



REPUBLIC OF KENYA

High Court at Eldoret

Civil Case 92 of 2006

BENJAMIN K. MITEL.....PLAINTIFFS

VERSUS

MARY CHEPNGENO CHESAINA.....RESPONDENT

RULING:

The Application is brought by way of Notice to Motion under the provisions of Order 10 Rule 11 of the Civil Procedure Rules 2010 and is dated the 13th July, 2011.

The Applicant relies on the grounds on the face of the Application and on the supporting Affidavit made on the 13th July, 2011.

The Applicant is seeking to set aside the Judgment entered and is also seeking unconditional leave to file a Statement of Defence.

The Applicant avers that service was improper and that she was not served with the summons to Enter Appearance.

The Applicant maintains that she is the registered proprietor of the suit land and that she has actual use and possession of the land.

That the matter pertains to land and that she intended Statement of Defence raises triable and contentious issues.

The Court was urged to exercise its discretionary powers and to allow the Applicant to defend the suit.

Reference was made to the decision of the Court of Appeal; **KINGSWAY TYRES & AUTOMART LTD C.A NO. 220 OF 1995** where it was held that;

“.....a court may set aside an ex-parte Judgment if a defendant shows he has a reasonable defence on merits.....”

Counsel for the Applicant urged the court to allow the application in order to dispense justice to all parties concerned.

The Application was opposed and the Respondent relied on the Replying affidavit filed on the 16th January, 2012.

Counsel submitted that proper service was duly effected on the Applicant who failed to enter appearance and file defence. The Respondent was also served with the Notice of Judgment. Counsel argued that the Applicant is guilty of “**LACHES**” and that application was made in bad faith with the sole purpose of delaying the conclusion of the matter.

Cornelius urged the court to dismiss the application as the intended statement of defence raised no triable issues.

This court has heard the submissions and arguments of both Counsel for the Applicant and Respondent and finds the following issues for determination;

- i. Service of Summons
- ii. Setting aside of the Judgment
- iii. Costs

The court has perused the Affidavit of Service made by **VINCENT OTIENO OGUTU**, the process server, and finds that the manner in which the summons were effected upon the Applicant to be satisfactory.

Notwithstanding the issue of regularity of service the Applicant must show the court that she has a reasonable and merited defence so as to satisfy the court so that it may invoke its discretionary power and set aside the exparte judgment. Refer to **KINGSWAY TYRES& AUATOMART LTD -VS- RAFIKI ENTERPRISES LTD C.A 220 OF 1995**

The Applicant has annexed to the application a draft statement of Defence. This court is of the view that it would have been prudent for the Applicant to have included and annexed a copy of her title in support of her claim, this would have influenced the court to exercise its discretion in her favour. Refer to Order 3 of the Civil Procedure Rules.

CONCLUSION

For the reasons stated above this court finds that the Applicant has not shown sufficient cause to justify the setting aside of the exparte judgment entered.

The application is hereby dismissed with costs to the Respondents.

It is so ordered.

DATED and DELIVERED at Eldoret this 17th day of January 2013.

**A.MSHILA
JUDGE**

Coram: Before Hon. A Mshila J
CC: Oscar
Chepkwony: For Respondent.
No appearance for the Appellant.

**A.MSHILA
JUDGE**