



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

Civil Case 242 of 2008

TOMOSIAY OLE SHONKO PLAINTIFF

VERSUS

LANGESA OLE NATU PULEI DEFENDANT

RULING

Interlocutory judgment in default of appearance or defence was entered herein against the Defendant on 31st July 2008. The Defendant has applied by chamber summons dated 7th August 2009 for an order to set aside that judgment and to be granted leave to defend the suit. The application is made under Order 9A, rules 10 and 11 of the Civil Procedure Rules (the Rules).

The grounds for the application appearing on the face thereof include:-

1. That the Defendant was never, or properly, served with summons to enter appearance and copy of the plaint.
2. That the Defendant learnt of the suit on 2nd July 2009 when his school going children collected copies of the plaint and summons to enter appearance from outside the home compound.
3. That the Defendant has a strong defence to the Plaintiff's claim, and that the suit should therefore proceed to trial.

In his supporting affidavit the Defendant has deponed that he learnt of the suit on 2nd July 2009 when his school going children collected some documents outside his homestead which he later learnt were copies of the plaint, verifying affidavit and summons to enter appearance.

He has further deponed that he thereupon proceeded immediately to the High Court at Nairobi where he was informed that the suit had been transferred to the High Court at Machakos. He then proceeded to Machakos where he was allowed to peruse the court file at the High Court registry. He was surprised to learn that interlocutory judgment had been entered against him in default of appearance and defence nearly one year before the summons and plaint were left outside his homestead.

The Plaintiff has further deponed that he learnt that an affidavit of service had been drawn and filed alleging that he had been served with summons to enter appearance on 16th April 2008 at 'Silent Restaurant' in Suswa Trading Centre.

The Defendant swears that he has never been served with summons to enter appearance and plaint as alleged. He says that on the

alleged date of service he was not at Suswa Trading Centre; he was attending prayers after the death of his wife, Kingasunye Langesa, at Duka Moja Trading Centre, many kilometres away from Suswa Trading Centre. He has further deponed that to the best of his knowledge there is no restaurant at Suswa Trading Centre called 'Silent Restaurant'. He has pointed out that he could have been easily served with summons and copy of plaint at his homestead or through the area chief at Ewaso-Kedong. He is categorical that the affidavit of service is false.

The Defendant has also pointed out in his supporting affidavit that the plaint discloses a boundary dispute between him and the Plaintiff that would best be resolved by a survey exercise in order to determine properly the common boundary between their respective parcels of land.

The Plaintiff has opposed the application. In his replying affidavit he has deponed that he was present when the Defendant was served with process, and that he was the one who pointed him out to the process-server. The process-server has said as much in his affidavit of service filed in court on 29th July 2008.

The court has an unfettered discretion under Order 9A, rule 10, subject only to the dictates of justice. In this case I note that the Defendant filed defence on 11th August 2009. The Plaintiff filed a reply to this defence on 16th September 2009, thus implicitly recognizing the Defendant's defence. On 4th November 2009 the Plaintiff filed his list of documents, no doubt in preparation for trial.

The Plaintiff has pleaded that he is the registered proprietor of land parcel L.R. KAJIADO/EWASO-KEDONG/1367 and that the Defendant is his immediate neighbour. The Plaintiff's case as pleaded is that the Defendant has unlawfully encroached on the Plaintiff's land and proceeded to "cultivate, erect a dam and trap underground spring water outlets for his own use without due regard to the Plaintiff". He has further pleaded that the Defendant continues to trespass on a portion of the Plaintiff's land measuring two acres despite being cautioned and having full knowledge of the existing boundary between them.

On his part the Defendant has pleaded that he is the registered proprietor of land parcel L.R. KAJIADO/EWASO-KEDONG/1363 which shares a boundary with the Plaintiff's land. The Defendant has further pleaded that the two parcels are separated by a clear boundary marked by beacons, and that the boundary extends in a straight line separating several other parcels of land adjacent to the Plaintiff's and the Defendant's respective parcels. The Defendant has denied that he has crossed this boundary; he has pleaded that he carries out his developments within the boundaries of his land. The Defendant has also pleaded that the Plaintiff's suit is misconceived and incompetent, and thus not maintainable in law.

What is disclosed by the pleadings in this suit is essentially a boundary dispute between the Plaintiff's and the Defendant's respective parcels of land. The two parcels appear to be registered under the Registered Land Act, Cap 300. The Defendant's plea that the suit is misconceived and incompetent is probably informed by section 21 (4) of Cap 300 aforesaid which provides:-

"No court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section."

Be thus as it may, a dispute of this nature ought to be properly and fully resolved in order to enable these two neighbours to live and coexist in peace and harmony. Whether the dispute will be resolved by trial of this action or elsewhere is to be decided at a later stage. What is important is that the Defendant should not be shut out of court at this stage. That would not be in the overall interests of justice.

I will therefore not determine whether or not the Defendant was duly served with summons to enter appearance and copy of the plaint. Instead I will exercise my discretion in the interests of justice to set aside the interlocutory judgment entered on 31st July 2008.

The Defendant has already entered appearance and filed defence. Those two documents will be deemed to be duly filed and served. Costs of the application shall be in the cause. It is so ordered.

DATED AT MACHAKOS THIS 14TH DAY OF JULY 2010

H. P. G. WAWERU
JUDGE

DELIVERED THIS 16TH DAY OF JULY 2010