk Swaleh on 25<sup>th</sup> February 2019, the 2<sup>nd</sup> defendant withdrew from the proceedings having vacated from the suit premises.

6. Both parties filed written submissions through their respective advocate in support of their opposing positions. The Applicants submitted that they were not served and therefore the court ought to exercise its unfettered discretion to set aside and discharge the said orders issued on 15<sup>th</sup> January 2019. They relied on the case of **Mary Njeri –v- Aga Khan Health Services t/a Aga Khan Hospital & 2 Others (2005)eKLR** and **James Kanyiita Nderitu Philotas Ghikas & Another (2016)eKLR**. While urging the court to order criminal investigation against the process server, the Applicants relied on the case of **James Kariuki Nganga t/a Ndaragu Merchants –v- Joseph Ngae Njuguna & Another (2004)eKLR**.

7. The Plaintiff submitted that the process server is not a party to the suit and has not been made a party and therefore distinguished the case of James Kariuki Nganga (supra) in which the judge issued orders against objectors who were parties in the proceedings before that court. The Plaintiff maintained that the Applicants were duly served and submitted that there was no request made to cross-examine the Process Server on his affidavit as was recognized by the Court of Appeal in the case of **Shadrack Arap BAIWO- v – Bodi Bach (1987)KLR**. On the 3<sup>rd</sup> Defendant's allegation that he was away in Nairobi at the time of service, the Plaintiff submitted that the same is an afterthought as the issue was only raised in the supplementary affidavit and not in the initial affidavit in support of the application. The Plaintiff added that reserving a ticket through a travel agent is not the same thing as travelling. That it would have been different if the 3<sup>rd</sup> Defendant had presented a boarding pass showing that he boarded on 27<sup>th</sup> November 2018 at Mombasa and again on 2<sup>nd</sup> December 2018 at Nairobi on his return to Mombasa. The Plaintiff further submitted that the issue of when the hearing date was fixed has been resolved by the affidavit of Jared Arani. The Plaintiff relied on the case of the **Mauritius Bank Limited –v- Jade Petroleum Limited & 3 Others (2018)eKLR** to argue that service has not been successfully rebutted. The Plaintiff concluded by submitting that the Applicants have no defence on merit to warrant the review sought, pointing out that the Plaintiff's case is that it is the registered owner of the suit property to the exclusion of everyone else including the 1<sup>st</sup> and 3<sup>rd</sup> Defendants. That the property remains the property of the Plaintiff, not of the 3<sup>rd</sup> Defendant, no matter the 3<sup>rd</sup> defendant's shareholding in the Plaintiff. The Plaintiff cited the case of **Lucy Wanjiku mkuu –v- Kari Salzmann Limited and another (2015)eKLR** and case of **Nuh Nassir Abdi –v- Ali Wario & 2 Other (2013)eKLR**.

8. I have considered the application the submissions made as well as the authorities cited. I have also considered the relevant law. The application basically seeks to review and set aside the ruling delivered on 14<sup>th</sup> January 2019 and orders issued on 15<sup>th</sup> January, 2019. Whereas order 40 Rule 7 of the Civil Procedure Rules states that an order for injunction may be discharged, varied or set aside, the rules for review are clear. Section 80 of the Civil Procedure Act gives power of review while Order 45 sets out the rules. The rules restrict the grounds for review and lays down the jurisdiction and a scope of review limiting it to the following grounds:

- a) **Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time when the decree was passed or the order made, or;**
- b) **On account of some mistake or error apparent on the face of the record; or**
- c) **For any other sufficient reason and whatever the ground, there is a requirement that the application has to be made without unreasonable delay.**

9. In the case of **National Bank of Kenya Ltd –v- Ndungu Njau (1997)eKLR**, the Court of Appeal held that:

**“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusions. Misconstruing a statute or other provisions of law cannot be a ground for review.”**

10. In the instant case, the Applicants allege that the ruling and orders were obtained irregularly because they were not served and were not aware of the proceedings. It is the Applicant’s contention that the affidavit of service filed and which was relied on by the court is false. The Plaintiff insist otherwise. The Applicants argue that the orders issued by the court would greatly prejudice them as the same were issued without their participation.

11. The ruling dated 14<sup>th</sup> January 2019 was made by the court after considering the application dated 2<sup>nd</sup> November

2018. It was after satisfying itself that the respondents were duly served with the summons to enter appearance as well as the application that the court proceeded to hear the application ex-parte. At the time, the court perused the affidavit of service that was then on record, and in the absence of any evidence to the contrary, the court found that the Defendants were duly served with the court process. The court then considered the application and made a conscious decision. The orders granted in my view, cannot be subject of review in the manner the 1<sup>st</sup> and 3<sup>rd</sup> Defendants have urged the court to do.

12. The court now wishes to turn its attention to the issue of service and consider whether the said ruling and orders should be set aside as sought by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants. Although the Applicants have not expressly stated in their application, an application to set aside ex-part orders is brought under the provisions of Order 10 Rule 11 of the Civil Procedure Rules.

13. According to the affidavit of service sworn by Urbanus Kioko Musyoki on 14<sup>th</sup> December 2018, he served the 2<sup>nd</sup> Defendant’s director who in turn informed him that he was talking to his landlord, Mr. Mohamed Tahir Sheikh, who is the 1<sup>st</sup> defendant’s director and also the 3<sup>rd</sup> Defendant herein. The process server depones that a few minutes later, “a light skin gentleman wearing a kanzu” walked in and asked him if he was the one who had been sent and that he informed him that the was a Process Server and served him together with the 2<sup>nd</sup> Defendant’s director and a male receptionist before the trio called one Mr. Ghulab who together with the receptionist ordered the process server out of other said premises. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants herein contend that the averments in that affidavit were untrue.

14. It must be noted that failure to acknowledge receipt of court process is not sufficient proof that service was not effected. In a case where it is one party’s word against the other, great assistance is given to the court when a process server is cross-examined on the contents of an affidavit of service. In the absence of the oral evidence, the court is left with little option but to rely on the documentation that is placed before it to make a determination as to whether or not service of court process was effected.

15. Essentially, setting aside an ex parte order is a matter of the discretion of the court. The discretion is free and the main concern of the court is to do justice to the parties before it (see the case of **Patel –v- EA Cargo Handling Services Ltd (1974) EA 75**). The discretion intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see **Shah –v- Mbogo (1967)EA 166** ). The nature of the action should be considered, the defence if any should also be considered, and so should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay bearing in mind that the denying a litigant a hearing should be the last resort for a court. It also goes without saying that the reason for failure to attend should be considered.

16. The fact that setting aside is a discretion of the court is not disputed. What is important is whether the Applicants have demonstrated that there is sufficient cause to warrant the exercise of the court’s discretion in their favour.

17. In the affidavit in support of the application sworn on 11<sup>th</sup> February 2019, the 3<sup>rd</sup> Defendant has deponed that the colour and complexion of his skin is different from that described by the process server. The Applicants have questioned the integrity of the service upon them. However, the Applicants have not found it necessary for the said process server to be availed and shed light on the issue of the disputed service. Instead the Applicants want the court to direct the Director of Public Prosecution to institute criminal proceedings and the Chief Registrar of the Judiciary to commence disciplinary proceedings against the process server. That to me appears a diversionary tactic to move away from the real issue in controversy, that is, the issue of service. In my view, having questioned the integrity of the service, the Applicants should have applied to cross-examine the Process Server. Such a cross-examination could have shed light on the disputed facts such as the colour and complexion of the 3<sup>rd</sup> defendant. The 3<sup>rd</sup> defendant could even have volunteered to appear in court in person during such a cross-examination to enable the court make a determination of what the process server deponed vis-à-vis what the 3<sup>rd</sup> Defendant has deponed.

18. The court also notes that in the supplementary affidavit sworn by the 3<sup>rd</sup> Defendant on 4<sup>th</sup> March, 2019, the 3<sup>rd</sup> Defendant introduces a new angle to the issue surrounding the disputed service. Whereas the issue of skin colour and complexion was raised in the initial affidavit in support of the application, in the said supplementary affidavit the 3<sup>rd</sup> defendant has deponed that he was out of town (in Nairobi) and therefore was not served. The question that arises is, if indeed the 3<sup>rd</sup> Defendant was away in Nairobi on the date the alleged service was effected, what then was difficult for the 3<sup>rd</sup> Defendant to depon to that fact in the initial affidavit? It is my considered view, and as rightly submitted by counsel for the Plaintiff, the allegation that the 3<sup>rd</sup> Defendant that he was out of town at the time of service appears to be an afterthought. And if indeed the 3<sup>rd</sup> Defendant had traveled by air to and from Nairobi, the 3<sup>rd</sup> defendant has not attached the boarding pass of either trip. All that the 3<sup>rd</sup> defendant has annexed to the supplementary affidavit is a ticket and an invoice from a travel agent. That to me is not sufficient evidence to show that one had traveled. One can possess a ticket and fail to travel or reschedule the travel. The boarding

pass could have been enough evidence that indeed one had travelled. Of more significance is the fact that the issue of the 3<sup>rd</sup> Defendant having travelled and being out of town at the time of service only came into the fore through the supplementary affidavit which was filed in response to the replying affidavit filed by the Plaintiff.

**19.** In the circumstances, in the absence of any evidence to the contrary, this court finds that the Defendants were duly served with the court process. The orders issued herein cannot be set aside on this ground.

**20.** Having said so, it behoves on the court to look at the Applicants proposed response to the application dated 2<sup>nd</sup> November, 2018. I note however, that the Applicants have not annexed any draft for the court to consider whether the same raised triable issues. There is however a statement of defence dated 20<sup>th</sup> February 2019 and filed on even date. The same however contains mere and bare denials. Besides, in paragraph 8 thereof, the 3<sup>rd</sup> Defendant avers that the Plaintiff is a special vehicle in which the 3<sup>rd</sup> Defendant has direct and primary interest. That in my view is an admission that any decision and action taken or made by the Plaintiff would ultimately be for interest of the 3<sup>rd</sup> Defendant herein, including seeking the orders now sought to be set aside.

**21.** By reason of the foregoing, it is my finding that the Notice of Motion dated 12<sup>th</sup> February 2019 is devoid of merit and the same is hereby dismissed with costs to the Plaintiff.

**DATED, SIGNED and DELIVERED at MOMBASA this 9<sup>th</sup> day of April 2019.**

**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Ngoya holding brief for Kongere for Plaintiff/respondent

Okere holding brief for Khalid for 1<sup>st</sup> and 3<sup>rd</sup> Defendants

No appearance for 2<sup>nd</sup> Defendant

Yumna Court Assistant

**C.K. YANO**

**JUDGE**