



**REPUBLIC OF KENYA**

**High Court at Kitale**

**Civil Suit 116 of 2012**

**JACOB KARI KAMONI ..... PLAINTIFF**

**VERSUS**

**EMILY CHERONO ..... DEFENDANT**

**R U L I N G**

This is a ruling in respect of a Notice of Motion dated 25/03/2013. The Applicant seeks for an order setting aside the proceedings and judgment in this matter and for leave to file her defence out of time. The Applicant contends that she was not served with summons to enter appearance and defence which resulted in the case herein being heard ex-parte. She also contends that the Respondent herein is seeking to evict her from Plot No. 838/13 at Moi's Bridge based on a decree issued in respect of Plot No. 838/58. The application is opposed by a Replying Affidavit sworn by the Respondent Jacob Kari Kamoni. The Respondent contends that the Applicant was duly served with Plaint and Summons to enter appearance but that she failed to file defence. He also contends that the land parcel referred to in the Applicant's application is different from the one which is subject of this suit. He further contends that the Eldoret High Court Civil Case 185 of 2009 concerns a different subject matter from the current one.

I have carefully considered the application herein and what is emerging is rather disturbing . The Applicant has not come to tell the truth about what is happening herein. From what I gather from the documents in this file, the Respondent herein and Jamen Kiombe Lidodo the former husband of the Applicant filed a suit against her in the lower court being Kitale Senior Principal Magistrate Civil Case No. 664 of 1999. In a judgment delivered on 06/11/2003 the Magistrate inter-alia ruled that the first Plaintiff Jamen Kiombe Lidodo was entitled to half share of Plot No. 838/13. The present Applicant who was the Defendant in that suit was aggrieved by the judgment and she preferred an appeal against the same in Kitale High Court Civil Appeal No. 5 of 2004. When the appeal came up for hearing, the Advocate for the Respondents raised a preliminary objection on the ground that, there was no decree attached to the memorandum of appeal. The objection was sustained and the appeal struck out. It is not clear whether there was an appeal against the ruling striking out the appeal or whether a fresh appeal was filed. Though it is not clear from the record herein, it would appear that the Respondent herein moved on the basis of the decree of the lower court and had the plot sub-divided and plot No. 838/58 resulted from the said sub-division. I say so because one of the documents produced in the hearing which is now being challenged was a deed plan which shows that Plot 838/58 was as a result of sub-division of Plot 838/13. It is not clear whether this sub-division was carried out to completion. The Respondent herein does not say anything about it. What complicates this matter is that the Applicant herein has annexed a copy of official search which shows that the Applicant with another person are the registered owners of Plot 838/13 which is 0.1148 of a hectare. The indenture in respect of the Respondent's Parcel No. 838/58 shows that the plot is also 0.1148 of an hectare. If indeed there was sub-division of 838/13, the acreage of Plot No. 838/58 will not have remained the same. This then shows that the sub-division may not have been done. This then leaves so many questions unanswered. It is also not clear why the Applicant herein decided to file a case in Eldoret High Court when it is not clear what happened to Kitale SPM CC No. 664 of 1999.

The process server who served the Applicant herein merely states in her affidavit of service that she served the Defendant in her shop opposite Kenya Commercial bank Moi's Bridge. The process server did not say how she identified the Defendant. She did not say whether the Defendant was introduced to her or how she came to know that it was the Defendant that she served. I find that this affidavit of service

is wanting for lack of description on how she came to know that whoever she served was the Defendant.

The proceedings herein have to be set aside as well as the judgment. The Applicant/Defendant is granted leave to file and serve defence within 14 days from the dater hereof. The Applicant shall also have costs of this application.

It is so ordered.

**Dated, signed and delivered in Open Court on this 17th day of May, 2013.**

**E. OBAGA**

**JUDGE**

In the presence of Mr. Gatune for Plaintiff/Respondent and Defendant/Applicant.

Court Clerk: Koskey.

**E. OBAGA**

**JUDGE**

**17/05/2013**