



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC CASE NUMBER 32 OF 2017 (O.S)**

**ALOYS ODIANGO OLANDE.....PLAINTIFF**

**VERSUS**

**SAMUEL AMON SIAJI.....1<sup>ST</sup> DEFENDANT**

**PETER OTIENO NYAKOYI.....2<sup>ND</sup> DEFENDANT**

**PETER WALUNYA NYAKOYI.....3<sup>RD</sup> DEFENDANT**

**SAMUEL OTIENO OBUDO.....4<sup>TH</sup> DEFENDANT**

**RULING**

On 29/6/2012, the plaintiff filed the Originating Summons herein dated 12/6/2012 for determination of various questions against the defendants. The firm of Ajuoga & Co. advocates entered appearance for all defendants. The originating summons was amended on 27/8/2013.

Samuel Otiemo Obudo filed the replying affidavit on 20/9/2012. Same applies to Mr. Peter Walunya Nyakoyi who filed a replying affidavit on the same date. The matter proceeded for hearing on 29/11/2018 without the presence of the defendants. The Defence case was closed immediately after the hearing of the plaintiff's case. Judgment was delivered on 6/12/2018. The defendants now seek to set aside the judgment dated 9/12/2014 and leave to defend. The issue for determination was whether the defendants were served with the Originating Summons.

In the supporting affidavit, Samuel Otiemo Obudo denies having been served with the originating summons. He states that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were also not served.

I have considered the evidence on record and I do not see evidence of service of the originating summons on the defendant's number 1, 2 and 4. This court finds that the plaintiff failed to demonstrate that the defendants were served with the Originating Summons and hearing notice for hearing on 29/11/2018.

In the case of *Esther Wamaitha Njihia & two others vs. Safaricom Ltd*(2014) Eklr, the High Court citing relevant cases on the issue held *inter alia*:-

*"the discretion is free and the main concern of the courts is to do justice to the parties before it. The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice. The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. It also goes without saying that the reason for failure to attend should be considered."*

The right to be heard is so cardinal and cannot be wished away.

The court in the case of *Richard Nchapai Leiyanguvs –V- IEBC & 2 others* (2013) Eklr proceeded to state as follows: -

*"The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the*

*integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality”*

This court finds that failure to serve the originating summons and the hearing notice was a fundamental breach of the defendants’ right to be heard and for that reason alone, this court is inclined to set aside the judgment dated 6/12/2018.

The upshot of the above is that the defendant judgment of 9/12/2014 together with the final Judgment of 6/12/2018 are set aside. The matter to proceed de-novo. Costs of the application in the cause.

**DATED AT KISUMU THIS 21<sup>st</sup> DAY OF JANUARY 2021**

**ANTONY OMBWAYO**

**JUDGE**

**This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2019.**

**ANTONY OMBWAYO**

**JUDGE**