



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1946 OF 1983

CREDIT CORPORATION LTD.....PLAINTIFF

VERSUS

MATHEW JOSEPH OGUTU.....RESPONDENT

RULING

By her application dated 19th January, 1994 the second defendant applies for three orders namely that execution of decree herein against her be stayed, that *ex parte* judgment entered against her on 28th March, 1984 be set aside and that she be allowed to file her defence.

Her application is based on the issue of alleged non-service of summons upon her. How was she served"

According to the return of service dated 25th August, 1983 one Frederick Kibuge an authorised court process server went, on 21st July, 1993, to serve the summons on the two defendants at their place of residence in Gachie location, Thigiri Road, Thigiri Rise, Nairobi.

At that place after inquiring from the house servant as to whereabouts of the defendants and after being informed that the defendants had left early in the morning and were due back late in the evening he affixed two "duplicate copies of plaints" on the outer door of the defendant's dwelling house in the presence of the house servant Rhoda Ayuma.

In his supplementary return of service Frederick Kibuga says that on the same day he had made several inquiries from Parliament building as to where the first defendant resides and that he was directed to the first defendant's residence at Thigiri Road aforesaid.

Order V rule 9 envisages that whenever practicable service should be personal service. Order V rule 8 envisages that the summons shall be served on each defendant.

We then come to order V rule 12 which provides that where the defendant cannot be found (emphasis mine) service may be effected on an adult member of the family of the defendant who is residing with him.

The order V rule 14 provides (*inter alia*) that if despite using all due and reasonable diligence the

defendant cannot be found, service may be made by affixing a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides.

Order V rule 12 in my view is to be read with order V rule 14 in that if the defendant cannot be found and if service cannot be effected on someone else then the serving officer may affix the summons as stated. But the first requirement before such affixing of summons is that when reasonable efforts to find the defendant fail or if the summons cannot be served thereafter on an adult member of the family, then only it may be affixed.

It is in my opinion wrong for a process server to affix summons on outer door the very first time he goes to the defendant's house.

It was in *Waweru vs Kiromo* [1969] EA page 172 that as the process server made no inquiry about the defendant's whereabouts it could not be said that he could not be found so as to allow service on his wife under order 5 rule 12 of Civil Procedure Rules. See the holding at page 173.

Trevelyan J followed the reasoning of Sir Audley Mc Kisack CJ (as he then was) in two Ugandan cases *Kavuma vs S T Mehta* [1960] EA 305 and *Pirbhai Lalji & Sons Ltd vs Hassanali Devji* [1962] EA 306.

The *ratio decidendi* of these two cases was that a proper inquiry must be made of the defendant's whereabouts and sufficient steps taken to establish that the defendant cannot be found.

In this case I am of the view that the process server should have tried to find out where the first defendant works and also if the second defendant resided with him and should have made more attempts to effect personal service on both defendants. I would wish the registries to note that the court process servers fully comply with requirements of order V rules 12 and 14 before a judgment in default is entered. A guideline would be say, three good attempts to personally serve the defendants, after due enquiries from person or persons (to be named in return of service). If service cannot be effected then the rule 12 of rule 14 mode will be in order.

I am afraid service of summons as effected on the second defendant was not proper. It was bad service and remains so. Hence I do not have to go into merits of defence. The *ratio* of *Patel vs EA Cargo Handling Services* [1974] EA 75 therefore does not apply.

In the circumstances the application is allowed. Judgment entered against the second defendant on 28th March, 1984 is set aside. All execution proceedings against the second are also set aside. The second defendant

will file her appearance and defence, both, within the next 15 days. I make no order as to costs as the second defendant could have moved Court to set aside judgment last year when she became aware of these proceedings. However, as I have held that service was bad *ab initio* it remains bad even when the defendants come to know of existence of suit except where an unconditional appearance is entered which entry normally waives any irregularity in service of summons.

Dated and Delivered at Nairobi this 28th day of February 1994.

A.B.SHAH

JUDGE



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