



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

ELC. NO. 75 OF 2013.

ALBERT ALEXANDER AGREY EKIRAPA.....PLAINTIFF/RESPONDENT

VERSUS

CHURCH COMMISSIONER FOR KENYA

(THE REGISTERED TRUSTEE)...DEFENDANT/APPLICANT

R U L I N G.

The Church Commissioners for Kenya Registered Trustees, through M/S. Otsula Kweyu & company advocates filed the Notice of Motion under certificate of urgency dated 8th December, 2014 for orders that;-

- ‘ 1. This application be certified urgent and heard *ex parte* at the first instance.
2. There be a temporary stay of execution of the judgment decree and all consequential order herein pending hearing and determination of this application.
3. That the honourable court be pleased to set aside the judgment entered against the Defendant on 13th November, 2014 and all consequential orders and the Applicant be allowed to file its Defence herein.
4. That the cost of this application be in the cause.’

The application is based on seven grounds marked (a) to (g) on the face of the application and affidavits of Desmond Mtula sworn on 8th December, 2014 and 7th February, 2015.

The application is opposed by Respondent, namely Albert Aggrey Ekirapa, through the affidavits sworn by his advocate, Joseph Vitalis Juma on 16th December, 2014 and 28th January, 2015.

I have considered the grounds on the application, contents of affidavits sworn by Desmond Mtulo, Joseph Vitalias Juma and the annexures thereto, and find as follows;-

1. That though the Applicant concedes being served with the summons in this case, the explanation that they got misplaced and therefore no action was taken thereafter is not convincing. The person who received the summons was not mentioned nor was explanation offered as to why no request was sent to the counsel appearing for the Respondent or the court for a replacement copy of the summons.
2. That the Respondent proceeded with the hearing in this case through formal proof and judgment

- was entered. That by the time this application was heard, the court's decree had been executed on 16th December, 2014 by deleting the Applicant's names from the suit land register and reinstating the names of Paul Eمويت Poudet, who was the original registered owner.
3. That this being a land matter and in view of many the decisions from the superior courts, in similar situations the court is of the view that the Applicant should be granted an opportunity to be heard in this case. Thereafter a decision on merit will be made. (*see Peter Wekesa –vs- Peter Wangusi Wasike*, Eldoret Court of Appeal No. 62 of 2003, *Richard Wefwafwa Songoi –vs- Ben Muniyifwa Songoi* Eldoret Court of Appeal No. 62 of 2006 and *Trust Bank -vs- Portway Stores (1993) Ltd & 4 others*. Nairobi HCC. No. 413 of 1997).
 4. That as the Respondent had served the summons and cannot be blamed for the Applicant's failure to file their papers, his costs in this application and thrown away costs should be met by the Applicant.
 5. That in view of the foregoing, the Applicant's application dated 8th December, 2014 is allowed as follows;-
 - a. The judgment entered in favour of the Plaintiff against defendant on 13th November, 2014 and all consequential orders are hereby set aside.
 - b. That the Defendant/Applicant allowed to file and serve their defence within 21 (Twenty one) days.
 - c. That the Defendant/Applicant to pay the Plaintiff/Respondent thrown away costs and costs of this application to be agreed or taxed and paid within 90 (ninety) days.
 - d. That so as to safeguard the status of the suit land while this case is determined on merit an inhibition against the title of the suit land North Teso/Angoromo/937 is to issue in terms of section 68 of the Land Registration Act No. 3 of 2012.

It is so ordered.

S.M. KIBUNJA,

JUDGE.

DATED AND DELIVERED ON 19th DAY OF MARCH, 2015.

IN THE PRESENCE OF ...MR. JUMA FOR PLAINTIFF/RESPONDENT

MR. KWEYU FOR DEFENDANT/APPLICANT

..... **COUNSEL.**

JUDGE.