



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL CASE NO.27 OF 2009

ROSE CHEPKORIR.....PLAINTIFF/RESPONDENT

VERSUS

MWINYI MOHAMMED RIVA.....1ST DEFENDANT/APPLICANT

NAPHTALI PIUS

ODINYA MATHEW.....2ND DEFENDANT/APPLICANT

RULING

1. This Ruling is in respect of the Notice of Motion dated 6th March, 2015 filed by the 2nd defendant. Its brought under **Order 42 Rule 6, Order 21 Rule 8 and 9, Order 22 Rule 22 and Order 51 Rule 1** of the **Civil Procedure Rules**, Sections **1A and B and 3A** of the **Civil Procedure Act**. He seeks the following orders;
 - a. *That the application be certified as urgent to be heard forthwith and ex-parte in the first instance and be fixed for inter-partes hearing thereafter.*
 - b. *That pending the hearing and determination of the application inter-partes or further orders of the court this Honourable Court be pleased to grant to the defendant/respondent an interim stay of execution of the judgment dated 30th September 2011, together with the warrants of attachment and sale dated 2/2/2015.*
 - c. *That this Honourable Court be pleased to quash the illegal proclamation of the Defendant/Applicant's movable properties and restitute the same to the Defendant/Applicant.*
 - d. *That the honourable court be pleased to set aside the judgment and decree herein.*
 - e. *That the execution and proceedings to enforce the judgement and decree herein be declared a nullity.*
 - f. *That this Honourable Court be pleased to cancel, set aside, recall and lift the warrants of attachment and sale herein for cancellation for having been issued irregularly.*
 - g. *That the Plaintiff/Respondent bears the auctioneers costs.*
 - h. *That the costs of this application be for provided for.*

Prayers (a) and (b) were dealt with.

2. The main ground as claimed by the Applicant in support of the application is that he was never served with summons to enter appearance. That as such judgment should not have been entered against him. He therefore prays that judgment entered herein against him plus the subsequent proclamation of his property be set aside. This is all set out in the grounds on the face of the record and the applicant's sworn affidavit, and supplementary affidavit by his Counsel P.J.O. Otieno (as he then was.)
3. The application has been opposed by the Plaintiff/Respondent vide the Replying Affidavit by Counsel for the Plaintiff Patricia M. Mitei. She indicates that after the judgment the applicants insurers paid the Plaintiff/Respondent Kshs.2,000,000 in settlement of the decretal sum payable under the insurance policy. She denies that the applicant was not served with summons to enter appearance. She too filed a Further Replying Affidavit.
4. Both Counsels agreed to dispose of the application by written submissions which they filed.

The 2nd Applicant's Case.

5. The Applicant claims not to have been served with summons to enter appearance. He argues that the address used was a wrong one as Box 124 Mfangano was non-existent. He further argues that the summons issued on 3rd April, 2009 were never extended after their expiry on 2nd April, 2010. Thus, there were no summons to be served by way of substituted service on 13th July, 2010.
6. He states that the decree has not been extracted in accordance with the law and the judgment being one (1) year old, a Notice to Show Cause should have been issued. The warrants of attachment issued were therefore irregular, he says.
7. Finally, he states that if execution is not stayed and his proclaimed properties sold he will suffer irreparable damage as the Plaintiff/Respondent is a person of strand, incapable of compensating the Defendant/Applicant for the same.
8. He therefore asks this court to set aside the judgment and all the processes consequential thereto and that he be allowed to file a defence and he be heard on merits. He annexed a draft defence to the supplementary affidavit.

The Plaintiff/Respondent's Case

9. The Respondent argues that the applicant was served with summons to enter appearance (RC 1&2) but he did not enter appearance nor file defence.

That summons to enter appearance were extended (Annexure RC-10.)

10. She dismissed the applicants draft defence as consisting of mere denials and raising no triable issued.

That the application was an attempt by the 2nd defendant/applicant to delay the conclusion of this case by relying on technicalities of procedure.

11. She states that the issue of the wrong postal address has nothing to do with her as it was the 2nd defendant/applicant who supplied the address of Box 124 Mfangano to the Traffic Police

pursuant to the provisions of **Section 73** of the **Traffic Act (Cap 403 Laws of Kenya)**.

12. She therefore requests the court to disallow the application as part of the decretal sum has already been settled by the applicant's insurer. The execution is for the remainder of the decretal sum.

The 2nd Defendant/Applicant's Submissions

13. Counsel for the 2nd Defendant/Applicant submitted on four issues.

(i) *That summons to enter appearance was not served as a wrong address was used, and the said address was non-existent.*

(ii) *The extension of the summons were illegal as the original summons had expired and could not be extended. He relied on Order 5 of the Civil Procedure Rules; the cases of;*

(a) **Udaykumar Chandulal Rajani & 3 Others Vs Charles Thaithi 1991 .**

(b) **Chesoni & another vs. Silverstein & Anor. 2006 J2 E.A 39.**

(c) **John Mwangi Kigotho Vs Moses Wafula Waswa Nyeri HCC No.64 of 2007,** submitting

that there was no valid summons to serve the 2nd defendant, hence the death of the suit at the expiry of the original summons issued and dated 3rd April, 2009.

(iii) *Whether the warrants of attachment and sale were regularly issued. He submitted that the judgment was issued on 30th September, 2011 and warrants of attachment and sale were issued on 2nd February, 2015. This was a period of more than three years and a Notice to Show Cause ought to have been issued in accordance with Order 22 Rule 1 of the Civil Procedure Rules. He cited the case of **Republic Vs. Commissioner of Police & 2 Others exparte KCB (2014)**.*

(iv) *Setting aside the judgment.*

On this he submitted that the applicants defence raises “*triable issues*” which should go for trial on merit. He referred to the case of **Olympic Escort International Co. Ltd & 2 Others Vs. Parminder Singh Sandhen & Another (2009) eKLR** where the Court of Appeal stated this of a triable issue;

“It is trite that a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bonafide.”

It was his submission that the need for the Plaintiff/Respondent to strictly prove the applicant's negligence was a triable and bonafide, issue. He therefore prayed that the court allows the application to afford the applicant an opportunity to have his day in court.

The Plaintiff/Respondent's Submission

14. Counsel for the Respondent M/s Mitei submitted that the firm of M/s Otieno, Yogo, Onyoro & Co. Advocates was not properly before the court as they did not seek leave to enter appearance and file a notice of appointment. She cited **Order 6 Rule 1, Order 9 Rule 7 and 9** of the **Civil Procedure Rules** to prove her point.

15. On the application dated 6th March, 2015 she submitted that in serving the 2nd defendant/applicant they used the address he had supplied to the police in respect of the police abstract. However, service using this address became complicated hence the resort to substituted service.

16. Further on the issue of extension of summons she submitted that the summons were extended and issued on 27th April, 2010 after the Plaintiff was allowed to amend her Plaint *vide* an application dated 3rd December, 2009. The amended summons was served on the 2nd defendant/applicant by substituted service on 13th July, 2010.

17. She submitted that there is no time limit as to when summons could be extended. This she said was irrespective of whether the initial twelve (12) months period has expired or not. On this she cited the cases of;

(i) **Kenya Shell Ltd vs. Gaitho Oil Ltd (2006) eKLR** and

(ii) **Mechanised Cargo Systems Ltd vs. Fina Bank Ltd (2007) eKLR** among many others.

18. Counsel further submitted that the 2nd defendant/applicant is guilty of laches and undeserving of the prayers sought. This is on the basis of service on him of the Notice of entry of judgment on him on 15th September, 2011 (annexture R C – 3&4). He did not take any action until now. Counsel cited the case of **Simon Thuo Mwangi Vs. Unga Feeds Ltd 2015 eKLR**.

19. Failure by the 2nd defendant/applicant to pay made the Plaintiff/Respondent to sue his insurer Jubilee Insurance Co. Ltd *vide* Kericho CMCCC No. 392 of 2014 as a result of which the insurance company paid the Plaintiff/Respondent Kshs. 2M as part of the decretal sum.

20. It was also Counsel's submission that the 2nd defendant/applicant did not pursue this case with the seriousness it deserved. He instead left the matter to his advocates; on this point she referred to the cases of;

(i) **National Bank of Kenya Vs. E.K.Kilel as quoted in Michael Kamau Gakundi Vs. Daima Bank & Anor. (2012) eKLR**.

(ii) **Ruth Njoki Mwangi & Anor. Vs. Cecilia Muthoni Nduati (2010) eKLR** and several others.

21. Of the 2nd defendant/applicant's draft defence, she submitted that the same consisted of mere denials and as such raised no triable issues, and should be struck out, she relied on the case of **Blue Sky EPZ Vs. Natalia Polyakova & Anor. (2007) eKLR & Others**.

22. She disputed the 2nd defendant/applicant's submission that he should have been served with a Notice to Show Cause and before execution for the following reasons;

(i) *The prayer was sought under the wrong provision of the law.*

(ii) *The relevant date for consideration is the date of decree and not judgment.*

(iii) *The 2nd defendant/applicant was served with Notice of entry of judgment. She therefore urged the court to disallow the application.*

23. I have considered the application, affidavit, annexures and the submissions and authorities which have been very useful. The issue which I find falling for my determination is whether the 2nd defendant/applicant has met the conditions for setting aside a judgment.
24. I wish on the onset to point out that the applicant cited **Order 42 Rule 6** of the **Civil Procedure Rules** as one of the provisions he is relying on for this application. The said provision is inapplicable as there is no appeal or intended appeal before this Court. This is a matter that has been handled by this Court and is being handled by the same Court.

Secondly, **Order 22 Rule 22** of the **Civil Procedure Rules** is inapplicable as the decree is being executed by the same court that issued it.

25. The record shows that there was entry of an interlocutory judgment against the 2nd defendant/applicant on 3rd September, 2010 for non-appearance.

The matter proceeded to formal proof and judgment was entered. Did M/s Otieno, Yogo, Ojuro & Co. Advocates require the leave of the Court to come on record" **Order 9 Rule 6** of the **Civil Procedure Rules** refers to parties who had initially acted in person. What they do, is give a Notice of the appointment of any advocate. They do not require the leave of the Court to come on record. **Order 9 Rule 9** of the **Civil Procedure Rules** applies to parties who wish to change advocates after the entry of judgment. In the present case the 2nd defendant/applicant was sued but he did not enter appearance and/or defend the suit.

It is therefore incorrect for Counsel to submit that M/s Otieno, Yogo & Ojuro & Co. advocates required the leave of the court to come on record.

26. The Plaintiff/Respondent filed a suit against the 2nd defendant/applicant on 1st April, 2009 and summons to enter appearance were issued on 3rd April, 2009. An application dated 3rd December, 2009 was filed seeking to enjoin the 1st Defendant. The same was heard on 1st and 2nd March, 2010 and Justice Mary Ang'awa allowed it and granted leave for the amendment of the Plaint. This was on 3rd March, 2010. The amendment was to be done within 14 days.
27. The amended Plaint was filed on 19th March, 2010. On the same date the Plaintiff/Respondent did write to the court requesting for extension of the validity of the summons against the 2nd defendant/applicant. The request was received in the Registry on the same day. Another application dated 24th May, 2010 was filed on 31st May, 2010, seeking orders for substituted service, by way of advertisement.
28. This application was heard by Justice G.B.M. Kariuki (as he then was) and he allowed it. He did a ruling on the same on 8th July, 2010. The 2nd defendant/applicant is now challenging the orders saying the said summons should not have been issued because there were no summons in existence. The court that allowed the substituted service was satisfied that there were summons in existence hence its order for service of the same.
29. The Court that extended the summons and allowed for substituted service was of concurrent jurisdiction as this one. The said orders cannot therefore be challenged before this court. They can only be challenged through an appeal.
30. The Defendants were therefore served with summons to enter appearance by way of substituted service as ordered by the Court. Upon the 2nd defendant/applicant's failure to enter appearance

and/or file defence an interlocutory judgment was entered and the case was fixed for formal proof. A judgment was finally entered on 30th September, 2011.

31. Notice of entry of Judgment was sent to the 2nd defendant/applicant on 15th November, 2011 (RC 3&4) through Box 124 Mfangano. Though the applicant denies this to be his address he in November, 2011 instructed his Counsel P.J.O Otieno (as he then was) to find out how the judgment in the matter was entered. Counsel did exactly that. I am referring to the further affidavit sworn on 21st April 2015 and filed on 22nd April, 2015 by Counsel. How did he know about the entry of judgment if he did not receive the Notice of entry of judgment"
32. It is therefore clear that the 2nd defendant/applicant was well aware of the proceedings and the judgment herein and he did not find it necessary to deal then. That was in November, 2011. This application was only filed on 6th March, 2015 when the 2nd defendant/applicant's properties were proclaimed.
33. As was stated by the Court of Appeal the case of **Simon Thuo Mwangi V Unga Feeds Civil Appeal No.181 of 2003** at **Nairobi in Esther Waimaitha Njihia & Others Vs. Safaricom Ltd (2014) eKLR.**

"The exercise of judicial discretion or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise or obstruct or delay the cause of justice."

34. This finding by the Court of Appeal sums it all up. The conduct of the 2nd defendant/applicant is that of a person who has deliberately sought to obstruct the cause of justice. He has since November, 2011 been aware of the existence of the judgment herein. He chose not to take any steps to settle it or have the judgment set aside.

I have considered the further affidavit by Mr. P.J.O. Otieno Counsel for the 2nd defendant/applicant (as he then was). There was no agreement that the parties entered into which could have bound them. The counsels knew what should have been done in case of any such agreement. The draft/defence annexed herein is mere denials and does not raise any triable issues.

35. Three and a half (3½) years of inaction by the 2nd defendant/applicant with the full knowledge of an existing judgment against him is not explained to the satisfaction of this court. The draft I therefore find no justifiable reason to make this Court set aside the judgment of 30th September, 2011.
36. The 2nd defendant/applicant has also asked this court to find the Proclamation by the auctioneers to be unlawful, and that the warrants of attachment should be recalled and cancelled.
37. The record shows that judgment herein was delivered on 30th September, 2011.
 - *Ruling on taxation was delivered on 29th November, 2013.*
 - *A certificate of costs was issued on 26th March, 2014, when a decree had been drawn.*
 - *An application for execution was received in the Registry on 29th January, 2015.*
 - *Warrants were issued on 2nd February, 2015.*

38. The 2nd defendant/applicant states that this procedure is wrong as the decree was more than a year old and he ought to have been issued with a Notice to show cause.

M/s Mitei for the Plaintiff/Respondent submitted that the one year starts running from the date of the decree and not judgment.

Order 22 Rule 18 (1) provides;

- (a) *more than one year after the date of the decree;*
- (b) *against the legal representative of a party to the decree; or*
- (c) *for attachment of salary or allowance of any person under rule 43,*

39. The Civil Procedure Act defines a decree as;

“The formal expression of an adjudication which, so

far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking

out of a plaint and the determination of any question within section 34 or section 91, but does not include—

- (a) *any adjudication from which an appeal lies as an appeal from an order; or*
- (b) *any order of dismissal for default:*

Provided that, for the purposes of appeal, “decree” includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up.”

40. From these provisions its clear that the period of one (1) year starts running from the date of the decree and not the date of judgment. In this case the date of decree is 26th March, 2014. The request for execution is dated 26th January, 2015 and was received by the court on 29th January, 2015. It was within the one (1) year period.

41. In as much as this is the position in law I do find that after the Plaintiff/Respondent being silent on the 2nd defendant/applicant could not get a decree 2 ½ years after judgment and then slam it on the 2nd defendant/applicant without any notification. The Applicant may easily have thought he had been forgiven of the debt considering the conversation between his counsel and the Plaintiff's Counsel, and the payment of Kshs.2 Million by his insurer.

42. My overview of all the circumstances of this case lead me to the conclusion that;

(i) *The Applicant has failed to satisfy this court of the need to set aside the exparte judgment of 30th September, 2011.*

(ii) *The 2nd defendant/applicant deserved a Notice to Show Cause being served on him to explain why he*

had not paid the balance of the decretal sum. The reason being that the Plaintiff/Respondent took almost three (3) years from the date of judgment to extract a decree.

(iii) The process of execution is therefore set aside. The warrants of execution are hereby cancelled and recalled.

(iv) The Plaintiff/Respondent to take out a notice to show cause for service on the 2nd defendant/applicant as per the rules.

(v) The auctioneers costs to be borne by the Plaintiff/Respondent

(vi) Each party to bear his/her own costs of the application.

Dated, signed and delivered in open court this 3rd day of July, 2015.

H.I.ONG'UDI

JUDGE

In the presence of:

M/s Maritim for Respondent-present

Mr. Mbeche for Ojuro for Applicant

Robert- court assistant



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