



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT BUSIA**  
**CIVIL CASE NO. 10 OF 2013**  
**IN THE MATTER OF THE REGISTERED LAND PARCEL**  
**NO. NORTH TESO/KAMURIAI/762**  
**AND**  
**IN THE MATTER OF THE LIMITATION ACTIONS ACT CAP 22 LAWS OF KENYA**  
**AND**  
**IN THE MATTER OF LAND REGISTRATION ACT 2012 LAWS OF KENYA**  
**BETWEEN**  
**WILLIAM EMASAJAA ETYANG ..... PLAINTIFF/RESPONDENT**  
**= VERSUS =**  
**SIPHORA AMUSUGUT EBU ..... DEFENDANT/APPLICANT**

**R U L I N G**

1. The defendant has moved the court vide the application dated 19/8/2020 and brought under the provisions of section 1A, 1B & 3A of the Civil Procedure Act and Order 10(11) of the Civil Procedure Rules. For determination is prayer (e) of the motion pleaded thus;

**(e) That the exparte proceedings and the exparte judgement and decree be set aside and the consequential orders made on the register of land parcel North Teso/Kamuriai/762 vide entries No. 4 dated 30/4/2014 be cancelled and the defendant/respondent be granted leave to enter appearance and defend the Originating process herein.**

**(f) That costs of the application be provided for.**

2. The application is supported by several grounds on the face of it inter alia;

*(a) The applicant was not served with:*

*(i) Summon to Enter Appearance and the Originating process.*

(ii) Notice to entry of interlocutory judgment.

(iii) Hearing notices.

(b) The Originating process used to rectify the register of N. Teso/Kamuriai/762 contravened Order 37(8) and section 143 of Cap 300.

(c) That it was not the mandate of ELC to assume the role of the High Court by choosing what to implement between BSA Suc. Cause No. 107 of 2011 and 203 of 2011.

3. The application was supported further by the affidavit of Siphora Amusugut Ebu sworn on 18/8/2020. She deposed that being the grand child of Irupo Ichodo who was the registered owner of N. Teso/Kamuriai/762. That she got entered into the register of the suit title pursuant to orders obtained in BSA High Court Suc. Cause No. 203 of 2011. She deposes that the Respondent is the son of Desterio Ichodo Ekakoro and not Irupo Ichodo. The applicant reiterated that she was never served with the originating process and that she had a good defence to the plaintiff's case. She annexed a draft replying affidavit to the Originating Summons. She urged the court to give her an opportunity to defend the claim.

4. The Respondent filed a replying affidavit on 6<sup>th</sup> October 2020 in opposing the application. He deposed that the applicant was served with Summons to enter Appearance on 20/3/2013 at her homestead as explained in the affidavit of service of Hillary Okanga Ongwete. That an exparte judgement was entered after the hearing proceeded exparte. It is the Respondent's contention that the applicant did not move the court until he filed his bill of costs on 26/6/2020. The Respondent deposed that the Applicant has not been keen to prosecute her application for revocation of the grant in BSA HC Suc. 203/2011 (renumbered BSA CMCC 679 OF 2018). That the applicant failed to set aside / stay the exparte judgement for the past seven (7) years. He urged the court to dismiss the application with costs.

5. In her submissions, the Applicant reiterated the contents of her application. She added that she learnt of this case when the Respondent annexed his affidavit evidence in his reply to the objection proceedings in Suc. Cause No. 107 of 2011. She urged that she has been exposed to extreme hardship and begs for the discretion of the court to allow her application. The Applicant relied on the decision of **John Kiprono Chumo Vs Phillip Kipng'eno Langat (2017) eKLR**. This case quoted the principles to guide the court in setting aside exparte judgements as stated in **Pithon Waweru Maina Vs Thuku Mugira (1983) eKLR** that;

**(a) Firstly, there are no limits or restrictions on the judge's discretion except that if he does vary the judgement, he does so on such terms as may be just.**

**(b) Secondly, this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but it is not designed to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice. As stated in Shah V Mbogo (1967) EA 116 at 123 and Shabir Dir V Ram Parkash Anand (1955) 22 EACA 48.**

**(c) Additionally, the court has no discretion where it appears there has been no proper service (Kanji Naram V Velji Ramji (1954) 21 EACA 20.**

**(d) It is also important to note that a discretionary power should be exercised judicially and in a selective and discriminatory manner not arbitrarily and idiosyncratically Smith V Middleton (1972) SC 30.**

6. The respondent through his submissions filed on 25<sup>th</sup> November 2020 stated that the judgement entered on 4/12/2013 was regular under the provisions of Order 10 Civil Procedure Rule. He relied on the Court of Appeal finding in the case of **James Kanyiita Nderitu & Ano Vs Mario Philotas & Ano (2016) eKLR** that;

**“... from outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under *Order 10 rule 11 of the Civil Procedure Rules*, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment ...”**

**In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance ...”**

The Respondent submits that the Applicant ought to have explained the inordinate delay on her part.

7. It is trite law that setting aside is a discretionary order and the Applicant must therefore demonstrate why the court should exercise the discretion in her favour. She has denied being served with the originating process, notice of entry of judgement and hearing notice. While the Respondent annexed evidence of service of Summons to Enter Appearance, no evidence was placed before the court in respect of service of notice to entry of judgment and a hearing notice.

8. Order 10 rule 11 and Order 12 rule 7 of the Civil Procedure Rules allow for setting aside *ex parte* judgement. However, the discretion should not be used to assist a party who seeks to frustrate the plaintiffs quest in accessing justice or reaping fruits of his lawful judgement. On 30<sup>th</sup> July 2013 when the Respondent fixed the matter for hearing in the registry, there was an order made by the deputy registrar that he serves the Applicant with a hearing notice. On the hearing notice dated 10/10/2013, Mr. Etyang then appearing for the Respondent only made mention of service of Summons to Enter Appearance and the Originating Summons. He did not serve the hearing notice as directed on 30/7/2013. The matter proceeded and a judgement rendered on 4/12/2013 in favour of the plaintiff/respondent.

9. The trial court in his judgement observed thus *“that the basis of the registration of the defendant, Siphora Amusugut Ebu, as the proprietor of the suit land on 5<sup>th</sup> November, 2012 has not been disclosed”*. The plaintiff indicated in his testimony that the defendant was not an heir of the Iropu Ichodo-deceased, and was not known to him. The Applicant has explained in her paragraph 3 and 4 of her supporting affidavit that she got registered as owner of the suit land by virtue of the order got in Busia HCC Suc. Cause No. 203 of 2011. The Respondent in this suit also claimed the land by virtue of letters of grant obtained in BSA HC Suc. Cause No. 107 of 2011. This raises a triable defence in so far as there is need for determination by the probate and administration court who between the plaintiff or the defendant should remain appointed the administrator of the estate of Iropu Ichodo-deceased. Before that is done, it is difficult for this court to determine who is entitled to the suit land previously registered in the name of Iropu Ichodo-deceased.

10. It is true that the applicant has brought this application after undue delay (7 years). She explained the delay that she only learnt of the judgment when the Respondent annexed a copy in the reply to the application for revocation of his grant. The court take cognisance of the observation made in the *Pithon Waweru Supra* that there are no limits or restrictions on the judges’ discretion so long as it is done on terms that are just. In the circumstances, I am satisfied that there are sufficient grounds made herein to set aside the *ex parte* judgement rendered on 4/12/2013 to enable each of the parties herein present their case.

11. To compensate the Respondent for the costs previously incurred (for the prejudice), I award him thrown away costs of Kshs.10,000/= . In conclusion, it is ordered that the application dated 19/8/2020 is allowed in terms of prayer (e). Further the thrown away costs of Kshs.10,000 awarded are payable within

30 days from 25/2/2021. In default execution to issue.

**Dated and signed at BUSIA this 25<sup>th</sup> day of February, 2021.**

**A. OMOLLO**

**JUDGE**