



**REPUBLIC OF KENYA**

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

**ELC CASE NO 5 OF 2012**

**SAMWEL SIGIRA A KOECH.....PLAINTIFF**

**VERSUS**

**VINCENT KIBET.....DEFENDANT**

**RULING**

1. The Defendant in this suit filed a Notice of Motion dated **25<sup>th</sup> April 2014** under **Order 10 Rule 11, Order 22 Rule (1), Section 3, 3A of the Civil Procedure Rules Act and Rules** and all enabling provisions of the Law, seeking substantive orders; **that the court sets aside the judgment entered against the defendant/applicant; that the defendant be allowed to enter appearance and file his defence out of time as well as costs for the application.**
2. The defendant makes this application on the grounds on the face of the application and supported by his affidavit sworn on **25<sup>th</sup> April, 2014**. He depones that he was not served with summons to enter appearance in person; that the same were received by the Chief of his location; that the Chief only gave them to him on **22<sup>nd</sup> July, 2013** when he returned home to attend his grandmother's funeral; that he later received a hearing notice for **28<sup>th</sup> August, 2013** and presented himself to court on the date of the hearing, but was not given audience as he had not filed any documents; that in the interests of justice and fairness, he should be allowed to file a defense out of time as he has a good defence.
3. The application was heard on **30<sup>th</sup> July, 2014**. **Mr Koech** represented the defendant/applicant while **Mr Sang** represented the plaintiff/respondent.
4. Mr Koech reiterated what was contained in the affidavit of the applicant. He submitted that failure to effect personal service upon the applicant was a contravention of the Civil Procedure Rules which require that a defendant must be served personally. He further submitted that the court should direct that the chief files an affidavit to explain this state of affairs. He urged the court to allow the application so that the applicant could file his defence, as the effect of the judgment would be to render him landless and a vagrant.
5. Mr Sang opposed the application. He relied on the replying affidavit dated **18<sup>th</sup> June, 2014** sworn by the plaintiff, in which the plaintiff deponed that the application was belated, brought in bad faith and meant to delay the course of justice as the defendant was present at the hearing (*for formal proof*) but never objected at any stage of the proceedings. Furthermore, there was an affidavit of service filed on **6<sup>th</sup> June, 2013** in which the process server deponed that the defendant was properly served. He prayed that the application be struck out.
6. Before I consider the merits of the application before me, I must point out that this is a very strange application, more so because the same was filed by an Advocate of the High Court of Kenya. I say this because, had the said advocate bothered to read the judgment delivered by this court on **31<sup>st</sup> October, 2013**, I doubt he would have found it necessary to file the current application. This court struck out the plaintiff's suit for the reason that the plaintiff had not proved his case to the required standard. That in my view got the defendant off the hook.
7. I cannot in my wildest dreams imagine why the defendant or his counsel would wish to challenge that Judgment. By denying the plaintiff the orders he was seeking of a permanent injunction and eviction of the defendant from the suit land, the defendant actually won the case. What is even more puzzling is that counsel for the plaintiff was mum about this issue during the hearing of the

application.

8. I choose not to say anymore on this matter. I do not see any point in addressing the merits of the application and I dismiss the same as I find it a total abuse of the process of the court, properly so defined. Costs of this application shall be borne by the defendant/applicant.

**Dated and delivered at Kericho this 24<sup>th</sup> day of September, 2014**

**L N WAITHAKA**

**JUDGE**

**In the presence of:**

- Mr J K Koech for the Applicant
- Mr Mutai holding brief for Mr Sang
- Court Assistant: Richard Korir