



REPUBLIC OF KENYA

High Court at Eldoret

Civil Suit 118 of 2005

YOHANA WEKUNDA NAMIRANDA.....PLAINTIFF

VERSUS

KEFA LIHANDA ALEGO.....DEFENDANT

RULING

The Defendant presented a Chamber Summons application dated 29th July 2008 seeking orders:

- a) ...(spent)
- b) **THAT the ex parte judgment entered against the Defendant be set aside and the Defendant be granted leave to file defence out of time and defend this suit in terms of draft annexed defence.**
- c) **THAT there be a stay of any further execution of the decree and the warrant of arrest against the Applicant be lifted.**
- d) ...(spent)
- e) **That the Plaintiff his servants and or agents o any person acting in his capacity and or behalf be restrained by way of temporary injunction from selling and transferring and or taking possession of a portion of 2 acres of land, of Kakamega/Mautuma/482 which the Defendant has claim and has been in occupation to any other person and or parties pending hearing and determination of the suit.**
- f) **That costs of this application be provided for.**

The application was supported by the affidavit of the Defendant and it was founded on the grounds that the matter proceeded ex parte after judgment was entered in default of appearance. That there was no proper service of the summons and plaint. That the Defendant came to learn of the existence of this suit after his arrest on 13th June 2008 and was never served with any documents. That the Defendant was served the mandatory 10 days notice of entry of judgment upon his arrest. That the Defendant has a good defence to the Plaintiffs' claim that raises triable issues. That it is fair and just that the Defendant be granted leave to defend. The Defendant deposed that his father had bought two acres of land from the Plaintiff prior to his death. That he is a son to James Lihanda Alego who died on 21st August 2003. That his father took immediate possession of the land as the Plaintiff processed subdivision and transfer. That the Plaintiff had demanded balance of the purchase price of Kshs. 43,000/= through his lawyer Onchiri & company sometime in February 2004. That he went to put up structures on the land on 7th March 2005. That the Plaintiff descended on him and beat him up on allegations that he was a trespasser. He proceeded to make a report at Mautuma police station and the Plaintiff was charged in Eldoret law courts criminal

case no. 1806 of 2008.

The Plaintiff filed a replying affidavit on 4th August 2008. He maintained that the exhibit adduced by the Plaintiff in support of sale of his land to his father are forgeries. That he is not aware that the Defendant is the son of the late James Lihanda Alego. He admitted that he entered into an agreement with James Lihanda Alego but it was not the one annexed. That the genuine agreement did not contain the particulars of the land. The Plaintiff relies on affidavit of service filed by process server who is stated to have served the Defendant. On the question of land the contention of the Plaintiff is that he has never been paid in full. There is a balance owing.

I have considered the submissions of the parties and the evidence placed before me. I wish to start by commenting made by the Defendant. Apart from seeking that he be granted leave to defend, he also seeks an injunction to restrain the Plaintiff from selling two acres of the parcel of land in dispute. Procedurally the prayer for an injunction even before leave is granted to defend appears to be incompetent if not an abuse of the process. I will not concern myself with the merits of the application because I believe it is prematurely made. I will strike out prayer (e) as incompetent at this stage.

The core issue is whether the Defendant has shown any basis to enable this court to exercise discretion in his favour. In an application to set aside judgment for default the applicant must satisfy the court that there is good cause that prevented him from taking cognizance of the court proceedings. Service of summons has been challenged by the Defendant. The Plaintiff relies on a affidavit of service sworn by Vincent Ogutu on 30th January 2006. Vincent stated that on 7th January 2006 in the company of a 'boda boda' called Japheth Serete he was shown the home of the Defendant by the said Japhet and he went there but did not meet the Defendant but met his wife called Angela. Vincent deponed that the said Anjela accepted service on behalf of her husband and she did this by signing at the back of the summons which he returned to court as evidence of service. The summons filed in court is signed and the name "Anjela Nyangasi" appears at the back. There is therefore no reason to doubt service on the wife. As a matter of fact the Defendant contends that he was not served personally. The issue to resolve is whether service on the wife was sufficient and good service.

Order V rule 9 (1) provides that whenever it is practicable service shall be made on the Defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient. The Plaintiff contends that he served under Order V rule 12. It provides that where in any suit the Defendant cannot be found service may be made on an agent of the Defendant empowered to accept service or on any **adult member of the family** of the Defendant who is residing with him. The affidavit of Vincent Ogutu does not state that the Defendant could not be found. He deposes that he was informed that the Defendant was in Nairobi and would be back on 10th January 2010. Diligent service would have demanded that the process server makes a second attempt on the said date. The danger of not serving a Defendant personally is inherent on the assumption implicit that the person served will convey the summons to the Defendant. The person may forget inadvertently. In such a case it becomes oppressive on a Defendant to insist on entering judgment in circumstances where he has not had an opportunity to resist the claim. It would be contrary to the principles of natural justice.

I have also looked at the draft defence and considered the issues raised by both parties. The contention of the Plaintiff is that he was never paid in full. He does not deny selling land to James Lihanda Alego. The Defendant on the other hand derives or claims title from James Lihanda Alego and states that they are pursuing Succession proceedings. The Defendant has not been sued in a representative capacity but in his own natural capacity. He is therefore entitled to resist the claim even before obtaining a grant of representation. He could be a trespasser but he must be served for his day in court.

The contention by the Plaintiff's counsel that wrong provision of the law have been cited does not deprive this court of power to deal with the application before it. Order L rule 12 is answer to Plaintiff's contention. It provides that every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated but no objection shall be made and no application shall be refused merely by reason of failure to comply with this rule.

For these reasons I am persuaded that the Defendant has shown cause to enable me exercise my discretion and set aside the judgment of 21st July 2007 which I hereby do and all subsequent execution proceedings against the Defendant. The Defendant shall file and serve his defence within 14 days. Surety is discharged and his title ordered to be released to him.

Dated AND SIGNED at Nairobi this 23RD day of AUGUST 2012

M.K. Ibrahim
Judge

DATED AND Delivered At Eldoret on This 27TH Day Of SEPTEMBER 2012.

ABIGAIL MSHILA

Judge

In the presence of: Ayuma h/b for Wafula for Respondent

N/A for Appellant