



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 74 OF 2018

SAMUEL LOTIYWO MURIO.....PLAINTIFF

VERSUS

DANIEL TIKORO.....1ST DEFENDANT

ISAAC MARIACH LONGARKAYE.....2ND DEFENDANT

LOCHAUN LONGARKAYE.....3RD DEFENDANT

RULING

The Application

1. By a notice of motion dated **12/8/2020** and filed on **13/8/2020** brought under provisions of **Sections 3 and 3A** of the **Civil Procedure Act** and **Order 10 Rule 11** of the **Civil Procedure Rules**, the defendants seek the following orders:

- (1) ...spent
- (2) ...spent
- (3) That the *ex-parte* judgment herein dated **3/10/2019**, the decree and any other consequential orders in this suit be set aside.
- (4) That leave be granted to the defendants to file a defence
- (5) Costs of this application be provided for.

2. The application is supported by the affidavit of the 3rd defendant sworn on **12/8/2020**. The 1st and 3rd defendants also filed supplementary affidavits both dated **5/11/2020**. The application is premised on the grounds that the applicants were not served with plaint and summons and that the affidavit of service filed herein is fatally flawed; that the land **parcel No. 151** claimed by the plaintiff/respondent does not belong to him and that in any event the defendants do not reside thereon and that it is in the interests of justice that the *ex parte* judgment be set aside. The 2nd and 3rd applicants are said to reside on **plot No. 251** on the same group ranch land while the 1st defendant stays on **plot No. 706** on the same group ranch land. It is also alleged that no notice of entry of judgment was served on the defendants.

The Response

3. The plaintiff filed a replying affidavit sworn on **16/10/2020**. The plaintiff's response is that he has been living on the suit land since the **1980s** to date; that he was allocated the plot in **1988**; the applicants' plot which they claim under their father's name is **No. 183** though they individually have other plots without numbers; that the applicants invaded his land in **2010** but were ordered to move to their father's plot in vain by law enforcement agencies and the local administration; that the applicants were arrested and charged before the court at Kapenguria but fled the country and later reappeared in **2017** and began utilizing **100 acres** plus; that the application has been brought after inordinate delay of over one year and raises no substance. He claims that the applicants would not be prejudiced if the application was not granted as they claim not to be on the suit land. The respondent avers that no grounds for setting aside have been demonstrated and that the application is fatally defective for having been filed without leave of court.

The Applicants' Rejoinder

4. In response to the respondent's claim the 1st applicant denies having been involved before elders in a dispute over land with the plaintiff while the 2nd applicant points out that the plaintiff's main annexure to his reply shows that he is not listed as the owner of **plot No. 151**. The 2nd applicant also denies knowledge of any criminal proceedings or involvement of the defendants with the police.

Submissions

5. The defendants filed their submissions on **23/11/2020**. I have perused the court record and found no submissions filed on behalf of the plaintiff.

Determination

6. The main issue that arises in the instant application is whether the applicant is entitled to the orders of setting aside sought.

7. Regarding non-service, the defendants poke holes in the affidavit of service of *Godfrey Masinde Sitati* sworn on the **27/8/2018** for not expressly stating that the plaintiff pointed out the defendants. In their view it is faulty for having stated that the plaintiff pointed out the home of the defendants. They allege that the affidavit does not state that they were pointed out to him and that he knew them at the time of service.

8. In respect of the existence of a triable issue, the defendants aver that the matters they have raised disclose a triable issue and thus the *ex parte* judgment should be set aside.

9. I have examined the affidavit of service that the applicants fault. They have omitted to concede that the same affidavit states that the process server met the 2nd and 3rd defendants at the home of the 2nd defendant, and that the process server went to the home of the 1st defendant adjacent to the 2nd defendant's home and personally served him. The applicants did not even as much as try to have the process server summoned for cross-examination. In my view there is no fatal omission in the affidavit of service as drawn. I conclude that the applicants were served.

10. This court has unfettered discretion to set aside *ex parte* judgment. It is on this basis that I will proceed to consider whether there are triable issues raised by the applicants. The main concern of the court is to do justice to the parties in any litigation where judgment has been entered. In **Patel v EA Cargo Handling Services Ltd [1974] EA 75 at page 76**, the court held as follows:

“The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

11. Having regard to the above cited decision and upon a perusal of the record I do find that the matters in their supporting affidavit and the draft defence annexed to the application raise serious issues that deserve to proceed to trial, foremost being the allegation that neither they nor the plaintiff owns **plot No. 151** and whether they, being not in occupation of **plot No. 151** claimed by the plaintiff in the suit, do not deserve the decree against them in respect thereof. In this application the plaintiff has produced a list that is faulted by the defendants as having listed another person's name against **plot No. 151** and this issue needs investigation to avert the possibility that orders issued in the interlocutory judgment may affect an innocent third party not named herein. In this court's view it would not be proper for the administration of justice to retain the present decree and leave so many questions unanswered while the defendants have voluntarily appeared and demonstrated that much light can be shed on the relevant matters by way of oral evidence in a substantive trial so as to arrive at a just conclusion in the dispute on the merits.

12. Consequently I find that the application dated **12/8/2020** by the defendants should be granted and I grant the same in terms of **Prayers Nos.(3) and (4)** thereof. The costs of the application shall be borne by the defendants. The defendants shall also bear the thrown away costs which I put at **Kshs.15,000/=**. In addition they shall file and serve their defence and all their necessary documents in compliance with the **Civil Procedure Rules** within **14 days** of this ruling. This suit shall be mentioned on **25/2/2021** for issuance of a hearing date.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 3rd day of February, 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE.