



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 676 OF 2012

GOVINDA & SONS COMPANY.....APPELLANT/RESPONDENT

- V E R S U S -

HASSAN ANAMANGE OCHAHIRURESPONDENT/APPLICANT

RULING

1. Hassan Anamange Ochachiru, the respondent/applicant herein, took out the summons dated 28th October 2016, in which it sought for *inter alia*:

1. THAT the orders issued by Honourable Justice Sergon on the 26th October 2016 be set aside and or be varied.

2. THAT the warrant of arrest issued against the plaintiff/respondent herein be lifted.

3. THAT costs and incidentals to the application be provided for.

2. The summons is supported by the affidavit of Edna Bosibori, learned advocate appearing for the respondent/applicant. When served, Govinda & Sons company, the appellant/ Respondent herein, filed the replying affidavit of Mugui Mungai to oppose the summons.

3. I have considered the grounds stated on the face of the summons plus the facts deponed in the affidavits filed in support and against the application. I have further taken into account the oral submissions of learned counsels. It is the submission of respondent/applicant's advocate that the motion dated 25.08.2016 which gave rise to the orders issued on 26.10.2016 was never served. It is further the submission of the respondent/applicant that the orders issued on 26.10.2016 were obtained on false information. It was pointed out that the respondent had alleged that the plaintiff withdrawn the amount paid as security from court and went into hiding which allegation is not true. The respondent/applicant further submitted that the appellant/respondent failed to disclose that Justice (Mr) Onyancha had previously heard and dismissed a similar application hence the motion dated 25.8.2016 was res judicata.

4. The applicant/respondent on the other hand has beseeched this court to dismiss the summons since the motion dated 25.8.2016 was served upon the respondent/applicant's advocate on 14.9.2016. Mr. Mungai, learned advocate for the appellant/ respondent further submitted that the respondent/applicant's advocate has the habit of declining to acknowledge receipt of documents with aim of defeating the course of justice. Mr. Mungai pointed out that the respondent/applicant's advocate

acted maliciously by withdrawing the decretal sum deposited in court as security for the due performance of the decree despite having been served with a court order issued on 8th march 2013 by Justice (Mr) Onyancha staying the process of withdrawal of the aforesaid sum.

5. After a careful consideration of the material placed before this court plus the rival oral submissions, it is not in dispute that the motion dated 25.8.2016 proceeded for hearing *ex parte* on 26.10.2016. It is apparent from the record that Mr. Mungai, learned advocate for the appellant/respondent informed this court that he had served the respondent/applicant's advocate and that the same did not elicit any response. This court considered the affidavit of service of Daniel Waweru Mwangi and was satisfied that the aforesaid motion was served upon the respondent/applicant advocate and proceeded to allow the same as unopposed. Miss Arati, learned advocate for the respondent/applicant has raised two important points for this court to consider. First, it is the submission of the learned advocate that the motion dated 25.8.2016 was not served upon her office. Secondly, it is her submission that a similar application had been made and eventually dismissed by Justice Onyancha on 16.7.2015.

6. On the first issue, touching on service, I have once again perused the affidavit of Daniel Waweru Mwangi and I am satisfied that the process server indeed effected service upon the office secretary to the firm of M/s Arati & Co. Advocates. The process server clearly stated that the aforesaid secretary accepted service but she declined to stamp on the document to acknowledge receipt thereof. The objection for want of service therefore cannot stand.

7. On the second ground, the respondent/applicant has urged this court to find that the motion dated 25.8.2016 was *resjudicata*. I have carefully perused the ruling of Justice (rt) Onyancha delivered on 16.7.2015 and it is apparent on the face of it that Justice Onyancha heard and determined an application which is similar to the motion dated 25.8.2016.

8. Mr. Mungai and his client did not disclose to this court this fact when they appeared *ex parte* before this court on 26.10.2016. Had that fact been disclosed to this court, the *ex parte* orders would not have been issued. With great respect, I agree with Miss Arati that the aforesaid orders were given without jurisdiction. The motion dated 25.8.2016 was *ab initio res judicata*.

9. Consequently the summons dated 28.10.2016 is allowed in terms of prayers 2 and 3 with costs to the applicant. The effect of this ruling is that the order issued pursuant to the motion dated 25.8.2016 is set aside and is substituted with an order dismissing the aforesaid motion with costs for being *res-judicata*.

Dated, Signed and Delivered in open court this 14th day of November, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

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