

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 9 OF 2014

ESTATE OF KIPRONO Arap LETING *represented by*

ANDREW KIPROTICH RONO PLAINTIFF

VERSUS

PAULINE YEBEI1ST DEFENDANT

SAMUEL KUTTO2ND DEFENDANT

R U L I N G

1. The applicants filed a Notice of Motion dated **23/3/2015** in which they seek orders setting aside the judgment entered against them on **30/4/2014** together with all consequential orders and that they be allowed to file their defence. The applicants contend that they were not served with summons to enter appearance. They further contend that the affidavit of service filed by the process server is false and that the judgment should be set aside so that they are not condemned unheard.
2. The applicants' application is opposed by the respondents through a replying affidavit sworn on 30/4/2015. The respondent contend that the applicants were duly serviced with summons to enter appearance but that they refused to enter appearance and file defence. He further contends that the applicants application is meant to assist the applicants to avoid payment of costs and prolong this matter.
3. I have gone through the applicants application as well as the opposition to the same by the respondents. The applicants contend that they were not served with summons to enter appearance whereas the respondent contends that they were duly served. The issue which emerges for determination is whether the applicants were served with summons to enter appearance or not. The respondent who is the administrator of the estate of his late father **Kiprono Arap Leting** brought a suit against the applicants seeking a declaration that **L.R. No. Chepsiro/Kibuswa Block 1/Kapcheplanget/40** solely belongs to **Kipron Arap Leting**. He also sought for a permanent injunction restraining the applicants from cultivating the land. Summons were issued and given to the process server for service.
4. A process server called **Archibald Wekesa Nyukuri** went and served the applicants with summons to enter appearance. An affidavit of service was filed on 25/2/2014. In the said affidavit, the process server has described how he went to Kapcheplanget farm where he served the applicants with summons to enter appearance upon being identified by the respondent. The applicants received the summons but they refused to accept service by signing. When judgment was entered against the applicants, the counsel for the respondents taxed the bill and a notice to show cause was issued. Notice to show cause was served upon the applicants by the same process server. This time the applicants went and instructed their lawyer who appeared in court on the date when the notice to show cause had been fixed. This confirms that indeed the applicants were served with summons to enter appearance but they ignored to file defence. When they were served with notice to show cause, they acted because they knew that things had taken a different course. The applicants claim that the notice to show cause was delivered to them in an envelope by a teacher who is their neighbour is not true. The process server who served them with summons is the one who served them with notice to show cause. The said teacher never swore an affidavit to confirm that he is the one who was given an envelope to take to the applicants. I find

that the applicants were indeed served with summons to enter appearance but they chose not to enter appearance and file defence.

5. When it comes to setting aside an ex-parte judgment the proposed defence should also be considered even if the court has found that there was service. In the present case, the applicants have annexed their proposed defence to the supporting affidavit. In the said defence, they deny that they are cultivating the land as claimed by the respondent. They state that the land is being cultivated by one **Isaac Kimeto Keino**. They further contend that **L.R. No. Chepsiro/Kibuswa Block 1/Kapcheplanget/40** belonged to **Kimagut Arap Yebei** and **Isaac Kimeto Keino** and that **Isaac Kimeto Keino** has been living on the said land for over 20 years and that he has acquired prescriptive rights over the same. Kimagut Arap Yebei is husband of first applicant and father of second applicant. He has since died. The applicants have no interest in the land. The land is already registered in the name of the father of the respondent. Paul Arap Yebei had filed a suit against the plaintiffs' father seeking some acres from the plaintiff. This suit was dismissed for want of prosecution. It is on the basis of Paul Arap Yebei's claims that his family is still cultivating the land of the late Kiprono Arap Leting. The applicants have already stated that they are not the ones cultivating on the land. I find that this is just a mere denial. Their proposed defence does not raise any triable issues. If the said Isaac Kimeto Keino has acquired prescriptive rights over the land, it is not for the applicants to litigate on his behalf. The said Keino has to do that by himself. The respondent lives in the same area with the applicants. He could not have been wrong as to the persons who are cultivating his late father's land. The applicants have no interest in the land. They have no defence with triable issues. I therefore find that their application lacks merit. The same is dismissed with costs to the respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this **25th** day of **June, 2015**.

E. OBAGA

JUDGE

In the presence of Mr. Kraido for Mr. Ndarwa for Respondent and Mr. Teti for Mr. Bungei for the Applicant.

Court clerk – Isabellah.

E. OBAGA

JUDGE

25/6/2015