



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO. 46 OF 2018

KANO KAJULU FARMERS CO-OPERATIVE SOCIETY LTD.....APPLICANT/PLAINTIFF

VERSUS

COUNTY LAND REGISTRAR KISUMU.....1ST RESPONDENT/DEFENDANT

MARY AKEYO OGENDO.....2ND RESPONDENT/DEFENDANT

RULING

The right to be heard is a human right and is so sacrosanct that it cannot be taken away without justification. Nobody should be punished unheard unless it is shown that he has been given an opportunity but refused or declined to utilize the opportunity.

On the 11/9/2018, the Kano Kajulu Farmers' Co-operative Society Ltd (hereinafter) referred to as Plaintiff came to court against the County Land Registrar Kisumu and Mary Akeyo Ogendo (hereinafter) referred to as defendants by way of originating summons under the provision of Order 37 rule 7 of the Civil Procedure Rule and Section 7, 17, 37 and 38 of the Limitation of Actions Act Cap 22 Laws of Kenya and Section 25 (1) (b) and Section 28 (h) of the Land Registration Act 2012 and Section 28 and 30 of the Registration Land Act Cap 300 Laws of Kenya (repealed) claiming to have acquired parcel of land Kisumu/Kochieng/2836 measuring an estimated area of 0.04ha or thereabouts and for determination of issues related to adverse possession.

The Originating Summons was allegedly served upon the defendants but they did not file any response. The matter was placed before the Judge on 29/07/2019 for directions and the court gave direction that the Originating summons and supporting affidavit to be treated as plaint. The respondents were deemed defendants and the hearing was to be way of viva voce. The matter was slated for hearing on 19/11/2019 and that the hearing notice was to be served.

On the 19/11/2019, the Plaintiff was ready to proceed and the directions were reviewed to the extent that the matter was to be canvassed by written submissions and the Judgment was set for 13/3/2020. Judgment was ultimately delivered on 27/4/2020.

On the 10/11/2020, the 2nd Defendant came to court with an application that the judgment entered herein in favour of the Applicant against the 2nd Respondent in default of filing Memorandum of Appearance and replying affidavit be set aside unconditionally, and the 2nd Respondent be allowed to file his replying affidavit and the matter be determined on merits with the participation of the 2nd respondent.

The application was based on grounds that the judgment on record was entered in favour of the Applicant against the 2nd Respondent on 27th April, 2020 upon hearing the Applicant ex parte. The 2nd Respondent categorically denies ever being served with the Originating Summons in this case.

According to the applicant, any purported service of any summons upon the 2nd Respondent does not constitute any service at all, within the meaning of the mandatory provisions of Order 5 Rule 3 of the Civil Procedure Rules. The 2nd Respondent has a legitimate right to defend himself in this proceedings and have a determination of the dispute herein on merits in accordance with the express unqualified and an unlimited fundamental right in the Constitution of Kenya, under articles 21 (1), 25 (c), 47 (1), 48 and 159 (2) (d) thereof and in this case, where the Applicant has clearly not served his application as required by law, and has obtained a Judgment that is irregular. The 2nd Respondent has a valid and legitimate defence in his replying affidavit with triable issues to the Applicant's case.

The application is brought before this good court in time and without any delay whatsoever after knowing of the case in June 2020 upon being issued with a notice of taxation of the applicant's bill of cost. It is in the interest of justice to grant the reliefs sought, so that this matter can proceed to hearing on merit.

In the supporting affidavit the 2nd Defendant states that she was never served with the Originating Summons and that the Plaintiff did not disclose how he served the 2nd Defendant. She came to know of the case when she was served with notice of taxation Bill of costs and a draft decree. She states that she has a valid defence.

The Plaintiff in reply filed grounds of opposition stating that the 2nd defendant was served with the Originating Summons and that chose not to attend court and file any document. The 2nd defendant has not explained prolonged delay. The plaintiff states that the 2nd defendant conduct is deliberate to delay the hearing of the matter to defeat justice.

That the 2nd defendant has not demonstrated that she has any defence.

I have considered the application, supporting affidavit, grounds of opposition and submissions on record and do find that the 2nd Defendant has satisfied this court that there was no proper evidence of service as the process server did not indicate the person or village Elder who identified the second defendant.

Moreover, the time of service is not indicated in the affidavit of service. Moreover, it is not clear whether the 2nd defendant was served with a hearing notice or an order issued by the Judge on 29/07/2019. I do find that the service of the pleadings to the defendants was not properly explained.

On delay, I do find that the 2nd Defendant became aware of the matter before 20/8/2020.

The application was filed 4 months thereafter. The 2nd Defendant states the 4 months is not unreasonable delay.

I do find that a delay of 4 months was unreasonable and the explanation that there are hard economic times and that it can take long to seek legal services of an advocate, is not a sufficient explanation.

The above notwithstanding, this court takes heavy reliance to the right to be heard and the fact that none of the parties have explained when the deceased died to enable the court weigh whether the whole period of adverse possession ran against the deceased owner.

I am inclined to allow the application and do hereby grant prayer 3 in the following terms

3. That the judgment entered herein in favour of the Applicant against the 2nd Respondent in default of filing Memorandum of Appearance and replying affidavit be set aside unconditionally, and the 2nd Respondent be allowed to file his replying affidavit and the matter be determined on merits with the participation of the 2nd respondent.

Costs in the cause. Orders accordingly.

DATED AT KISUMU THIS 24th DAY OF MARCH, 2021

ANTONY OMBWAYO

JUDGE

This Ruling 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 15th March 2019.

ANTONY OMBWAYO

JUDGE