IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gachuhi, Apaloo & Masime JJA)

CIVIL APPEAL NO 88 OF 1985

BETWEEN

SAINAGHI T/A ENTERPRISE PANEL BEATERS.....APPELLANT

AND

KASUKU.....RESPONDENT

(Appeal from a Ruling and Order of the High Court at Nairobi, O'Kubasu J)

JUDGMENT

November 7, 1988, **Gachuhi, Apaloo & Masime JJA** delivered the following Judgment.

The respondent delivered his car to the appellant with instructions to carry out certain repairs at an estimated cost. When he went to collect it, he found some additional work had been carried out which he denied having given instructions for. The vehicle was not delivered then. The respondent then filed the suit.

There is a return of service that was filed by the process server who is a law clerk stating that he served the defendant with summons at his place of work on February 23, 1984 at 10.45 am. There was no appearance entered. The respondent went ahead and obtained judgment on formal proof. On learning that judgment had been entered in a suit he was not aware of, the appellant applied for it to be set aside on the grounds of non-service of the summons.

The appellant further stated that he left for medical treatment in Europe on April 29, 1984. He was made aware of the suit on telephone from Nairobi. In his affidavit sworn in Rome he annexed samples of his signature on two cheques signed in 1980, a letter signed by him on March 29, 1984, a letter of demand sent to the respondent from the appellant's advocate dated April 18, 1984 and a plaint filed by the appellant on May 4, 1984 in the Resident Magistrate's Court claiming the sum of Kshs 19,460 which included storage charges. The application in particular disputed the signature at the back of the summons which is purported to have been signed by the appellant. There was no replying affidavit.

After the hearing of the application which took the form of written submission, the learned trial judge dismissed the application with costs upon which dismissal this appeal lies.

In his ruling, the learned judge heavily relied on the return of service. This return of service was not sworn. The learned judge misdirected himself in treating it as a sworn affidavit. This is a clear case of the dispute of service and of the signature of the person served. When it became clear to the judge that the signature is disputed it was incumbent on the judge to call for the evidence of service by the process-server whose return of service has been challenged by a sworn affidavit to determine as to who was telling the truth before dismissing the application made for setting aside the *ex-parte* judgment.

A similar situation arose in which it was determined by the predecessor of this court in *Karatina Garments Ltd v Nyanarua* [1976] KLR 94. At page 95 letter A to B the court stated;

“We would like to state from the outset that rule 10 of order IX of the Civil Procedure Rules, then in force, gave power to the court to set aside or vary a judgment given *ex-parte* upon such terms as may be just. The power was discretionary and unqualified. We are of the view that in a case like this one where the respondent denied having been served with a summons, it was proper for the court to inquire into this aspect of the matter; and in the face of the conflicting affidavits filed, it was again proper for the deponents to be examined on oath to try and ascertain the truth. It was then a matter of fact as to which party was to be believed.”

We are of the view that due to the conflict between return of service, and the affidavit by the appellant, evidence of the process server should have been recorded and that of the appellant to assist the court in resolving the issue as to who was telling the truth. By treating the return of service as an affidavit and not calling the process server to support his return of service, the learned trial judge erred and misdirected himself in dismissing the appellant’s application. This appeal must therefore succeed.

The appellant in his original application to the High Court for setting aside the *ex-parte* judgment filed a defence with the counter-claim. He was then applying for leave to defend the suit. Such leave could either be conditional or unconditional. Under the circumstances the appellant is entitled to unconditional leave to defend. On payment of the necessary court fees, the draft defence and counter-claim already filed should be taken as filed. In the final analysis our order is that:

1. That this appeal is allowed with costs.

2. The *ex parte* judgment of the High Court is set aside.

3. The defence and counter-claim already on record to be taken as validly filed on payment of the necessary fees.

4. The appellant will have the cost of his application in the High Court.

Date and delivered at Nairobi this 7th day of November , 1988

J.M GACHUHI

.....

JUDGE OF APPEAL

F.K APALOO

.....

JUDGE OF APPEAL

J.R.O MASIME

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR