



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO 53 OF 2017

FORMERLY MERU ELC CASE NO.292 OF 2016

ANJERINA KARIMI MUTEGLI.....PLAINTIFF

VERSUS

INTEX CONSTRUCTION CO. LTD.....DEFENDANT

RULING

1. The applicant states that this application is grounded upon sections 1, A, 1B and 3(A) of the Civil Procedure Act, Order 10 rule 11, Order 51 rule 1 of the Civil Procedure Rules, Article 159 of the Constitution of Kenya and all other enabling provisions of law.

2. The application is dated 17th August, 2017 and has the following grounds:

- a) That interlocutory judgment in default of appearance was entered against the defendant on 02.03.2017 and the final judgment delivered on 11.04.2017.
- b) That plaintiff/respondent has commenced execution proceedings and warrants of attachment of property and warrants of sale of property were extracted on 02.08.2017 in execution of monetary decree for Kshs.1,879,827.98.
- c) That the defendant's/applicant's property was proclaimed on 14.08.2017 and it is at imminent risk of attachment and sale in execution of the said warrants.
- d) That the defendant was not served with summons to enter appearance, and failure to enter appearance within the stipulated time is excusable.
- e) That the defendant was not served with the court's notice transferring the matter from High Court at Meru to Chuka.
- f) That the defendant was not served with a mention notice and a hearing notice for 02.03.2017 and 08.03.2017, respectively. Judgment notice was also not served.
- g) That the defendant/applicant was not served with a notice of entry of judgment against them as mandatorily required by the law.
- h) That the draft defence as annexed to this application raises triable issues which raise prima facie defence that should go for trial for adjudication.

- i) That this honourable court has an unfettered discretion to grant the orders sought herein to prevent the defendant/applicant being shut out and condemned unheard.
- j) That the defendant stands to suffer irreparable prejudice unless the orders sought herein are granted.
- k) That no prejudice will be occasioned to the plaintiff, which cannot be compensated with an award for costs.
- l) That it is just that the prayers sought are granted.

3. The application is supported by the affidavit of one Sharon Mwakugu sworn on 17th August, 2017. It says:-

“I, SHARON MWAKUGU of Post Office Box Number 60293-00200 Nairobi and a resident in the aforesaid County in the Republic of Kenya do make oath and state as follows:

1. That I am an advocate of the High Court, the Legal Manager of the Defendant’s Company, and I am fully seized of the matters herein and duly authorized and competent to make and swear this affidavit.
2. That I am aware from the defendant’s Company’s records that the plaintiff filed this suit on 22.12.2016 seeking general and special damages from harm allegedly occasioned to her house by the defendant’s actions.
3. That at all the material time, the defendant’s company was engaged in the construction of Chiakariga – Tunyai road and the construction project was insured by The Jubilee Insurance Company of Kenya Limited, the insurer.
4. That around April, 2017 my company officers while on Chiakariga – Tunyai road construction sites happened to learn by chance from workers who hailed from the locality that the plaintiff had filed a suit claiming compensation for her damaged house.
5. That the defendant’s company relayed the news of the suit to The Jubilee Insurance Company of Kenya Limited, the insurer, to investigate if indeed such a suit existed.
6. That the insurer’s Legal department undertook investigations and confirmed that indeed the plaintiff had filed this suit, and later instructed the firm of Muthoga Gaturu and Co. Advocates to represent the Defendant in the matter. Annexed herewith and marked “SM 1” is instructions email dated 18.04.2017.
7. That I am informed by the defendant’s advocate on record that on filing notice of Appointment of advocates and perusing the file on 20.04.2017, they noted that the plaintiff had obtained a judgment against the defendant on 11.4.2017. Annexed herewith and marked “SM 2” is a copy of notice of appointment of advocates.
8. That I am further informed by the said advocates that interlocutory judgment in default of appearance and filing defence was entered against the defendant on 02.03.2017 on the strength of affidavit of service (of summons and plaint) sworn by Kiautha Arithi advocate on 02.03.2017.
9. That I am advised by the defendant’s advocate on record that the mode of service even as purported by the affidavit referred to herein above was not proper because the defendant’s company should have been personally served and summons should not have been served upon by any other means unless sufficient efforts were made by the process server to effect service upon the company were unsuccessful.

10. That the affidavit of service by Kiautha Arithi does not give reason why summons were not personally served upon the officers of defendant's company as required by law.
11. That the default judgment entered on 02.03.2017 was therefore irregular as the defendant was not served with the summons and plaint.
12. That failure to enter appearance and file a statement of defence by the defendant's company was not deliberate.
13. That the defendant's company was also kept in the dark in relation to position of the case as it was not served with the court's own notices causing the transfer of the case file from the High Court Meru to Chuka.
14. That the defendant's company was denied a chance to participate in the proceedings when this matter was listed for directions and hearing on 02.03.2017 and 08.03.2017, respectively, as the defendant was not served with notices to attend court on those occasions.
15. That it is also not clear how the matter proceeded for hearing on 08.03.2017 whereas that date was meant for 'directions', according to the court records.
16. That I am further advised by the defendant's advocate on record, which advice I verily believe to be true that the plaintiff also failed to serve a notice of entry of judgment to the defendant as required by law, making the proceedings herein highly irregular and the same ought to be vacated.
17. That the judgment delivered on 1.04.2017 and the decree issued on 28.07.2017 cannot stand due to the irregularities and illegalities cited above and the same should be set aside.
18. That the defendant's company is desirous to defending this suit and the draft defence, which is annexed to this application, raises serious triable issues. Annexed and marked "SM 3" is a copy of the draft defence.
19. That I am further advised by the defendant's advocate on record, which advice I verily believe to be true that the advocate misplaced his file within his office and therefore lost track of the matter, and therefore, failed to file this application in good time.
20. That the respondent has commenced execution proceedings and extracted warrants of attachment of property and warrants of sale of property on 02.08.2017 in execution of monetary decree for Kshs.1,879,827.98. Annexed herein and collectively marked "SM 4" are copies of warrants of attachment and of sale of property.
21. That the defendant's property was proclaimed on 14.08.2017 by Viewline Auctioneers and we are reasonably apprehensive that said property is at imminent risk of attachment on sale, any time from now, in execution of the said warrants, before the determination of the appeal. Annexed herewith and marked "SM 5" is a copy of the proclamation.
22. That the proclaimed items comprise of the defendant's operations, as a road constructor in many parts of this country, will grind to halt and cause inconvenience to the government and public.
23. That if the orders sought herein are not granted the defendant stands to suffer irreparable and substantial loss as it may not recover any amount received by the respondent if the proclaimed items are sold.
24. That the plaintiff does not stand to suffer any prejudice if the orders prayed for are granted for which an order on costs cannot compensate.

25. That it is just that the orders prayed for are granted to enable me ventilate the defence for a just determination on the issue of liability and quantum.

26. That the delay by the advocate in filing this application promptly upon receipt of the insurer's instructions was inadvertent and the same is excusable and is not inordinate.

27. That in the interest of rendering substantive justice, the mistake of an advocate should not be visited upon an innocent client.

28. That I swear this affidavit in support of the application herein seeking orders for stay of execution, setting aside of the judgment and leave to file defence out of time.

29. That what is deposed to herein is true to the best of my knowledge and belief, save matters sworn on information, whose sources have respectively been disclosed.

4. The applicant has responded to the application through the replying affidavit sworn by the plaintiff's advocate on 4th September, 2017. The affidavit says:

"I, KIAUTHA ARITHI of Post Office Box Number 2418-60200, MERU do hereby make oath and state as follows:

1. That I am an advocate of the high court of Kenya practicing law in the name and style of M/S KIAUTHA ARITHI & CO. ADVOCATES who are in conduct of this matter on behalf of the plaintiff/respondent well versed with the matters deposed to hereunder and therefore competent to make and swear this affidavit.

2. That I have read and understood the notice of motion dated 17th August, 2017 brought under certificate of urgency along with the supporting affidavit and it is in reply thereto that I make and swear this affidavit.

3. That from the outset I say that the same is dishonest and clearly desired to mislead this honourable court and place roadblocks on the respondent's path to realize the fruits of her regular and fair judgment.

4. That on the instructions of the plaintiff/respondent herein, our firm addressed to the applicant/defendant a demand notice on 21st July, 2016 seeking payment of Kshs.1,253,618/= in lieu of the damage visited upon the plaintiff residential houses while blasting rocks in the process of tarmacking the CHIAKARIGA – TUNYAI road. To date there has not been a response of the said letter which I annex herewith and mark as annexure KA1.

5. That consequently the plaintiff instructed our firm to file suit which we did on the 22nd day of December, 2016 (MERU HC ELC NO. 292 of 2016).

6. That summons were issued on 29th December, 2016.

7. That I served the said summons attached with a copy of the plaint, witness statements and a list of documents on 20th January, 2017 through M/S Fargo Courier Ltd vide certificate of postage NO. A. 5775356. Annexed and marked KA2(a) and (b) is a copy of the forwarding letter and receipt.

8. That I requested M/S FARGO COURIER LTD to provide me with evidence of receipt of the delivered pleadings, statements and documents to the defendant's offices situated on Purshottam place, 9th and 10th floors, Westlands Nairobi.

9. That M/S FARGO COURIER LTD duly complied and provided us with 'track your parcel'

document clearly showing that the sent parcel was received in the defendant's offices afore detailed on 21st January, 2017 at 10.30a.m by one LYNN KEMBOI of National Identity card number 25394039. Annexed and marked KA3 is a copy of the said 'truck your parcel' document from Wells Fargo Courier.

10. That all these delivery documents were annexed to my affidavit of service dated 2nd March, 2017 and filed in court on the same day.

11. That on 26th January, 2017 I received a notice form the Deputy Registrar of the Meru High Court indicating that this matter had been transferred by court to Chuka ELC court for hearing and determination. This was certainly after the establishment of this honourable court at Chuka. The said notice was copied to the defendant therein. Annexed and marked KA4 is a copy of the said notice.

12. That we also received a notice from the Deputy Registrar, High Court Chuka notifying us of their receipt of the Meru ELC fie and the new number at Chuka was CHUKA ELC NO. 53 of 2017. This too was copied to the defendant. Annexed and marked KA5 is a copy of the said notice.

13. That on 13th February, 2017, we were served with a mention for directions notice dated 9th February, 2017 indicating that the matter was listed for directions on 2nd March, 2017 before the Environment and Lands Court at Chuka Again the same was copied to the defendant. Annexed and marked KA6 is a copy of the aid mention notice.

14. That I attended court on 2nd March, 2017 but there was no attendance by the defendant. I indicated to court that there was no appearance or defence as yet ad I had the same morning requested for judgment in default.

15. That this honourable court fixed the matter for hearing on 8th March, 2017 and directed that interlocutory judgment should have been formally entered by then. This court was categorical that I should avail all the witnesses.

16. That judgment in default was entered on 2nd March, 2017.

17. That the matter proceeded to hearing on 8th March, 2017 when the plaintiff was heard and she called two witnesses.

18. That judgment was reserved for 11th April, 2017.

19. That judgment was delivered on 11th April, 2017.

20. That we filed the plaintiff's bill of costs on 11th April, 2017.

21. That on 13th April, 2017, again through M/S FARGO COURIER SERVICES LTD, we notified the defendant of the entry of judgment and served it with the plaintiff's bill of costs. Annexed and marked KA7 (a) (b) & (c) respectively are our letters of the 13th day of April, 2017 to the defendant, notice of entry of judgment detailing the contents of the delivered judgment and enclosed the bill of costs and Fargo Courier Ltd receipts No. 5932576.

22. That I requested from M/S WELLS FARGO LTD 'trace my parcel' record which was provided and shows that annexure KA7 (a), (b) and (c) were received at the defendant's office at Pughottam Plaza Westlands by one LYDIA NDUKO (ID NO. 10922531) on 18th April, 2017 at 9.32 am. Annexed and marked KA8 is a copy of the said 'trace your parcel' document.

23. That the court record will show that when the plaintiff's bill of costs came up for taxation on the 25th day of May, 2017, the defendant had already appointed M/S MUTHOGA GATURA & CO. ADVOCATES to appear for it and the said advocate (MR. RUKIOYA) HAD DETAILED Mr. Kijaru Advocate to hold their brief and ask for time to file objections to the plaintiff's bill of costs.

24. That despite our opposition because service had been effected way back on 13th April, 2017 upon the defendant and we had not been served with the notice of appointment of advocates by M/S MUTHOGA GATURA & CO. ADVOCATES, the Deputy Registrar allowed the defendant's advocate fourteen (14) days to file their objections and fixed the ruling for the plaintiff's bill of costs on 13th July, 2017.

25. That there was no indication that the defendant had any quarrel with the judgment/decree on record or denial of service.

26. That the defendant's advocate never filed any objections to the bill of costs which is a pointer to how casually the defendant has taken this matter.

27. That Order 5 Rule 3(b) (ii) of the Civil Procedure Rules allows service to corporations and companies by courier services and it does not have to be personal.

28. That I have perused the court record and noted that M/S MUTHOGA GATURA & CO. ADVOCATES came on record way back on 20th April, 2017. This notice is yet to be served on us.

29. That if the defendant denies service, how did it get to know about this matter so that it could appoint M/S MUTHOGA GATURA & CO. ADVOCATES?

30. THAT the present application is brought too late in the day after the defendant completely ignored this honourable court's process and it is only designated to stop the plaintiff from enjoying the fruits of a regular and fair judgment. It is an afterthought.

31. That the defendant has only rushed to court because of the ongoing execution.

32. That the defendant has peddled open and direct falsehoods before the honourable court for it was clearly served with all the processes herein.

33. That clearly I (sic) from the afore detailed service that the defendant came to learn of this matter and as deponed vide paragraph 2 of SHARON MWAKUGU'S supporting affidavit and not by the defendant's workers learning by chance of the existence of this suit as deponed vide paragraph 4 of the self-same SHARON MWAKUGU'S supporting affidavit.

34. That the defendant has absolutely no defence against the plaintiff's claim. Indeed as produced by plaintiff during the formal proof, the defendant prepared a mutual release and settlement agreement followed by a Diamond Trust, Crown Plaza cheque No. 001143 for Kshs.328,905/= which the plaintiff declined to accept as it was too little. Liability cannot therefore be denied. Annexed and marked KA 9(a) and (b) respectively are the said mutual release and settlement agreement and the cheque.

35. That the proclaimed items cannot be tools of trade by the defendant. The defendant is a road construction company inter-alia.

36. That the plaintiff still sleeps in a small mud kitchen as depicted by PW2 courtesy of the defendant who destroyed her stone house and the defendant is least bothered about the plaintiff's suffering and it is wont to have her suffering continue.

37. That the defendant seeks to drink from the waters of Equity with very soiled hands and should not be let to soil the pure waters of Equity.

38. That I pray that this application be dismissed with costs.

39. That all what is deponed hereinabove is true to the best of my knowledge, information and belief.

5. The parties have canvassed the application by way of written submissions.

6. I have carefully considered the pleadings, the submissions and the authorities proffered by the parties in support of their diametrically opposed assertions and propositions.

7. I consider it that the arguments proffered by the parties have a common fulcrum. It is if or if not the mode of service employed by the plaintiff at various times amounted to proper service which is recognized by law.

8. Order 5 rule 3 of the Civil Procedure Rules provides guidance in this area. It says:

5(3) Subject to any other written law, where the suit is against a corporation the summons may be served –

(a) on the secretary, director or other principal official of the corporation; or

(b) if the process server is unable to find any of the officers of the corporation mentioned in rule 3(a) –

(i) by leaving it at the registered office of the corporation;

(ii) by sending it by prepaid registered post or by a licensed courier service provider approved by the court to the registered postal address of the corporation; or

(iii) if there is no registered office and no registered postal address of the corporation, by leaving it at the place where the corporation carries on business; or

(iv) by sending it by registered post to the last known postal address of the corporation.

9. As envisaged by Order 5 Rule 3, there is other written law. Section 1010 of the Company's Act, Chapter 486 of the laws of Kenya states:

“1010 – A document may be served on a company registered under this Act by leaving it at, or sending it by post to, the company's registered office”.

10. It is pellucid that service by Fargo Courier Services Ltd can amount to proper service. There is a catch however. Such courier must be approved by the court. In the present case this mode of service was not approved by the court.

11. It is also beyond peradventure that the plaintiff did not effect service upon the defendant by way of registered service.

12. I accept the assertions proffered by the defendant that there was no proper service concerning the various times alluded to by the defendant.

13. In the circumstances, I allow the application in terms of prayers 3 and 4 in the application.

14. Costs shall be in the cause.

15. Parties are directed to come to court for directions on 29th November, 2017 at 9.00am.

16. It is so ordered.

Delivered in open court at Chuka this **8th day of November, 2017** in the presence of:

CA: Ndegwa

Parties not in court

P.M. NJOROGI,

JUDGE.