



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT BUNGOMA**

**HCCC NO.89 OF 2003**

**MICHAEL SIMIYU SIBA** ..... **PLAINTIFF**

**~VRS~**

**ABSOLOM WALIAULA MUKHWANA** ..... **DEFENDANT**

**RULING**

This is a ruling on the Defendant's application dated 20/03/2006 seeking for setting aside of interlocutory judgment and for leave to be granted to the Defendant to file defence.

Parties recorded a consent that the application be heard by way of affidavits in support and in opposition of the application.

The Applicant denies service of the plaint and summons to enter appearance. He was therefore not aware of the suit until the day the Defendant went to evict him in compliance with the court orders issued. The Applicant argues that he has a good defence to this suit. It is deponed that the affidavit of the process server that he served the Applicant or his wife was false. The Applicant has been living on the suit premises for 42 years. The Respondent is facing a criminal case for making a document without authority in respect of the suit premises Kimilili/Sikhendu /705.

The Respondent in his replying affidavit depones that he is the sole registered owner of the L.R. Kimilili/Sikhendu/705. The Respondent argued that service of the plaint and summons to enter appearance were properly served on the Applicant. The Applicant has now been evicted from the suit premises and that the Respondent is the one using the land.

Service is denied herein. The process server in his affidavit depones that when he went to serve, he found the Defendant and his wife Peninah Waliaula. The Defendant accepted service but refused to sign. An affidavit of service is therefore in existence. If the Applicant was seriously opposed to it, he would have applied to have the process server cross-examined on the contents of his affidavit. Such an application was not made despite the denial of service.

The Defendant claims that he has a good defence. He states that he had lived on the land for over forty years. No other interest on the land has been demonstrated by the Applicant.

The Respondent denies that the Defendant/Applicant has lived on the land for over forty years as claimed. He refers to him as a trespasser who has already been evicted from the land.

I have carefully considered the arguments of both parties in this application. The affidavit of service is on record. Although service is denied, the Applicant who was represented by a counsel did not bother to go further to prove that he was not served by calling for examination of the process server in court. The

only issue raised in defence is the long period stay on the land which is denied. Assuming that the Applicant has lived on the land for that long, that fact does not confer on him any legal right on the land. He had a right to apply for title through prescription if he stayed on the land uninterrupted for twelve years and above. The Applicant did not claim to have filed such a suit or obtained any order in his favour. It is the Plaintiff who went to court. The Plaintiff explains that the land was sold to him by one Masai Chesititi in 1965. The Defendant does not even say that anyone sold him the land or part of it. The facts presented by the Defendant do not make up a good defence on this suit. The Applicant did not annex a draft defence to this application.

The Applicant has a duty to prove that he was not served and to demonstrate that he has a good defence to justify this court to exercise its discretion in his favour. In the case of *EXPRESS (K) LTD VS MANJU PATEL CIVIL APPEAL NO.158 OF 2000 (REPORTED IN EA 2001 (1) 54)* the Court of Appeal held that the court must consider whether the Defendant raises a reasonable defence. If he does so, then he may be allowed to enter into the suit and defend. In the case of *DOBIE & CO. (K) LTD & ANOTHER CIVIL APPEAL NO.38 OF 1998 AND IN THAT OF KINGSWAY TYRES AND AUTOMART VRS RAFIKI ENTERPRISES LTD CIVIL APPEAL NO.220 OF 1995* it was held that in an application to set aside default judgment, the court must be satisfied that there was a real likelihood that the Defendant would succeed. It is not enough to say that the Defendant has an arguable case.

I agree with the ruling of the Court of Appeal Judges about the three cases and I am well guided by them. In the case before me the Defendant has not shown that he had an arguable case let alone having a real likelihood to succeed. It would be a waste of judicial time to hear a suit with a defence that is nothing more than a sham.

I find that the Defendant has failed to justify the exercise of this court's discretion to set aside the exparte judgment. The application lacks merit and I dismiss it with costs.

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**F. N. MUCHEMI**  
**JUDGE**

Ruling dated and delivered on the 9<sup>th</sup> day of Nov 2011 in the presence of Mr Oncharo for Applicant and Mr Situma.

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**JUDGE**