

EMMANUEL J PFUPA
versus
HERBERT MHURIRO

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 5 September 2019 & 18 June 2020

Chamber Application

P Makora, for the plaintiff

MANZUNZU J: Placed before me was this chamber application seeking a default judgment as *per* draft order in the following terms:

“IT IS ORDERED THAT

1. Default judgment be and is hereby granted in favour of the plaintiff and against the defendant in the sum of US\$17 000.
2. Alternatively, in the sum of \$28 000 bond;
3. Interest and *tem pore morae* from 18 June to the date of payment in full;
4. Cost of suit.”

The plaintiff issued summons on 5 April 2019 seeking the above relief against the defendant.

According to the summons the defendant’s address for service was given as House No. 10311, Kuwadzana Extension, Harare.

The plaintiff’s claim is based on an agreement between the parties wherein plaintiff claims he bought a motor vehicle from the defendant and paid the purchase price.

However, the same motor vehicle was later seized by the Police it being alleged was stolen.

An agreement of sale was attached to the summons with the defendant’s address as No. 10311 Kuwadzana Extension Harare.

When the matter was placed before me on 5 September 2019 with the application for default judgment, after examining the documents, I noticed that service of the summons was at 19 Edmonds Avenue, Belvedere, Harare. The Sheriff’s return remarked that; “Copy of

summons and plaintiff's declaration served by affixing to a white letter box after no one at the address for service accepted service citing that they do not know the defendant."

On 5 September 2019 I raised a query by letter to the plaintiff's legal practitioners as to whether service of the summons was proper.

On 9 September 2019 I got a response part of which reads; "The Honourable Judge is respectively referred to r 38 Order 5 of the High Court Rules which allows for service in the manner effected by the Deputy Sheriff in that he affixed the summons and declaration.

It is common cause that delinquent defendants hide their address for service. We therefore request that the matter again be placed before the Honourable Judge for consideration of the chamber application for default judgment."

Rule 38 Order 5 cited above reads;

"38 Times for service process

Service of process shall not be valid if served between 10 p.m. and 6 a.m.:

Provided that—

- (a) process for the arrest of any person; and
- (b) process served by post, telegraph, tele facsimile or courier;
shall be valid whenever it is served."

It is clear from the provisions of r 38 that the query I raised was not addressed. I then directed my assistant to invite the legal practitioner concerned to come forward and move her application. She undertook to do so on Monday 8 June 2020. She did not turn up neither did she inform why she has failed to do so. This is certainly unexpected of a diligent legal practitioner who owes a duty to her client and to this court. In the absence of her appearance I had to consider the merits of this application based on papers filed of record.

There is definitely no proper service of the summons. There is no explanation as to why the summons were served on 19 Edmonds Avenue, Belvedere Harare when the summons and support documents show the address for service as No. 10311, Kuwadzana Extension, Harare.

This application can therefore not succeed in the absence of proper service of the summons on the defendant.

Accordingly, the matter is hereby struck off the roll with no order as to costs.

N.B: It is directed that the Registrar shall refer a copy of this judgment to the Secretary for the Law Society