

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
Civil Case 101 of 2004

JAMES KIKECHI.....PLAINTIFF

~VRS~

SEPSITIANO WAFULA.....1ST DEFENDANT

DAVID MWECHER CHENGWONY.....2ND DEFENDANT

RULING

On the basis that the Defendants had been served with summons but had failed to enter appearance or defend the originating summons, the court received the evidence of the Plaintiff in formal proof and gave him judgment in the matter. In the suit, the Plaintiff claimed to have acquired 14.8 acres of land parcel no.Elgon/Chemoge/188 registered in the name of the 2nd Defendant by adverse possession on account of his having had open, peaceful and continuous possession of the land for over twelve years since he bought it on 13/10/1968 from the Defendant's father Joseph Kutukhulu who was the registered proprietor. Joseph Kutukhulu passed on in 1977 before he transferred it to the Plaintiff. The court found for the Plaintiff against the Defendants jointly and severally and directed the Land Registrar to rectify the register in respect of the suit land by rectifying the register by deleting the name of the 2nd Defendant as the registered proprietor and substituting it with that of the Plaintiff.

In the instant application the 2nd Defendant has asked that the *ex-parte* judgment and all consequential orders be set aside so that he can be allowed to defend the suit. The ground upon which the application was made was that the 2nd Defendant was not served with summons to enter appearance and was therefore not aware that he had been sued. The response by the Plaintiff was that the 2nd Defendant was served, and properly so.

Under Order 12 rule 7 of the Civil Procedure Rules (what used to be Order 9 A rule 10) the court has wide and unfettered jurisdiction to set aside any default judgment on terms that are just to the parties and the circumstances of the case. If there was no proper or any service of summons to enter appearance, the resulting default judgment is irregular which the court should set aside as a matter of course (**Remco Ltd v. Ministry Jadva Parbat and Co. Ltd and Others [2002] 1 EA 233**). In such a case the court has no discretion to exercise. If the Defendant was served with summons but did not enter appearance or defence, the default judgment is a regular one. The court has unfettered discretion to set it aside on such terms that are just. In dealing with an application to set aside in such a case, the court's concern should be to do justice between the parties, avoid hardship resulting from accident, inadvertence, excusable mistake or error and not to assist a person who has deliberately sought, by evasion or otherwise, to obstruct or delay the course of justice (**Patel v. EA Cargo Handling Services Limited [1975] EA 75**).

The issues to be considered include whether the application has been brought timeously, whether the defendant can reasonably be compensated by costs for any delay or inconvenience occasioned by the setting aside, and, most important, whether the defendant has a defence that raises triable issues. Finally, it should be remembered that to deny the subject the right to have his dispute resolved on merits is the last thing a court of law should do (**Maina v. Mugiria [1983] KLR 78**).

This is a land matter. The 2nd Defendant has annexed a proposed defence. The land in dispute, it should be recalled, is registered in the name of the 2nd Defendant. The court has ordered that that registration be cancelled and his name be replaced by that of the Plaintiff. He has not been heard in the matter. In law, the registration made him the *prima facie* absolute and indefeasible owner of the land. That claim is about to be taken away when he has not been heard.

Why was the 2nd Defendant not heard? He states that he did not know that the Plaintiff had filed this suit against him and had not served him with summons to enter appearance. The annexed affidavit of service states that on 20/9/2007 the process server Bakari Juma Musima served a copy of the originating summons, supporting affidavit and annexures on the:-

“Defendant personally, who accepted service but declined signing at the back of the original copies.”

The “*Defendant*” in question was the 2nd Defendant. The affidavit does not say that among the documents that were served was a copy of summons to enter appearance. It follows that the claim by the 2nd Respondent that he was not served with summons to enter appearance is true. The 2nd Defendant states that he was in fact not served at all. He raises the question how the process server was able to trace him. The process server did not swear that he knew the 2nd Defendant before. He did not say he was accompanied by the Plaintiff or any other person who knew him to point him out for service. The court accepts that he was not served with summons, or any other documents in the case. The result is that the default judgment was irregularly entered and is hereby set aside *ex debito* justicie. Costs shall be paid by the Plaintiff.

Dated, signed and delivered at Bungoma this 17th day of September, 2012.

A. O. MUCHELULE
JUDGE