



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 32 of 2016

WILSON DANIEL OGOLA.....PLAINTIFF

VERSUS

MAURICE OUMA OGWENDO.....DEFENDANT

RULING

1. The Defendant filed the motion dated the 11th July 2018 seeking for the judgment entered on 30th May 2018, in favour of the Plaintiff against the Defendant, in default of filing appearance, statement of defence in time, and after hearing the Plaintiff *ex parte*; and all consequential proceedings and orders made thereafter be set aside; the Defendant be allowed to file his defence, and the suit be heard on merit. The application is based on the seven (7) grounds on its face and supported by the affidavits sworn by Maurice Auma Agwendo on the 11th July 2018 and 20th January 2019.

2. The application is opposed by the Plaintiff through the replying affidavit sworn on 20th October 2018.

3. The application was heard on the 20th February 2019 when Mr. Omondi and M/s Ondieki, Learned Counsel for the Defendant and Plaintiff, made their oral submissions for and against the application respectively.

4. The following are the issues for the court's determinations;

a) Whether the Defendant has made a reasonable case for the setting aside of the *ex parte* Judgment.

b) Who pays the costs.

5. The Court has carefully considered the grounds on the motion, the affidavit evidence, the record, the oral submissions from both Counsel and come to the following findings;

a) That this suit was filed by the Plaintiff in person, through the plaint dated the 28th December 2015 and filed on the 12th February 2016. That the Plaintiff seeks for an order stopping the Defendant from interfering with his land parcel Kisumu/Kogony/5656 and costs.

b) That the summons to Enter Appearance were issued on the 18th February 2016, and according to the affidavit of service sworn by Bernard Osewe on the 7th April 2016, served with other documents upon the Defendant on the 6th April 2016 at about 3.45 p.m. "***near Land's Office gate***". That interlocutory Judgment was entered on the 28th June 2016, and after hearing the Plaintiff as PW1 on the 19th June 2017 and 27th February 2018, the Judgment was entered in his favour on the 30th May 2018. The Defendant has challenged the service of summons to enter appearance mainly on the ground that the process server has not annexed a copy of his license and that the process server has not disclosed how he identified him for service. The Defendant has further annexed a copy of his draft statement of defence in which he denies trespassing onto the said land, averring that he resides on parcel Kisumu/Kogony/6916 which is distinct from the other parcel. That the court has perused the said affidavit of service and finds that it falls short of disclosing who identified the Defendant for service, or how the process server knew the Defendant to be the person to be served. That the provision of **Order 5 Rule 15 (1) of the Civil Procedure Rules** prescribes what the affidavit of service should contain including time of service and "***the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons.***" That the Defendant could have sought for the process server to be availed for cross-examination under **Rule 16** but did not seek to do so. The court finds the affidavit of service of the summons to be too sketchy, leaving doubts as to whether the person allegedly served was the Defendant. That there is therefore merit in the Defendant's contention that there was no proper service of summons.

c) That the annexed draft statement of defence raises triable issues to the Plaintiff's claim, and it is only fair that the interlocutory

Judgment entered on the 28th June 2016, and the ex parte Judgment of 30th May 2018 be set aside to allow the Defendant file and serve his statement of defence, and the suit heard on merit now that he has come to court.

d) That in view of the foregoing, the costs of this application will abide the outcome of the main suit.

6. That flowing from the foregoing, the court finds merit in the motion dated and filed on the 11th July 2018. The said application is allowed in the following terms.

a) Prayer 2 granted.

b) The Defendant do file and serve his statement of defence in 14 (fourteen) days.

c) The costs be in the cause.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 10TH DAY OF JULY 2019

In the presence of:

Plaintiff Absent

Defendant Absent

Counsel M/s Jemtai for Ondieki for Plaintiff and

M/s Auma for Omondi for Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE