



REPUBLIC OF KENYA
IN THE COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS (COMMERCIAL DIVISION)

CAUSE NO. 2594 OF 1997

POSTBANK CREDIT LIMITED.....PLAINTIFF

VERSUS

JOHN WACHIRA WAMBUGU.....DEFENDANT

RULING

1. This ruling is a follow-up to the ruling delivered by this court on 16th October 2019. It was in relation to a notice of motion application dated 28th September 2018, seeking for an order that, the order made dismissing the suit made by the court on 9th July 2018, be set aside and the costs of the application be provided for.

2. At the time of hearing that application, the court was informed that, the plaintiff's advocates were unaware that on 9th July 2018 the matter was fixed for hearing of a notice to show cause. That, the notice to show cause had not been served to the plaintiff and/or his advocate, before the suit was dismissed on that date. The respondent on the other hand, argued that, the provisions of the Civil Procedure Rules 2010, do not require the notice to show cause be served, but simply states that it be given.

3. Having heard both parties, the court stated as follows;

“the applicant avers that they were not served with the notice under Order 17 Rule 2 of the Civil Procedure Rules, but a perusal of the court file reveals a notice of dismissal dated 5th July 2018, was served on both the plaintiff and the defendant's law firms and duly acknowledged.”

In view of the denial of the same by the applicant, it will be important that the signature of the recipient of the notice on behalf of the firm of; Okoth & Kiplagat Advocates be verified before any further orders can be made. In that regard, I direct that, the Honourable Deputy Registrar takes up the matter with a view of establishing whether the process server indicated on the notice duly served the notice upon the said firm. The report of that investigation will be availed to the court within a period of seven days from the date of this order and the matter to come for mention thereafter.”

4. The Honourable Deputy Registrar took up the matter with the process server and acted accordingly. As a result, Ms. Hellen Ndinda Motari the process server swore an affidavit dated 14th November 2019, in which she deposed as follows;

a) *That, I am a court bailiff attached at Milimani Commercial Court & Tax Division.*

b) *That, on 5th July 2018, I received a notice of dismissal with express instruction to serve upon M/s Wambugu Motene & Company Advocates for the defendant/respondent and Okoth & Kiplagat for the plaintiff/applicant.*

c) *That, on the said day the clerk of the firm of M/s Wambugu Motenda & Company Advocates came over to the registry counter to make some filing. I introduced myself to him. He responded by introducing himself to me as Mr. Simon, I then tendered to him a copy of the court, the notice to show cause dated 5th July 2018, why this suit should not be dismissed, when he accepted my service by signing and dating copy in acknowledgment.*

d) *That, the clerk of the firm of the defendant Advocates herein one by the name Simon was known to me upon service.*

e) *That, I do return this honourable Court a copy of the notice to show cause dated 5th July 2018, why this suit should not be dismissed, duly served and acknowledged for.”*

5. In view of the fact that the process server has confirmed service the court can give its final orders. However, in the interest of justice I shall hear the parties in case any wishes to challenge the averments by the process server

6. It is so ordered

Dated, delivered and signed in an open court this 27th January 2020.

GRACE L NZIOKA

JUDGE

In the presence:

Mr. Paul Mwangi for Akelo for the plaintiff

Ms. Karani for Mr. Kimani for the defendant

Dennis -----Court Assistant