

REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
CORAM: GICHERU, TUNOI & OWUOR, J.J.A.
CIVIL APPEAL NO. 16 OF 1999
BETWEEN

JOHN AKASIRWA APPELLANT
AND
ALFRED INAT KIMUSO RESPONDENT

**(Appeal from the ruling and order of the High Court of
Kenya at Kakamega (Tanui J) dated 23rd February,
1998
in
H.C.C.C. NO. 258 OF 1992)**

JUDGMENT OF THE COURT

In an application dated 8th December, 1997, and filed under the provisions of **Orders 9A rule 10, 9B rule 8 and 21 rule 22 of the Civil Procedure Rules**, the appellant herein sought to have the superior court set aside interlocutory ex parte judgments entered against him on 22nd June, 1993 and 18th April, 1996, respectively. He also sought to have a defence he had annexed to the application to be deemed duly filed.

The grounds upon which the orders were sought were that he had only come to learn of the existence of a suit and the decree against him through a letter to the Land Registrar copied to him. He had never been served with summons to enter appearance in any suit. Upon perusal of the court file in respect of H.C.C.C. No. 258 of 1992, it transpired that the summons to enter appearance in the case was allegedly served on one Rose Wafula described as his wife in the endorsement at the back of the said summons. According to him, **Rose Wafula** was not his wife at the material time since they had parted way back in 1973.

In reply, the respondent was adamant that he knew that the appellant had been served with the summons through his wife. Furthermore, the appellant knew of the existence of the case against him in 1997 when they both attended a Land Control Board meeting at which the respondent blocked the sale of the suit land by the respondent to yet another person, Titus Chesoni. He had specifically brought to the attention of the respondent the existence of the present suit.

By virtue of the evidence put to the learned judge together with the submissions on the issue of service, the judge was made aware that service was a main issue in the matter before him. He indeed referred to it in his ruling of 23rd February, 1998, the subject matter of this appeal. He however did not make any findings on the issue either way, save that he declined to set aside the ex-parte judgments and to grant leave to the appellant to defend the suit. Hence, the main ground of appeal herein is that:

"The learned judge erred in law in not appreciating that there was no sufficient service of summons or at all upon the appellant, a sufficient reason on which he ought to have set aside, the ex -parte judgment."

In the affidavit sworn in support of the application referred to at the beginning of this judgment, it was deposed that

: "(8)That I have carefully perused the court file, and found that the service of summons to enter appearance if at all was never served on the defendant/appellant but one Rose Wafula.

(9)That contrary to what is stated at the return of service I am instructed by the applicant that the Rose

Wafula who is a relative of the plaintiff ceased to be the defendant's wife way back in 1973 and therefore at the alleged service of the summons upon her, she was not his wife."

Proper service of summons to enter appearance in litigation is a crucial matter in the process whereby the court satisfies itself that the other party to the litigation has notice of the same and therefore choose to enter appearance or not. Hence the need for strict compliance with Order 5 Rule 9 (1) . The ideal form of service is personal service. It is only when the defendant cannot be found, that service on his agent, empowered to accept service is acceptable. But, then as stated by this Court in **FILIMON AFWANDI YAWALA VS RONALD INDAMULI & ANOTHER CA NO. 9 OF 1987 (Unreported)** a departure from this ideal service must be based on some cogent evidence. Therefore, service in respect of Order 5 Rule 12 is only valid where there is reasonable ground to believe that the defendant cannot be found. However

: "Service on an adult member of the family of the defendant who is residing with him should take into account which member of the family would ensure that the summons reach the defendant in time. The wife of a defendant (if she is the only wife) would do the trick."

There was no evidence before the learned judge by way of affidavit or otherwise to explain the circumstances under which the process server came to the conclusion that the appellant could not be found. Nor was there any evidence as to which "Rose Wafula", the alleged wife, upon whom he tendered the summons. This is a pertinent issue because the respondent in his submissions before us categorically stated and in so doing confirmed the appellant's averment that he was married to one Rose Wafula, a sister of the respondent whom he separated from as far back as 1973. That being the case, she could not have been the wife who allegedly received the summons on behalf of the appellant.

The upshot of this is that there was no evidence that the process server ever tried to find the appellant and, therefore, it was not open to him to conclude that he could not be found. It is only when the appellant could not be found for personal service that the process server would have invoked the provisions of Order 5 rule 12 . In our view, the learned judge erred in not making a finding that the alleged service on the so called Rose Wafula was not a proper service and therefore invalid. In that regard, the interlocutory judgments were not validly entered and are a nullity. This finding makes it unnecessary for us to consider the other grounds of appeal canvassed before us. We, therefore, allow this appeal, set aside the two judgments in the superior court and substitute therefor an order giving the respondent an unconditional leave to file his defence and defend the suit in the usual manner.

There shall be an order for costs to the respondent.

Dated and delivered at Kisumu this 23rd day of March, 2001.

J.

JUDGE OF APPEAL

E.

GICHERU

P.

JUDGE OF APPEAL

K.

TUNOI

E.

JUDGE OF APPEAL

OWUOR

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

DEPUTY REGISTRAR