



REPUBLIC OF KENYA

High Court at Busia

Civil Case 74 of 2011

MELTUS WANYAMA OBWETE.....APPLICANT

=VERSUS =

MAURICE WANDERA NABUYA.....DEFENDANT.

R U L I N G.

The Applicant, **MAURICE WANDERA NABUYA**, through his advocates, M/S. Ashioya & company Advocates, filed the application by way of Notice of Motion dated 28.06.2012 praying for the setting aside of the interlocutory judgment, ex parte proceedings and judgment entered against him. He also prays for costs to be provided for. The application had been filed under certificate of urgency and was certified as such on 11.07.2012. The application is based on the six grounds (a to f) on the face of the Notice of Motion and the supporting affidavit sworn on 10.07.2012 by Maurice Wandera Nabuya. The applicant inter alia depones:

1. That the suit was filed against him for eviction from Samia/Budongo/637 and judgment entered against him for non-appearance and failing to file defence.
2. That he and his family lives on the said land and if evicted he will suffer irreparable loss.
3. That the said land does not solely belong to the Respondent.
4. That he was not served with suit papers in this case but as he has since obtained limited grant ad colligenda bona to the estate of his deceased brother's estate he should be given a chance to file defence and counter claim.

The application is opposed by the Respondent, Meltus Wanyama Obwete who filed a replying affidavit dated 10.09.2012 through his advocates M/S. Wetang'ula, Adan, Makokha Advocates. He among others depones:

1. That the Applicant was indeed served and chose not to defend the suit.
2. That his co-owner to land parcel Samia/Budongo/637 Isaac Omolo is survived by only one sister called Felecia Nabwire Lubia and Applicant is therefore a stranger to the suit land.
3. That the Applicant has his own land and had no reason to trespass into land parcel Samia /Budongo/637.

On 20.02.2013, Mr. Ashioya and Mr. Mutiso Advocates for Applicant and Respondent respectively entered a consent that the Notice of Motion application dated 28.06.2012 be disposed by filing written

submissions within a specified duration. None of the counsel filed the submission within the time agreed as they were filed on 05.04.2013 for Applicant and 19.04.2013 for Respondent.

I have considered the submissions by both counsels.

The main contention by the Applicant is that he was not served and only came to know of this case when he visited the court registry to file for a limited grant. The Respondent contends that he was duly served. He states in paragraph 4 of his replying affidavit sworn on 10.09.2012 as follows:

“ 4. That I know of my own knowledge that on 19.10.2011 I accompanied the process server one Jacob W. Waliaula and directed him to the home of the defendant herein and on sighting the plaintiff (Defendant) who was in his home I duly informed the process server who proceed (proceeded) to the said home and effected service as retreated (required) “

The process server, Jacob W. Waliaula, filed an affidavit of service sworn on 19.10.2011 and at paragraph 4 of the said affidavit states:

“ 4. That on 19.10.2011 while using the direction received from the plaintiff’s Advocates officer I proceeded to the defendant’s home situated at Bululumba village in which I found one who introduced himself as Maurice Wandera Nabuya, the defendant herein whom after introducing myself to and my intention, I served him by tendering duplicates of Notice of Motion, summons to enter appearance, plaint and verifying Affidavit thereof to him at 8.30 am and he acknowledged receipt of the same by signing on the reverse of the summons and Notice of Motion.”

The process server did not mention in his affidavit of service that the plaintiff had accompanied him during the service. If indeed the plaintiff had accompanied the process server during the service the latter would have stated so. Instead the process server states he relied on the direction he had received from the plaintiff Advocates office. This contradiction leaves doubts as to first whether the Defendant had been properly served with the suit papers and secondly when the service was effected if at all. Was it in the presence of the plaintiff or in his absence?

The suit as filed by the Plaintiff/Respondent was for injunction against the Defendant/applicant and eviction alleging he had trespassed on the land in 2011. The Applicant has in his supporting affidavit annexed a copy of a grant Ad litem issued in Busia P & A 55 of 2012 in respect of the estate of Isaac Omolo Nabuya who died on 23.06.1972. The said Isaac Omolo Nabuya was the co-owner with Respondent of Land parcel Samia/Budongo/637 which the Respondent in this suit want Applicant to be evicted from and to be enjoined from any dealings.

Even though the Applicant’s did not annexe a draft defence to the application the contents of the supporting affidavit gives a very good idea on the kind of claim the applicant is likely to raise if given a chance to defend the suit. The court is of the considered view that the Applicant would still have the option of initiating a fresh matter against the Respondent on the basis of collecting the properties forming part of Isaac Omolo Nabuya’s estate now that he has the grant Ad litem. The court therefore finds it is only fair the Applicant be afforded that opportunity in this suit now that he has shown the interest on condition he meets the costs so far incurred by the Respondent in this case.

The application dated 28th June, 2010 and filed in court on 10th July, 2012 is allowed as follows:

1. The interlocutory Judgment, exparte proceedings and Judgment entered on 28th May, 2012 are hereby set aside.
2. The Applicant is hereby directed to ensure he files and serve his defence within fourteen (14) days and Respondent granted leave to reply if need be.
3. That the Applicant will meet the Respondents costs incurred up to today to be agreed by counsel or as

taxed before the Deputy Registrar. Such costs as agreed or taxed to be paid within 30 days.

S. KIBUNJA.
JUDGE,

21ST MAY, 2013.