



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**ELC NO. 61 OF 2014**

**JOHN KIPTIONY BETT.....PLAINTIFF/RESPONDENT**

**VERSUS**

**JOSEPH KIPTOO BARNGETUNY.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**PHILIP BARNGETUNY.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

This ruling is in respect of an application brought by way of a Notice of Motion dated 6<sup>th</sup> March 2018 by the defendant/applicants for orders that the Honorable Court do set aside ex parte orders and be allowed to file a defence.

Counsel for the defendants relied on the grounds on the face of the application and the supporting affidavit by the defendants which averred that they were never served with summons to enter appearance or any order of the court. Counsel submitted that the issues for determination are whether the Defendants have satisfied the test of setting aside of ex-parte orders and whether they should be granted unconditional leave to enter appearance and file defence.

It was Counsel's submission that the Applicants have satisfactorily shown that they deserve the orders sought herein since they were not personally served with summons to enter appearance and the ex parte order granted by the court as the affidavit depicting service do not comply with the procedural rules as required by Order 5 Rule 15 and that the Defendants were not aware about the existence of this suit and /or any orders issued herein.

Counsel cited several cases to support the application and urged the court to allow the application as prayed.

**Analysis and determination**

The application before the court is for setting aside ex parte orders and all consequential decrees to allow the defendants to enter appearance in this matter.

The issue for determination is whether the defendant/applicants have satisfied the court that either they were not properly served with summons or that they failed to appear in court for the hearing due to sufficient cause. The Supreme Court of India in the case of *Parimal vs Veena* 2011) 3 SCC 545. observed that:-

*"sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"*

In dealing with applications to set aside ex parte orders the court must be alive to the fact that it should afford substantive justice to all the parties. Will the plaintiff suffer any prejudice if the ex parte orders are set aside? Will the defendant suffer injury if the court applies technicalities and deny him an opportunity to be heard?

The Court is further guided by the case of **Shah -vs- Mbogo [1967] EA166 at page 123B** where the court stated as follows:-

*'this discretion to set aside an ex-parte judgement 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 the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.'*

This is a matter that was filed in 2014 and then the plaintiff went to slumber without taking any action to move the court to prosecute the matter. The plaintiff woke up in March 2017 when he filed an application under certificate of urgency for a temporary injunction which application was granted upon service of the defendants. The defendants had neither entered appearance nor filed a defence. This makes the court doubt whether they were properly served as required by law.

From the supporting affidavit by the defendants, the court also doubts whether the defendants were ever served with the order which culminated in the application for contempt of court. When the 1<sup>st</sup> defendant appeared in court after a warrant of arrest was issued, it was stated that the 2<sup>nd</sup> defendant had gone underground and had not been arrested.

I have stated before that we have rogue Process Servers who are not performing their work diligently as required by law. This has led to false affidavits of service being filed occasioning injustice to litigants. Something should be done to weed out these individuals who are an impediment to access to justice.

Having considered the pleadings, the supporting affidavit and the submissions by Counsel I find that there is sufficient cause to set aside all ex parte orders and the consequential decrees in this matter. I further order that the defendant be allowed to file a defence within 15 days from the date of this ruling failure of which the order lapses.

Dated and delivered at Eldoret this 2<sup>nd</sup> day of July, 2018.

**M.A ODENY**

**JUDGE**

Ruling read in the open court in the presence of Mr. Songok for Plaintiff/Respondent and Mr. Kagunza for defendant/Applicant.

Mr. Koech: Court Assistant.