



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 178 OF 2015

SAID ABDALA AZUBEDI.....PLAINTIFF

VERSUS

SAMUEL MBUGUA IKUMBU.....DEFENDANT

RULING

(Application to set aside ex-parte orders of injunction; applicant claiming that he was never served; Order 5 Rule 15; affidavit of service not indicating time of service and not indicating how the process server identified the applicant; application allowed)

1. The application before me is that dated 11 October 2017 filed by the defendant. It is an application seeking the following principal orders :-

(i) *The court do set aside the purported service of process arising from the affidavit of service by one Mathew Musotsi dated the 13th July, 2015.*

(ii) (a) *The ex-parte hearing and resultant ruling delivered on 22nd September 2015, be discharged, or varied, or set aside, together with all consequential orders of injunction emanating therefrom.*

(b) *Alternatively, by reason of this suit not being determined within twelve (12) months from the date of the grant hereof, the injunction be deemed as lapsed.*

(iii) *...(spent)*

(iv) *Leave be granted to the defendants to file defence and/or set-off and counterclaim.*

(v) *Costs of the application be provided for.*

2. The application is opposed and before I go to the gist of it, I will give a bit of a background of this suit.

3. The case itself was commenced by way of plaint that was filed on 22 June 2015. In the plaint, the plaintiff/respondent pleaded that on 31 July, 2013 he entered into a sale agreement with the defendant/applicant vide which he purchased from the defendant the land parcel Nakuru Municipality Block 5/133 at a purchase price of Kshs. 75,000,000/=. It is averred that the parties agreed that the plaintiff would pay Kshs. 10,000,000/= on the signing of the agreement, which was done, and a further Kshs. 10,000,000/= was to be paid after 90 days, which again was done. It was further pleaded that according to their agreement, the plaintiff was to start collecting rent from the suit premises from the month of August, 2013, which was effected until July, 2014, when the defendant attempted to interrupt the same. It is pleaded that the property is charged to Barclays Bank of Kenya, and the balance of the purchase price was to be financed by First Community Bank. The defendant was thus required to get an appropriate undertaking to Barclays Bank, so that the Certificate of Lease may be available, and it is pleaded that the defendant has not yet complied with these terms of agreement. It is pleaded that on 22 January 2015, the defendant purported to renege on the contract and offered to refund the plaintiff the purchase price so far paid, less Kshs. 8,100,000/= collected by the plaintiff as rent. In the suit, the plaintiff inter alia sought orders of specific performance and a permanent injunction against the defendant.

4. Together with the suit, the plaintiff filed an application under certificate of urgency, for an interlocutory injunction, seeking to have the defendant restrained from the suit premises, or collecting rent from it, pending hearing and determination of the suit.

5. The plaintiff first came before me on 2 July 2015 when I certified the matter as urgent and directed that it be served for inter partes hearing on 14 July 2015. On 14 July 2015, only counsel for the plaintiff was present without any appearance having been filed by the defendant.

There was an affidavit of service filed, sworn by Mathew Musotsi on 13 July 2015, whereby he deposed that after a long search for the defendant, he served him with summons, pleadings and the application for injunction, on 11 July 2015 at his place of residence opposite Menengai High School in Nakuru.

6. In this application, the defendant has contended that he was not served with the application, summons or plaint as claimed by Mr. Musotsi. He has deposed that he changed residence from Section 58, opposite Menengai High School in the year 2013, and thus service could not have been effected on him at the said location. He has deposed that he only became aware of the suit through his previous advocates, M/s Sichangi & Partners Advocates, who had received a letter from another firm of advocates, which letter informed him that he is restrained from interfering with collection of rent from the suit premises. He has further stated that the injunction granted has automatically lapsed following the provisions of Order 40 Rule 4(3) of the Civil Procedure Rules, 2010. He has deposed that he is now suffering as the plaintiff collects about Kshs. 446,000/= per month as rent, and that so far, the plaintiff has collected approximately Kshs. 25,000,000/= as rent from the suit premises. He disputed the contract asserted by the plaintiff and has stated that he has a good and solid defence. He has further deposed that the plaint is defective as it is neither dated nor signed.

7. The plaintiff filed a replying affidavit to oppose the motion. He has inter alia asserted that service was duly effected upon the applicant, and that further, a copy of the order of injunction was served upon the applicant on 24 March 2016 through the law firm of M/s Ikua Mwangi & Company Advocates and he attached an affidavit of service of the said order. He has also averred that the applicant's bank and his advocate in the transaction with the bank was informed of the court order on 18 March 2016; that knowledge of the said order is captured in correspondences between the applicant's bank and his own advocate; that there was a mix-up in filing of his documents and a copy of a plaint which was not dated was placed in the court file; that he has on several occasions through his advocate sought to fix the matter for hearing and that the case had a hearing date for 15 November 2016 but the same did not take off. He has asked that the application be dismissed.

8. The applicant filed a supplementary affidavit vide which he inter alia deposed that the affidavit of service is defective on grounds inter alia that it lacks the time of service, place of service, name and address of the person who indentified the person served, whether the person who served knew him, and copies of what was served were not attached; that the affidavit of service lacks the court stamp; that it does not state whether he signed the documents served or that any copies were left in his possession. He has deposed that he only became aware of the suit when his advocates in the sale transaction with the plaintiff, M/s Sichangi & Partners received a letter from his advocates in the sale transaction, M/s Ikua, Mwangi & Company Advocates, vide which a copy of the order restraining him from collecting rent was attached. He has also attacked the affidavit of service attached by the respondent showing that the order was served and has claimed that it is fraudulent. On the correspondences between the advocates, where there was mention of a pending case, he has stated that this refers to a case that he has with Barclays Bank of Kenya and not this case.

9. Mr. Kagucia for the applicant filed written submissions which I have considered in this ruling. In his submissions, Mr. Kagucia asserted that service was never effected upon the applicant and argued that the proceedings must be set aside. He relied on the case of **Remco Limited vs Mistry Jadva Parbat & Co. Ltd & 2 Others, Nairobi HCCC No. 171 of 2001**. He further submitted that the plaint is defective and incompetent for not being dated and relied on the case of **R vs Commissioner of Land & Others, Mombasa H.C Civil Misc. Application Number 273 of 2009**. He also submitted that his client has a good defence that raises triable issues.

10. On his part, Mr. Wambeyi for the respondent, relied on the replying affidavit and did not make any submissions.

11. What the applicant wants is to have set aside the orders of injunction given on 22 September 2015. The applicant has also raised issue on the competency of the plaint which he has pointed out is neither signed nor dated. Service of summons has been hotly disputed by the applicant, but asserted by the respondent, who has relied on the affidavit of service on record. I agree with Mr. Kagucia on some technical aspects of the said affidavit of service. A first reading of it will certainly convince one that the process server did actually effect service. In his affidavit, the process server stated that he inquired on the whereabouts of the applicant and he was informed of his residence. He then went to the said residence on 11 July 2015, found the applicant, and served him.

12. I do note however that there is no time of service indicated in the affidavit of service. Neither is there any indication as to who pointed out the applicant to the process server so that the process server is sure that the person he is serving is actually the defendant in the case. This is important because nowhere in the affidavit of service does the process server state that he personally knew the applicant. I am now convinced that the affidavit of service violates the provisions of Order 5 Rule 15 (1) which is drawn as follows :-

15 (1) The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No 4 of Appendix A with such variations as circumstances may require (emphasis mine).

13. It will be seen from the above that the process server needs to state the time of service and also give the name and address of the person identifying the person being served and the person witnessing the delivery of the summons. These two important matters are not contained in the affidavit of service. The affidavit of service on record does not state the time that the applicant was served and also does not give the name of the person who identified the applicant. I have already mentioned that the process server does not state in his affidavit that he knew the applicant and it was therefore necessary for him to indicate who informed him that the person served is the defendant in the suit. It could very well be that the person who was served is somebody else and not the defendant.

14. On the above grounds alone, without the necessity of going into the other attacks on the affidavit of service, I have no option but to set aside the affidavit of service. It follows that I also have to set aside all orders made pursuant to the said service and thus the orders made on 22 September 2015 are hereby set aside. With the setting aside of the said orders, it is not necessary for me to consider whether or not the said orders have to be considered as having lapsed pursuant to the provisions of Order 40 Rule 6, of the Civil Procedure Rules, 2010 (for the reason that they were injunctive orders yet the suit has not yet been determined within a period of one year since the injunction was issued).

15. I have also deliberately not addressed the issue of whether or not the plaint is fatally defective, for I do not have a substantive prayer regarding this, and I think it would be unfair to decide the issue at this moment, for the plaintiff may not have fully addressed his mind on this, since as I have mentioned, it is not a substantive prayer in the application before me. That can await another opportunity.

16. On the ground alone that there is a material defect in the affidavit of service, this application must succeed.

17. I now make the following orders :-

- (a) **That the purported service effected on 11 July 2015 upon the defendant/applicant is hereby set aside.**
- (b) **That the ex-parte orders made on 22 September 2015 are hereby set aside.**
- (c) **That the defendant is at liberty to file defence within 14 days from today.**
- (d) **That the defendant shall have the costs of this application.**

18. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 15th day of February 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Mr. Kagucia for the defendant/applicant.

Mr. Kabita holding brief for Mr. Wambeyi for the plaintiff/respondent.

Court Assistant: Janepher Nelima.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU