



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 57 OF 2013**

**PROF. ELIM LOKAPEL T/A TRANS AFRICA HIGH SCHOOL AND TRANS AFRICA  
INSTITUTE OF ADVANCED STUDIES ..... PLAINTIFF**

**VERSUS**

**WILLIAM LOMORU**

**JOHN LOCHINO**

**JAMES MZEE KATOLI**

**ESTHER AKIRU ADUI**

**ETHEKON EDHAN AKIRONYA**

**SELINA AKONO LOMENKUYA**

**ESTHER EPASS AWOSIT**

**HARON EKAI ECHWA**

**EREMON ASUNYEN LIMANYANG**

**REGINA AKIRU MATEING**

**ITAU EKAI**

**BENSON ESEKON EDUKON**

**REBECA ATABO ..... DEFENDANTS**

**R U L I N G**

1. The twelve applicants are defendants in this case. They had been sued in this case by the respondent. The applicants never entered appearance or filed defence. The case proceeded by way of formal proof and a judgment in favour of the respondent was given on 7/11/2013.
2. The applicants were prompted to file an application dated and filed in court on 11th December, 2013 after the respondent started executing the decree. The application is supported by the affidavit of William Lomoru who has authority of all the other applicants.
3. The applicants contend that they were never served with summons to enter appearance and that they only came to learn about this case on 5/12/2013 when the deponent was shown a decree dated

- 11th November, 2013. The deponent also contends that he consulted his co-applicants who informed him that they had never been served with summons to enter appearance and file defence.
4. The applicants further contend that the affidavits of service filed by the process servers do not state the true position as regards the alleged service. They contend that they have a good defence and that the ex-parte judgement should be set aside.
  5. The application was opposed by the respondent through a replying affidavit sworn on 18th December, 2013 and filed in court on 19th December, 2013. The respondent contends that summons to enter appearance were served upon all the applicants and affidavits of service to that effect filed.
  6. The respondent contends that he is the one who personally accompanied a process server called Ephraim Lokai Lojao when the summons to enter appearance were served. The respondent further contends that after service of summons to enter appearance upon the applicants, the applicants approached the County Government of Turkana who wrote him a letter dated 6/8/2013 in which the County Government of Turkana indicated to him that some community members had received summons asking them to attend court in Kitale and that the dispute between him and the applicants could be resolved if he withdrew the court case.
  7. The respondent contends that the applicants were aware of the case as demonstrated by the letter referred to in paragraph 5 hereinabove. He contends that the applicants are out to intimidate him and that some of them assaulted him when he went to enforce the court decree.
  8. I have carefully gone through the applicant's application as well as the objection to the same by the respondent. The issue which emerges for determination is whether the applicants were served with summons to enter appearance and other court documents. In applications such as this, the court should also consider whether there is a defence which raises triable issues.
  9. On the issue of service, I have no doubt that the applicants were served with summons to enter appearance. Service was effected by a process server called Ephraim Lokai Lojao who is attached to Lodwar Law Courts. At the time of service the process server was accompanied by the respondent who knew the applicants and who pointed them out to the process server. The said process server was availed by the respondent for cross – examination. He gave vivid details on how he served the thirteen applicants with summons to enter appearance and order of injunction. His evidence on service was not shaken during cross – examination and indeed the counsel for the applicants never submitted on the issue of service.
  10. The same process server who served the summons to enter appearance was the one who served a hearing notice for formal proof. The other documents such as bill of costs and decree were served upon all the applicants by a process server called Nahason Wadier Ongayo. This process server was accompanied by one James Lopoyok who was conversant with Turkana language and who knew the applicants. The affidavits of service were duly filed and they are detailed.
  11. The letter of 6/8/2013 written by the County Executive Committee member for lands, Physical Planning and Urban Areas Management Turkana County is clear that the applicants were aware of the case. They will not have gone to the office of Deputy Governor if they had not been served. The summons to attend court are specifically mentioned in the said letter. It is therefore not true for the applicants to claim that they first became aware of the case in court on 5/12/2013 when they were served with court decree. I find that the applicants were properly served.
  12. I am aware that I have unfettered discretion when it comes to considering applications such as this. Having found that there was proper service, I now move on to consider whether the applicants have a defence on merits with triable issues. In the *case of Ceneast Airlines Limited - Vs- Kenya Shell Ltd [2000] 2 EA the court of Appeal quoted with approval the following remarks of Duffus P in Patel versus EA Cargo Handling Service [1974] EA 75.*

***“The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean in my view, a defence that must succeed, it means as Sheridan J put it “a triable issue,” that is an issue which raises a prima facie defence and which should go to trial for adjudication”***

13. I have looked at the joint defence of the applicants annexed to the application. The applicants contend that the land is community land and that if there was any allocation by the defunct Lodwar Municipal Council, then the same was irregular and is a nullity. The applicants also contend that they were on the land prior to 2007 when the respondent alleges that they moved into his land. From the letter written by the County Government of Turkana office of Deputy Governor, it is clear that the applicants contention is that the respondent has expanded the boundaries of the plot which had been allocated to him. If this is the case, then this is not a ground for setting aside the judgement which was regularly obtained. All the documents pertaining to the land in issue are on record. The plot has been surveyed and beacons put in place. The applicants cannot simply uproot the beacons and come to court to say that they want to be heard.
14. The applicants have not demonstrated that they have a defence with triable issues. It is apparent from their conduct that these are people who are not interested in following the due process of law. They do not have respect for the due process of law. Some of them assaulted the respondent when he went to effect the decree of the court. There is a statement recorded with the police and OB number. There are also medical treatment notes. This is not conduct of people deserving orders of setting aside judgment. They have not demonstrated they have a case with triable issues. They are merely claiming that the land is community land. I find that the applicants application lacks merit. The same is hereby dismissed with costs to the respondent.
14. It is so ordered.

Dated, signed and delivered at Kitale on this 22nd day of May, 2014.

**E. OBAGA**

**JUDGE**

In the presence of Mr Kibii for respondent and Mr Teti for applicants.

Court Clerk – Kassachoon.

**E. OBAGA**

**JUDGE**