



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

HCCC NO.34 OF 2009

ODHIAMBO MAYUNGA.....PLAINTIFF

~VRS~

PIUS WANJALA SAENYI.....1ST DEFENDANT

RICHARD PIUS WANJALA.....2ND DEFENDANT

RULING

By consent of the parties this application dated 8th March 2011 is to be heard by way of affidavits. The Defendant's notice of motion filed on 18/03/2011 seeks for setting aside interlocutory judgment entered on 14/7/2009 and all consequential orders. It further prays for orders to grant leave to the Defendant to file defence out of time and the suit to be heard on merit.

The facts leading to this application are that there has been a long standing land dispute between the parties involving land reference number WEST MATEKA/KHASOKO/270 which led to suit Bungoma SRM CC No.39 of 1980 being filed. The Applicant/Defendant benefited in the suit where as it was ordered that subdivision be done to excise his portion out of the suit premises. The sub-division resulted in the Applicant's land L.R. NO.WEST BUKUSU/KHASOKO/704. The Plaintiff filed this suit HCCC NO.34 of 2009 on 30/04/2009 seeking to nullify the orders of sub-division given in favour of the Defendant in the earlier suit.

The grounds relied on by the Applicant are that he was not served with the plaint and summons to enter appearance in this suit. He depones in his supporting affidavit that the affidavit of the process server is full of false hoods claiming that service was effected but the Applicant refused/neglected to attend.

The Respondent/Plaintiff opposes the application on grounds that service was effected and that the Applicant appointed Nakhone & Co. Advocates to represent them. The counsel then filed a chamber summons on behalf of the Applicant and appeared in court once together with the Respondent's advocate. It is also contended that the Applicant's counsel is not properly on record.

I have looked at the affidavit of service in the court file. Paragraph 3 shall and does not adequately describe the places of residents of the two defendants. It reads:

“That on the same date accompanied by the Plaintiff we proceeded to Nasianda and went further to Lubunda village.”

The time of service on the 1st Defendant is not indicated in the affidavit. The above quoted paragraph does not show whether the Defendants both live in the same area, compound or village. It is not clear whether one of them lives at Nasianda and the other at Lubunda village. Is Nasianda a market, a village or a sub-location? Paragraph 10 states that the 2nd Defendant was served. He accepted service and signed on one copy. Surprisingly the said copy of the signed document was not attached to the affidavit of service or to the replying affidavit. It is important to note that to the replying affidavit was not annexed a copy of the process server's affidavit.

The Respondent states that the Applicant was served because he even instructed an advocate who appeared in court once and filed an application for the Respondent. The advocate Nakhone & Co. was instructed after the Applicant came to know of the existence of the suit. The suit was filed on 30/04/2009. The notice of appointment is undated and filed on 21/10/2009 which was about six (6) months after filing the suit. Interlocutory judgment was entered on 14/7/2009 which was three (3) months before the advocate came on record.

I find that the replying affidavit does not contain any valid opposition to the application. The issue of the current advocate being improperly on record was not expounded or explained. I will therefore disregard this argument.

The defence of the Applicant is that the land which is the suit premises is registered in his name. He has a right to defend his legal rights of property ownership. He also has a right to be accorded an opportunity to be heard. The fact that the Applicant was not served as required works in his favour in this application. Having found that the Defendant has a good defence, I find the application merited. The same is allowed as prayed. The Defendant to file and serve his defence within 14 days. Costs in the cause.

F. N. MUCHEMI

JUDGE

Ruling dated and delivered on the 12th day of July, 2011 in the presence of Mr. Onchiri for the Plaintiff and Mr. Makali for the Defendant.

F. N. MUCHEMI

JUDGE