

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC NO. 1391 OF 2013

JOHN ROKI WAITHAKA.....PLAINTIFF

VERSUS

JULIUS NJUGUNADEFENDANT

RULING

1. The Defendant/Applicant filed a Notice of Motion dated 27th September, 2018 in which he seeks to set aside the Judgement which was delivered on 31st January 2018 together with all consequential orders and that he be granted leave to defend this suit. The Applicant contends that he was not served with summons to enter appearance and file defence.

2. The Applicant states that he is a South African Citizen but that he comes to Kenya frequently. He states that as at the time the process server alleges to have served him, he was in South Africa. He exhibited a copy of his South African passport which shows that at the time he is alleged to have been served with summons to enter appearance and file defence, he was in South Africa.

3. The Applicant's application has been opposed by the Plaintiff/ Respondent through an affidavit sworn on 17th October 2018 by the Respondent's counsel. The Respondent contends that the Applicant is being economical with the truth and that other than the contested service of summons, the Applicant has been served with other Court processes such as notices of motions and other documents. The Respondent also argues that the Applicant who is also a Kenyan Citizen has failed to exhibit his Kenyan passport and that though he alleges to have learnt about the entry of Judgement in May 2018, it is not until September that this application was filed.

4. The Respondent further argues that the Applicant has no defence with triable issues and that he is only out to delay this matter by re-opening the hearing. The Respondent also takes issue with the Applicant's claim that he was not able to file the application in time as the court file was missing for some time.

5. I have considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the submissions filed herein. The only issue for determination is whether the Applicant has demonstrated grounds which will enable the court to set aside the ex-parte Judgement. The Applicant states that as at the time the process server alleges to have served him, he was way in South Africa. The Applicant has annexed a copy of his South Africa passport which shows that he exited Kenya on 3rd January 2013 after entering Kenya on 3rd December 2013 for the December Holidays .He again entered Kenya on 29th March 2014 and exited on 7th April 2014. It is therefore clear that he was not in Kenya on 31st January 2014 when the process server alleges to have served him.

6. It is therefore clear that there was no service summons to enter appearance and on this ground alone the Judgement which was delivered on 31st January 2018 cannot stand. I therefore allow the Notice of Motion dated 27th September 2018 in terms of prayer (3) and (4). The Applicant shall file a defence together with all the documents he intends to rely on within 14 days from the date of this Ruling.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 23rd day of January 2020.

E.O.OBAGA

JUDGE

In the absence of:

Parties who were aware of the date and time of ruling.

Court Assistant : Hilda

E.O. OBAGA

JUDGE