



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

ELC SUIT NO. 938 OF 2012

JOSEPH NGIGI KAHIU.....PLAINTIFF/RESPONDENT

VERSUS

NDETIKA RURAL S

ACCO SOCIETY LTD.....DEFENDANT/APPLICANT

RULING

On the 4th December, 2012 the plaintiff/respondent herein, **Joseph Ngugi Kahiu** filed a Notice of Motion seeking for orders that the Defendant herein Ndetika Rural Sacco Society Ltd be directed and/or ordered to forthwith release and deliver to the plaintiff his title deed No. NDEIYA/NDEIYA/1563.

The said application came up for hearing on 5/2/2013 before Justice Gitumbi. The Defendant/Applicant was absent and upon perusal of the Affidavit of Service by the court, the court allowed the application dated 4/12/2012, as the court was satisfied that there was proper service.

On 26/2/2013 the defendant/applicant herein filed instant application under Order 51 Rule 1, of the Civil Procedure Rules and Sections 3A and 63 of the Civil Procedure Act. The applicant/respondent has sought for their orders.

- a. Spent
- b. Spent
- c. That the orders made exparte by the Honourable Court on 5/2/2013 and all other consequential orders be set aside.
- d. That defendant be granted leave to defend the plaintiffs' application dated 4th December, 2012 and that the same be heard on merits.
- e. Costs be provided for.

The application was premised on these grounds: -

- a. That the Plaintiff's advocates process server deponed a false affidavit that he had served the Defendant with the hearing notice.
- b. That no documents of the suit or application were served on the Defendant.
- c. That the Defendant has a good defence to the suit and the application dated 4/12/2012 should be heard on its merit.

The application was also supported by the annexed affidavit of **Joan Mbesya** the General Manager of the defendant. She averred that though the process server alleged that he served the hearing notice dated

24/1/2013 to the General Manger called Mary Withera, there was no employee of the defendant known as Mary Withera. She further averred that she was the General Manager of the Defendant Sacco and the said documents were never received in their offices. That they have a good defence and the orders issued on 5/2/2013 should be set aside and matter heard and decided on merit.

The application was opposed. The plaintiff/respondent, **Joseph Ngugi Kahiu** swore a replying affidavit and averred that the application as filed is fatally defective, incompetent, misconceived, bad in law and without merit and there are no basis for the sought orders as repeated service had been effected on the defendant's agents who deliberately refused to acknowledge such service.

That the defendant has not disputed having his title deed for L.R No. NDEIYA/NDEIYA/1563 and the draft defence has no legally justifiable reasons for failure or refusal to release the same to the Respondent. That the application is an after thought geared to deny him his title deed and therefore disentitle him of his right to deal with the land.

The parties canvassed the application through written submissions. I have considered the pleadings, the annexures thereto and the written submissions and I make the following findings: -

The applicant brought the application under Order 51 Rule 1 of the Civil Procedure Rules and Section 3A and 63 of the Civil Procedure Act. However the applicant has sought for an Order of **setting aside** an exparte order. Such an application ought to have been brought under Order 10 Rule 11 which provides for setting aside of judgement. It reads as follows: -

“Where judgement has been entered under this order, the court may set aside a vary judgment and any consequential decrees or order upon such terms as are just.”

The defendant did not appear on 5/2/2013 and so orders were issued against the said defendant for non-appearance or default of defence. That was therefore a consequence of non-appearance and applicant ought to have premised his application under order 10 rule 11. However failure to quote the rules under which the application was based is not fatal to the application. The applicant has relied on Section 3A of the Civil procedure Act which gives the court the ***inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.***

The applicant herein stated that he was not served with the Summons to enter appearance nor the Notice of Motion upon which the orders dated 5/2/2013 were issued.

Order 5 Rule 1, deals with the issue of summons and it states; -

“When a suit has been filed a summon shall issue to the Defendant ordering him to appear within the specified time therein.”

The plaintiff herein filed the suit on 4/12/2012 which was accompanied by a Notice of Motion even dated. The court ordered the said Notice of Motion to be served on the normal way after date was taken in the registry.

From the court's record, the Plaintiff took a hearing date on 6/12/2012. The application was set for hearing on 5/2/2013. The Plaintiff therefore did to serve the Hearing Notice together with the Notice of Motion, Summons to enter appearance and the Plaintiff.

The affidavit of service filed in court on 5/2/2013, shows that one Frank Matoke served a Hearing Notice to the defendant. No evidence that the process server also served the Notice of Motion, the Summons to enter appearance together with the Plaintiff.

Order 10 Rule 2 of the Civil Procedure Rules is very clear on the affidavit of service. It states as follows:

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“Where any defendant fails to appear and the plaintiff wishes to proceed against such defendant, he shall file an affidavit of service of the summons unless the summons have been served by the process server appointed by the court.”

The process server herein only served the **Hearing Notice** and not the Notice of Motion nor Summons. That is therefore not proper service. In the case of *John Akasirwa vs Alfred Inat Kimuso, Civil Appeal No. 16 of 1999 LLR 7372*, the court held it at;

“Proper service of summons to enter appearance in litigation is a crucial matter in the process whereby the court satisfies itself that the other party to the litigation has notice of the same and therefore choose to enter appearance or not”.

In the instant case, there is doubt as to whether there was proper service of Summons and the Notice of Motion in question.

The court has discretion to set aside an ex parte judgement or order but such discretion should be exercised judicially.

The defendant/applicant has stated that it has a merited defence with triable issues. It is also trite law that the court is vested with unfettered discretion in dealing with an application for setting aside judgment. This was held so in the case of *Pthon Waweru Maina vs Thuku Mugira (1982-88) KAR 171*

In the instant application there is no doubt that the Defendant/applicant is retaining the plaintiff's title deed for NDEIYA/NDEIYA/1563.

The Defendant has attempted to give reasons why it is retaining the said title deed in its defence and replying affidavit. I have considered that defence and it raises some issues which needs to be considered by the court.

The court has considered that defence and finds that it raise triable issues which should be canvassed at the trial.

I will be guided by the case of *Nimrod vs Joseph Momanyi Civil Appeal No. 35 of 1998*. Where the court held that ***“on an application for setting aside judgement, a court should look at the nature of defence even if there is no sufficient cause for non-attendance and a litigant should not be deprived of an opportunity of pressing his defence”***

The applicant/respondent should be granted an opportunity to state why it is not necessary to order that the title deed in question should be returned to the Plaintiff/Respondent.

I will also rely on the case of *Tree shade Motors Ltd Vs DT Dobie & Co. Ltd Civil Appeal No. 38 of 1998* where the court held that

“Even if service is valid, judgment will be set aside if defence raises triable issues.”

Having considered the submissions herein and the quoted authorities and the relevant law, the court finds that it is **proper** and **just** to allow the applicant's application. The court is empowered to do so by Section 3A of the Civil Procedure Act.

Consequently the court allows the applicant's/respondent's application dated 26/2/2013 and **set aside**, the ex parte order issued on 5/2/2013 and all other consequential orders thereto. The defendant is granted leave to defend the plaintiff's application dated 4/12/2012 so that the same is heard and decided on merit.

Cost of this application be in the cause.

It is so ordered.

Dated this 29th day of **August**, 2013.

L.N. GACHERU

JUDGE