



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M KARIUKI, SICHALE & KANTAI, J.J.A)

CIVIL APPEAL NO. 25. OF 2016

BETWEEN

NATIONAL BANK OF KENYA LIMITED.....1ST APPELLANT

JOSEPH M.GIKONYO T/A

GARAM INVESTMENTS AUCTIONEERS..... 2ND APPELLANT

AND

GEOFFREY WAHOME MUOTIA.....RESPONDENT

(Being an appeal from the ruling and order of the High Court of Kenya at Nairobi (F. Amin J.) dated 11th November, 2015

in H.C.C.C. No. 23 of 2015)

JUDGMENT OF THE COURT

The suit at the High Court has not been heard on the merits. A brief review of the facts of that suit will suffice for purposes of this judgment. The respondent Geoffrey Wahome Muotia as plaintiff filed suit against the 1st appellant, National Bank of Kenya Limited seeking various reliefs. It was alleged in the plaint that the respondent was the owner of the property registered as LR No. 209/12544 situate at Upper Hill, Nairobi. It was further alleged that the respondent had offered the said parcel of land to the appellant as security for a loan in the sum of Ksh.281,000,000/- in favour of Upperhill Hotel Limited. That loan was to be repaid in an agreed manner but the appellant appeared to have defaulted in paying requisite instalments and that led to the 1stappellant exercising a power of sale as donated by the charge it held as security.

When the respondent was served with requisite notices, he filed the said suit and also filed under Certificate of Urgency a motion praying for interim reliefs to stop the 1stappellant from advertising the said property or proceeding with the intended sale. Farah Amin, J., upon hearing the application ex-parte issued an order on 23rd January 2015 restraining the 1st appellant from advertising for sale or in any other way offering for sale the said property pending a mention date within 14 days of the date of that order. The matter was ordered to be mentioned on 6th February, 2015 and the respondent was ordered to serve the 1stappellant accordingly. Whether service or proper service of the order was effected became the subject of further protracted proceedings before the said Judge.

By a Notice of Motion said to be brought under Order 40 rule 3 of the Civil Procedure Rules Section 63 of the Civil Procedure Act and all other enabling provisions of law, the respondent prayed *inter alia* for an order to enjoin the 2nd appellant Garam Investments Auctioneers into the suit as an alleged contemnor; that the court determine that the 1st appellant was in contempt of the orders of the court granted on 23rd January, 2015; that the court punish the contemnor and/or the directors and/or responsible officers of the contemnors by imprisonment for 6 months or as the court may deem fit attaching their assets to compensate the respondent for a loss suffered as a result of the contempt. It was stated in the grounds in support of the motion that the court had issued restraining orders restraining the appellant from advertising the respondents' property or offering it for sale; that the order had been served on the appellants; that knowledge of the existence of the order had been acknowledged; that despite the order the 2nd appellant had caused the property to be advertised for sale in a newspaper advertisement carried in the Daily Nation of 26th January 2015; that the advertisement had caused the plaintiff's business massive harm; that the advertisement was made deliberately in defiance of the orders of the court; and finally that it was just and meet to grant the orders sought.

The motion was also supported by an affidavit sworn by the respondent. He repeated the matters set out in the said grounds adding that the court order had been extracted by his lawyer on 23rd January 2015 some minutes to 5.00 pm; that he had instructed his lawyer to serve the order upon the appellants; that he had been informed by his lawyer that the court order had been effected upon the 1st appellant at about 6pm on the same evening to the 1st appellants' gateman because the 1st appellants' gate was closed; that the court order had been served upon the 2nd appellant the next day 24th January, 2015 at their offices; that the 1st appellant on 26th January 2015 acknowledged receipt of the court order allegedly served on 23rd January, 2015. It was further deponed that an advertisement was published in Daily Nation of 26th January, 2015 and that the same had caused losses to the respondents' business.

There was also an Affidavit of Service of a Court Process Server, Jafeth Mutua Kililyo. He deponed that upon receiving instructions from the respondents' advocate on 23rd January, 2015 he proceeded to the 1st appellant's offices along Harambee Avenue Nairobi where he reached at about 6pm but found the offices closed. He further stated that the court order together with a plaint and summons to enter appearance were enclosed in an envelope addressed to the 1st appellant's Company Secretary. He left that envelope with the gateman where he stated that he served the 1st appellant. The next day 24th January 2015 he proceeded to the offices of the 2nd appellant where he served a secretary in the firm with court documents. There was another Affidavit of Service by the same Jafeth Mutua Kililyo where he stated that on 26th January 2015 upon receiving further copies of the said court documents from the respondents' advocates he proceeded at 4pm to the 2nd appellants' offices at Harambee Avenue and effected service of the same upon the 1st appellants' Company Secretary.

The 1st appellant filed a replying affidavit sworn by Samuel Wanjohi Mundia, an advocate and its Head of Commercial and Litigation Department. He deponed amongst other things that service of the court order had not been properly effected in the first instance on the 1st appellant as such service offended the provisions of Order 5 Rule 3 and Order 48 Rule 2 of the Civil Procedure Rules as regards service of process upon a Corporation. He further deponed that service of court process on an unnamed gateman was not service at all; also that the Civil Procedure Rules did not permit service of summons after official working hours of 5 pm and that service would be deemed as served the next following working day which in that case would have been 26th January, 2015. He deponed further that the 1st appellants' offices did not open on Saturdays.

Joseph M. Gikonyo a licenced auctioneer and the proprietor of the 2nd appellant swore an affidavit on 13th February, 2015 where he stated amongst other things that his firm should not be joined to the suit; that he had the highest regard and respect for the authority of the court; that on the 23rd January, 2015 he had sought instructions from his instructing clients, the 1st appellant whether the suit property should be advertised for sale and that having received confirmation his firm proceeded to book a space for an advertisement to be run on Monday 26th January, 2015 in Nation Media Group Limited. He further deponed;

“10. That I am aware that the court order dated 23rd January, 2015 was served upon my staff in

the office on Saturday 24th January 2015 in my absence as I was already out of town in Kajiado. I am informed by my receptionist, which information I verily believe to be true that the said order was served just about 1.00 p.m. as they were preparing to close offices for the day.

11. That quite apart from the fact that I am advised by the advocates on record which advice I verily believe to be correct that under the Civil Procedure Rules, service of a court order effected after the hour of five in the afternoon of Friday is deemed to have been effected on the following Monday, I am aware that it would not have been possible to cancel publication of the advertisement already placed on 23rd January, 2015.

12. That I am aware that cancellation of the advertisement would have required my personal attendance at the offices of Nation Newspaper, the publisher for purposes of identifying myself and initiating the process of removing the suit properly from the advertisement space already booked which would not have been humanly possible in view of my being out of town and further that in any case, the finance and advertising departments of Nation Newspaper which I would needed (sic) to involve close at 1.00 p.m. on Saturdays.

13. That in these circumstances, I verily that it is evident that my firm was not served before the acts complained of in the application had occurred and as such there is no basis upon which the allegation that the court order of 23rd January, 2015 was disobeyed can be factual”.

That Motion was heard by the same Judge who allowed the application for joinder ordering that Joseph N. Gikonyo T/A Garam Auctioneers be joined as a party to the proceedings. On the application for leave to cite the appellants for contempt the learned Judge found that both appellants had been properly served with the court order and were guilty of contempt of court for advertising the respondents' property in the issue of 26th January 2015 of Nation Media Group. The learned Judge further ordered that the appellants present themselves to court to address the court before sentence was meted out. Those are the orders that provoked this appeal premised on the Memorandum of Appeal drawn by the advocate for the appellants. The learned Judge is faulted and is said to have erred and misdirected herself in law and fact by failing to appreciate the applicable law and legal principles that fall for consideration in an application for joinder of parties; the learned Judge is said to have misdirected herself by pronouncing herself on issues not before the court; that the learned Judge erred by rejecting evidence that had not been controverted; that the learned Judge erred by taking judicial notice of matters which the Judge could not do; that the learned Judge erred by citing the appellants for contempt of court when the requisite threshold had not been met; that the learned Judge erred in imputing knowledge of existence of an order by the 1st appellant on the basis of alleged knowledge of the order by its agents the 2nd appellant; that the learned Judge should have noted that it was necessary to serve a penal notice with the order in the absence of which there were consequences against the respondent; and that the learned Judge erred by delivering a ruling without a notice to the parties. For all these we are asked to allow the appeal and set aside the ruling and orders appealed from.

The appeal came up for hearing before us on 12th June, 2017 where we noted that both parties had filed written submissions as earlier directed by the court. Parties appeared for highlighting of the same. In adopting written submissions learned counsel for appellant Mr. Mutua Molo, submitted that the respondent had a legal duty to demonstrate that the appellant had been served with a court order and had knowledge of it, had disobeyed it and that disobedience was deliberate. Learned counsel challenged the validity of service of process on the 1st appellant through a sealed envelope to an unidentified gateman at 6pm. According to counsel if indeed service was effected 23rd January, 2015 why did the respondent find it necessary to effect service again on the 1st appellant on 26th January, 2015. Learned counsel submitted that in respect of the 1st appellant service was effected on 26th January 2015 the same day that the advertisement occurred. In respect of the 2nd appellant learned counsel submitted that the affidavit of Mr. Gikonyo, the proprietor of the 2nd appellant showed that the court order was served on Saturday 24th January, 2015 at 1.00 pm when the said Mr. Gikonyo was out of the office and that it was not possible to remove or stop publication of the advertisement that had been placed on Friday 23rd January 2015 to be run on Monday 26th January, 2015. According to counsel that deposition had not been controverted.

Mr. Kabugu Muguku, learned counsel for the respondent, in opposing the appeal submitted that there were no final orders of the High Court that could give rise to an appeal. Learned counsel submitted that the appellants had been served with the court orders and that they had disobeyed the same. According to counsel there was sufficient time to cancel or remove the advertisement and having not done so the appellants were guilty of disobeying the court order that had been served on them and they should be punished accordingly for being in contempt of court.

As stated at the start of this judgment the appeal arises from interlocutory proceedings and we must therefore walk a careful path and desist from making comments that may impact the hearing or embarrass the trial Judge who will eventually hear the case pending before the High Court.

We have perused the record of appeal and having also perused and considered both written and oral submissions and the applicable law we have taken the following view of the appeal.

In terms of the two prayers in the Motion before the learned Judge, the respondent asked, firstly, that the 2nd appellant be enjoined to the suit as a party; secondly that the enjoined party and the 1st appellant be cited for contempt of court for breaching a court order that had been issued on 23rd January, 2015. It was the respondents' case that the court order issued by court had been served upon the 1st appellant on the same day 23rd January, 2015 and again on 26th January, 2015 and that the order was served on the 2nd appellant on 24th January, 2015 but that the appellants, in defiance of the court order, continued to, and carried an advertisement in the Daily Nation of 26th January, 2015 for sale of the suit property. The appellants responded as follows:

It was the 1st appellants' case that leaving a sealed envelope at the locked gate of its offices on a Friday at 6.00p.m could not be said to be service of a court order at all; that service of process against it through a gateman could not be proper service and that by the time proper service was effected upon its Company Secretary on Monday 26th January, 2015 the advertisement had been published on that very day.

The 2nd appellants' case was that the court order was served upon their offices on a secretary of the firm at 1 p.m on Saturday 24th January, 2015; that Mr. Gikonyo was out of town and that his presence would have been necessary to withdraw or cancel the advertisement but, that, in any event, the offices of the Nation Media Group were not open on Saturday afternoon and that it would have been practically impossible to cancel or withdraw the advertisement that had been placed on Friday 23rd January, 2015 to be run on Monday 26th January, 2015.

The learned Judge analyzed all the said depositions in rival affidavits and considered the submissions made before her. In the course of that analysis the learned Judge speaks to the matter as follows as part of her ruling:

“64. Mr. Gikonyo suggests that it was impossible for him to comply with the Order. Unfortunately, that it not borne out by the evidence. He says that he was in Kajiado. There is no evidence to substantiate that assertion. He says that the Nation Newspaper closed its offices on Saturday at 1pm. Although he provides no independent evidence to substantiate that statement. I accept it as true because I take Judicial Notice of the advertisement that appears in said newspaper regularly which states that their offices close on Friday at 6 pm., on Saturdays at 1 pm. What that advertisement says and what the Auctioneer omitted from his evidence, no doubt deliberately, was that the aforesaid offices were also open on Sunday until 1pm. Therefore the explanation as to timing is not satisfactory. In relation to it being necessary for him to attend personally, again there is no evidence to substantiate that allegation. That is particularly so, because he was not the individual who placed the advertisement in the first place. There is nothing to explain why the same member of staff who was authorized to place the advertisement was not authorized to withdraw it.

65. The argument for Defendants put forward is that the Affidavits are uncontroverted and therefore should be accepted. However, it should not be forgotten that the deponents of the Affidavits have not been subjected to cross-examination and therefore their evidence has not

been tested.

Following Mr. Mutua's argument that the law and procedure applied in England and Wales applies, then it follows that the correct procedure is trial with oral evidence and cross examination and not trial upon affidavits that put forward a selective version of events.

66. The question as to whether the Defendant Bank was served and/or had the Order brought to its/its officers attention before Monday 26th January 2015 is more complicated, but the answer is no less clear. The Defendant Bank has put forward an Affidavit by its Legal Officer. The Company Secretary is the person to whom the envelope was addressed. If the bank had wished to put forward a clear response nothing would be simpler than the Company Secretary saying clearly that he did not receive the Order before Monday 26th January, 2015. He has not done so. Mr. Mundia puts forward a convoluted explanation about the gateman receiving the Order and not being authorised. He then jumps to the "official working hours" of the Head Office. Again, there is no independent evidence of that assertion. Only the evidence of a person who has an interest in the outcome. What Mr. Mundia carefully sidesteps, but which the Bank advertised with great fanfare is that they open at least some of their Branches on Saturdays. I also take Judicial Notice of the fact that there is a Branch on Harambee Avenue i.e. having an address similar or close to the Head Office. If the two are connected is not clear as neither the process server nor the deponent on behalf of the Bank have bothered to address this issue".

The affidavit evidence produced before learned Judge by the respondent was that service of the court order on the 1st appellant was effected to a gateman at its locked offices at 6.00 p.m. in a sealed envelope.

Order 5 Rule 3 Civil Procedure Rules sets out an elaborate procedure on how court process is to be effected on a Corporation. Such summons may be served upon the Secretary of the Corporation, a Director or other Principal Officer of the Corporation or, if those persons cannot be found, process may be left by the process server at the Corporations' registered office or by sending it to the Corporation by prepaid registered post or by a licensed courier service provider approved by the court to the Corporations' registered address. If all these is not possible then process is to be left at the place where the Corporation carries on business or by sending process by registered post to the last known postal address of the Corporation.

In addition, on the issue of service, Order 50 Rule 9 of the said Rules declares that service of court process shall normally be effected on a weekday other than Saturday and before the hour of five in the afternoon. The Rule further provides that process effected on a Friday after five o'clock in the afternoon is deemed to have been effected on the following Monday.

In respect of the 2nd appellant its director Mr. Gikonyo explained in an affidavit that the court order was effected at his firm at 1 p.m. on Saturday 24th January, 2015 when he was away from Nairobi in Kajiado. He further deponed that his personal attendance in Nairobi would have been necessary to stop or cancel the advertisement that had been placed the previous day and that offices of Nation Media Group were not open on Saturday afternoon. This was the only evidence placed before the learned Judge and was not controverted in any form at all. There was no evidence placed before the learned Judge by any party to show that offices of Nation Media Group were opened on Sundays in the morning to 1 p.m. The learned Judge took judicial notice of 2 issues: (i) that offices of Nation Media Group are open on Sundays until 1 p.m. and (ii) that the 1st appellant has other offices at Harambee Avenue, Nairobi, close to its headquarters.

It is true that judicial officers are free to take judicial notice of certain events particularly those that occur or are present with certain notoriety. The evidence placed before the learned Judge was that their process server visited the offices of the 1st appellant at 6.00 p.m. where he found the same closed. He decided to leave a sealed envelope with the gateman at the locked gate. It was the respondents' further evidence that it was found necessary, on Monday 26th January, 2015 to effect further service of process on the 1st appellant and that the process server this time served the 1st appellant's Company Secretary with process in the afternoon of 26th January, 2015.

As we have shown in this judgement the law prescribes the procedure for effecting service of process upon a Corporation and, in any event, service of process is to be effected before five o'clock in the afternoon on weekdays. The evidence before the learned Judge showed that the 1st appellant was not served at all on 23rd January, 2015 as leaving a sealed envelope with an unidentified gateman on that day at 6 p.m. was not any or any proper service on the Corporation at all.

The appellants further showed through uncontroverted evidence that the advertisement had been placed on 23rd January, 2015 to be published on 26th January, 2015; that court order was effected on the 2nd appellant on Saturday 24th January, 2015 at 1 p.m.; that the 2nd appellants' Principal Officer Mr. Gikonyo was out of town and that the offices of Nation Media Group were not open but closed that Saturday afternoon. It was wrong for the learned Judge to take judicial notice that offices of the said media house open on Sundays up to 1.00 o'clock in the afternoon. That fact, if it be one, has been challenged by the appellants – whether those offices open on Sundays is not a fact with any notoriety that would entitle a Judge, to take judicial notice of. The respondent needed to place material or evidence before the trial court to show such a fact.

The only reason advanced by the respondent for applying for joinder of the 2nd appellant to the suit as 2nd defendant was to enable the respondent to sue the 2nd appellant for contempt of court. We have shown in this judgment that the 2nd appellant was not in breach of any court order and it is therefore not necessary to join the 2nd appellant to the proceedings in the High Court at all.

In the end we found merit in this appeal which we hereby allow. We set aside the ruling of the High Court given on 11th November, 2015 and substitute thereof an order dismissing the Motion dated 2nd February, 2015. In view of the position taken in the matter by Lady Justice Farah Amin it is better that the suit be handled by another Judge. We so order. The appellants will have costs of this appeal.

Dated and delivered at Nairobi this 28th day of July, 2017.

G. B. M. KARIUKI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR