



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**Civil Case 367 of 1993**

**EDWARD MUTHEE GITIMO.....PLAINTIFF/RESPONDENT**

**VERSUS**

**JOSEPH MATHENGE GITIMU.....DEFENDANT/APPLICANT**

**RULING**

The subject matter of this ruling is the summons dated 19<sup>th</sup> June 2009 in which **JOSEPH MATHENGE GITIMU**, the defendant/ applicant herein, has sought for the following orders:

1. *That the judgment entered on 30<sup>th</sup> July 2008 be set aside.*
2. *That there be a stay of execution of the aforesaid judgment pending the hearing and determination of this application.*
3. *That the defendant be granted leave to file a defence to this suit out of time.*
4. *Costs of the application.*

The summons is supported by two affidavits sworn by Joseph Mathenge Gitimu. **EDWARD MUTHEE GITIMU** opposed the application by filing a replying affidavit he swore on 10<sup>th</sup> July 2009. Directions were given for the summons to be determined by written submissions.

It is the submission of the Defendant/applicant that he was not served with any pleadings or documents. Secondly that the draft defence annexed to the application raised triable issues. The plaintiff/Respondent herein is of the view that the Applicant was duly served by two process servers whom the Applicant has not attempted to summon to cross-examine. It is a further submission of the Respondent that the Applicant is hell-bent to delay the determination of this dispute and that the draft defence attached to the application is a sham and a mere denial.

I have considered the material placed before me and the written submissions filed by the both learned counsels. The facts leading to the filing of this motion are largely undisputed. Edward Muthee Gitimu filed the plaint dated 30<sup>th</sup> September 1993 in which he sought for judgment against Joseph Mathenge Gitimu in the following terms:

1. *A declaration that the defendant holds parcel no.MAGUTU/GAIKUYU/326 in trust for the plaintiff and himself in equal shares.*
2. *An order terminating the said trust.*
3. *That he be registered as the proprietor of the aforesaid land.*

It would appear that the plaint and the summons to enter appearance was served on the Defendant who failed to enter appearance nor file a defence. The Plaintiff filed a request for judgment in default of appearance on 28<sup>th</sup> October 2004. Entry of interlocutory judgment in default of appearance was made on 30<sup>th</sup> November 2004 and the suit was fixed for formal proof on 29<sup>th</sup> May 2007. Judgment was entered in favour

of the plaintiff on 20<sup>th</sup> July 2007.

Basically the plaintiff seeks to have the judgment set aside on the basis that he was not served with the summons to enter appearance. I have perused the affidavit of service of Joseph Chege Kinyanjui dated 4<sup>th</sup> July 2004 and the one of Simon Gichuki sworn 22<sup>nd</sup> September 2004. Those affidavits clearly indicate that the defendant was served with summons to enter appearance. The defendant has merely denied service but he has failed to summon the deponents of the affidavits of service to cross-examine. I am unable to agree with the Defendant that he was not served. I am satisfied that he was served with the summons to enter appearance and he decided not to enter appearance. I have looked at the draft defence attached to the application and I find it to contain no triable issues. The same remains a mere denial. In the end I see no merit in the application. It is dismissed with costs to the Respondent.

*Dated and delivered at Nyeri this 23<sup>rd</sup> day of April 2010.*

**J. K. SERGON**

**JUDGE**