

NOEL WALLACE, )  
 )  
 Plaintiff/Appellee, ) Appeal No.  
 ) 01-A-01-9512-CH-00579  
 v. )  
 ) Lawrence Chancery  
 KENERD PARIS WALLACE, ) No. 6470-93  
 )  
 Defendant/Appellant. )

**FILED**

**July 24, 1996**

**Cecil W. Crowson  
Appellate Court Clerk**

COURT OF APPEALS OF TENNESSEE  
MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CHANCERY COURT FOR LAWRENCE COUNTY  
AT LAWRENCEBURG, TENNESSEE

THE HONORABLE WILLIAM B. CAIN, CHANCELLOR

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REVERSED AND REMANDED

O P I N I O N

This is an appeal by defendant, Kenerd Paris Wallace, from the trial court's judgment denying his motion to set aside a divorce decree on the ground that plaintiff, Noel Wallace, did not properly serve defendant as required by Rule 4.04(1) of the Tennessee Rules of Civil Procedure.

This matter began when plaintiff filed a complaint for divorce against defendant in October 1993. Plaintiff gave Bob Moore, an independent processor, the summons and the complaint to serve upon defendant. Mr. Moore knew defendant's address and defendant's two places of employment. On 19 November 1993, Mr. Moore went to defendant's home on two occasions. Defendant was not at home or simply did not answer the door. Mr. Moore returned on 20 November, but once again defendant did not answer the door or was not at home. Mr. Moore saw different automobiles at the residence on each occasion. Based on this observation, he surmised that on at least one of the occasions defendant must have been home and that defendant was "evading" process. As a result of his conclusion, Mr. Moore left the process with defendant's son. Defendant's son later delivered the process to defendant.

Because defendant failed to answer the complaint for divorce, the court granted plaintiff a default judgment and divided the marital property. Thereafter, defendant failed to comply with the court's order, and plaintiff filed a contempt petition. Prior to the hearing on the contempt petition, defendant filed a motion to set aside the judgment in the divorce action. The court denied the motion and found that defendant was in contempt of court. Defendant filed a timely notice of appeal as to the denial of his motion to set aside the judgment.

Tennessee's Rules of Civil Procedure describe the proper procedure to use when serving an individual personally and when personal service is unsuccessful. These rules provide as follows:

(1) Upon the filing of the complaint the clerk of the court wherein the complaint is filed shall forthwith issue the required summons and cause it, with necessary copies of the complaint and summons, to be delivered for service to any person authorized to serve process. The person shall serve the summons, and his return indorsed thereon shall be proof of the time and manner of service. A summons may be issued for service in any county against any defendant, and separate or additional summonses may be issued against any defendant upon request of plaintiff. Nothing in this rule shall affect existing laws with respect to venue.

(2) A summons and complaint may be served by any person who is not a party and is not less than 18 years of age. The process server must be identified by name and address on the return.

Tenn. R. Civ. P. 4.01(1995).

The plaintiff shall furnish the person making the service with such copies of the summons and complaint as are necessary. Service shall be made as follows:

(1) Upon an individual other than an unmarried infant or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally, or if he *evades or attempts to evade service*, by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, whose name shall appear on the proof of service, or by delivering the copies to an agent authorized by appointment or by law to receive service on behalf of the individual served.

**Id.** 4.04(1)(emphasis added). Here, there is no evidence and the trial court did not find that defendant evaded or attempted to evade process. The trial court simply held that there was actual service because the process server left the process with defendant's son, who was of suitable age and discretion, and because defendant's son passed the process on to defendant. We disagree.

"In applying and construing the substitute service statutes, it is the duty of the Court to give the statute a strict construction as such statutes are in derogation of common rights

and strict compliance therewith must be observed." **Tabor v. Mason Dixon Lines**, 196 Tenn. 198, 202, 264 S.W.2d 821, 822-23 (1953). Simply because the subject matter of the suit is within the jurisdiction of the court, proper service of process should not be assumed. The record must establish that the plaintiff complied with the requisites of the procedural rules. The fact that the defendant had actual knowledge of attempted service does not render the service effectual if the plaintiff did not serve the process in accordance with the rule. **See Third Nat'l Bank of Nashville v. Estes**, App. No. 85-142-II, 1986 WL 3155, at \*5 (Tenn. App. 12 March 1986).

Service of process which does not meet the requirements of the rule is void, and a judgment based on void service is a void judgment. **Overby v. Overby**, 224 Tenn. 523, 525-26, 457 S.W.2d 851, 852 (1970). Service of process must strictly comply to Rule 4 of the Tennessee Rules of Civil Procedure. **See Tabor**, 264 S.W.2d at 822-23. Nothing in this record shows that service conformed to the rule. Therefore, the judgment is void.

It results that the judgment of the trial court in refusing to set aside the original decree is reversed. The cause is remanded to the trial court for the entry of a judgment setting aside the original decree and for further necessary proceedings. Costs on appeal are taxed to the plaintiff/appellee, Noel Wallace.

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SAMUEL L. LEWIS, JUDGE

CONCUR:

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HENRY F. TODD, P.J., M.S.

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BEN H. CANTRELL, J.

