



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA

Civil Suit 11 of 2008

MOSES OKWARE OPARI
PETER MANYURU IWUON.....PLAINTIFFS/RESPONDENTS

VRS

AMAYI OKUMU KASIAKA.....DEFENDANTS/APPLICANTS
JAMES WANDERA
JOHN OMONGARI

RULING

This is the Defendants' application dated 16th September 2009 brought under section 3A of the Civil Procedure Rules and all enabling provisions. It seeks for orders that the ex-parte judgment and/or orders of eviction given on 10th February 2009 as contained in the order issued on 23rd February 2009 be set aside and the Defendants be granted leave to enter appearance and file their defence to contest the suit.

Mr. Wanyonyi took the court through the grounds relied on. They include *inter alia* lack of service of the summons to enter appearance and the hearing notice. The orders of eviction were obtained ex-parte and concealed until the structures of the Applicants on the land had been demolished. The Defendants were later charged with forcible detainer in Bungoma Criminal Case No.1235 of 2009. The Respondent threatened to flatten the remaining skeletal structures after destroying all the crops on the land.

The Respondents, represented by Mr. Kituyi opposed the application. The 2nd Respondent avers that he is the one who pointed out the Applicants to the process server on 30th June 2008. The parties live in the same neighborhood. They were served with summons to enter appearance, the plaint and chamber summons. Due to their failure to enter appearance or respond to the application, the court confirmed the injunctive orders granted in the chamber summons. The Applicants were served with the orders of the court, the O.C.S, Malaba, was also served. A copy of notice of entry of judgment was also served on the Respondents. The Applicants were evicted from the suit premises. They attempted to return to the land but were arrested and charged with forcible detainer. The Applicants contended that, the Busia HCCC No.16 of 2009 was filed after eviction from the suit premises. The suit filed in

Bungoma HCCC No.1 of 2006 was withdrawn. The Applicants have not annexed any draft defence and the real situation is that they have no defence.

In an application of this nature, the Applicants must satisfy the court that they were not served with summons to enter appearance and with any other relevant pleadings. It must also be shown that the Applicants have a defence which raises triable issues.

On the issue of service, the Respondents annex copies of three (3) affidavits of service. The first one PM I 1 sworn by Caleb Sasita an authorized process server is dated 3rd July 2008. Paragraph 1 shows that on 30th June 2008, the process server received copies of summons to enter appearance, the plaint, verifying affidavit, affidavit and annexures from the firm of Wasilwa & Company Advocates. In paragraph 2, he depones that he served the documents the same day at Kotur Village in Teso District where the Respondents reside. One Mr. Joseph Manyuru Iwuon a neighbour pointed out the Applicants to him. They accepted service but refused to sign on the return copies.

The second affidavit sworn by the same process server Caleb Sasita on 10th March 2009 shows that a notice of entry of judgment was served on the Applicants on 10th March 2009. This being the second time to serve the Applicants, there was no need of having someone to point them out as shown in paragraph 3.

The 3rd affidavit was sworn on the 28th April 2009 by Caleb Sasita. He depones that he served the Officer Commanding Malaba Police Station with the notice of entry of judgment on 27th April 2009 at the station.

The order of eviction dated 9th March 2009 shows that it was issued on the 9th March 2009 and is duly signed by Deputy Registrar, High Court of Kenya, Bungoma.

The injunctive orders were granted on 8th July 2008 after the court satisfied itself as to service. Judgment was entered in default of appearance on 1st August 2008. The case was formally proved before Justice Mbogholi Msagha on 18th December 2008 and judgment confirmed.

Although service is disputed, the Applicants did not apply to call the process server for cross examination. This is the only way to test the genuineness of the alleged service. In the absence of such examination, the court will scrutinize the affidavits of the process server against the evidence of the parties contained in their affidavits. The dates of service of the orders of the court do not reveal any concealment of the orders as alleged. The only issue worth of consideration is that one Joseph Manyuru Iwouni is alleged to have pointed out the Applicants to the process server the first time they served. He is referred to as a neighbour by the process server. In the replying affidavit to this application, Peter Manyuru Iwouni, the 2nd Respondent herein confirmed that he was the one who pointed out the Applicants to the process server. He also confirmed that the Applicants are his neighbours. It is his first name which was indicated as "**Joseph**" instead of "**Peter**". There is nothing wrong with a neighbour or a party to the case pointing out a person for service of process. The doubts raised by the Applicants on who pointed them out has been cleared through the replying affidavit.

On close scrutiny of the affidavits of service, I find that they all contain vivid details. The date, time and place of service is shown. The mode of identification of the Applicants has been explained as required. The affidavits are therefore reliable and are satisfactory evidence of service.

The Applicants failed to annex a draft defence which is a requirement in order to show that they have triable issues which may be canvassed at the trial. The supporting affidavit only alleges that, the 2nd Respondent obtained title to the land without the requisite Land Control Board consent. It is on this ground that the Applicants seek to challenge that title. It is important that the Defendants declare and demonstrate their legal interest in the suit premises which will give them a ground to stand on as they prepare to challenge the title of the Plaintiff. It is this kind of declaration and demonstration by the applicants which would raise triable issues. The court would then be persuaded to give the Applicants a chance to defend their interests. These elements are lacking in the pleadings of the Applicants in this application. The 2nd Respondent has title to the land and has already obtained judgment against the Applicants.

It is my finding that the applicants have failed to satisfy the requirements needed in an application of this nature. They do not deserve exercise of this court's discretion to set aside the judgment. The application is brought under a general provision of section 3 A of the Civil Procedure Rules instead of Order IXA of the Civil Procedure Rules. The legal provisions are wanting.

For the foregoing reasons, I dismiss the application with costs to the Respondents.

F. N. MUCHEMI
JUDGE

Dated, Delivered that Signed at Bungoma this 12th day of November 2009 in the presence of Kakoi for Kituyi for respondents.