



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITALE**  
**PETITION NO.15 OF 2013**

**CLARE NASIMIYU WANJALA ..... PETITIONER**

**VERSUS**

**MOSES WAKWOMA KAKOI ..... 1ST RESPONDENT**

**DANSON SITATI SIMIYU ..... 2ND RESPONDENT/APPLICANT**

**THE LAND REGISTRAR TRANS NZOIA COUNTY .....3RD RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL ..... 4TH RESPONDENT**

**RULING**

1. Danson Sitati Simiyu the applicant herein brought a notice of motion dated 12.2.2015 in which he seeks to set aside the exparte Judgement entered against him on 4.2.2015. The applicant contends that he was not served with petition documents and that the affidavits of service filed herein contain falsehoods. That he does not have a wife called Annes Sitati as claimed in one of the affidavits of service. He contends that his wife is called Ruth Mukhono and not Annes Sitati as claimed in the affidavit of service. The applicant contends that he has a good defence with triable issues in that his plot which is registered is two points of an acre which he bought in 1998 whereas the respondent is claiming that her land is two acres.

2. The application is opposed by the respondent Clare Nasimiyu Wanjala who contends that the applicant's affidavit contains falsehoods and that the applicant is out to deny her from enjoying the fruits of her Judgement. She contends that the applicant had been attending court monitoring the proceedings and only came to file the present application after judgement had been entered in her favour.

3. I have carefully gone through the applicant's application as well as the response by the respondent. The issues which emerge for determination are firstly whether the applicant was served with the petition documents and secondly whether the applicant has any defence on merits. On the issue as to whether the applicant was served, I have gone through the affidavits of service filed by different process servers. The affidavits have fully described the applicant and the places where he was served. The applicant claims that he came to know about the existence of this suit through a CID officer who is his neighbour who went and told him that he had seen his name on a cause list in court. He did not disclose the name of the CID officer and the said CID officer did not swear an affidavit to support the allegations by the applicant. The applicant does not disclose the date the alleged officer saw his name on the cause list. The Judgement in this case was delivered on 4.2.2015. The applicant filed this application on 12.2.2015. It may well be true that he was actually monitoring the proceeding in this petition and only

came to act after he realized that the title he had had been ordered cancelled. I therefore find that he was properly served.

4. Even though I have found that the applicant was properly served, I am obliged to consider whether the applicant has any defence on merits. The petitioner herein was claiming that her plot is known as Elgon Investment Estate Limited Milele Plot 664. The applicant on the other hand contends that his plot is Kiminini / Matunda Block 7/664. The respondent contends that her plot is 2 acres whereas the respondent contends that his plot is two points of an acre and that it is not at the area where the respondent alleges her plot to be. In the circumstances, I find that the applicant's defence which is annexed to the application raised triable issues. The applicant ought to be given unconditional leave to defend the petition by the respondent. I accordingly set aside the judgment of this court delivered on 4.2.2015 as well as all consequential orders in place. The applicant is given 14 days within which to file a response to the petition. Costs shall be in the cause.

It is so ordered.

Dated, Signed and delivered at Kitale on this 17th day of June, 2015.

**E. OBAGA**

**JUDGE**

In the presence of the Applicant and Second Respondent . Court clerk - Isabella

**E. OBAGA**

**JUDGE**

**17.6.2015**