



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC CASE NO. 19 OF 2017

JAMES CHARLES NAKHWANGA OSOG.....1ST PLAINTIFF/RESP.

ALPHONCE ALI OJIAMBO

1. SYLVESTER OKHUBEDO OJIAMBO

2. JANE ODHIGA OTIATO.....2ND RESPONDENT

(As Administrators of the estate of SILVANUS OJIAMBO OTIATO)

VERSUS

SYLVESTER OGUNYA KECHULA.....DEFENDANT/APPLICANT

RULING

1. The Applicant brought this application premised on article 159 of the Constitution and section 1A, 1B, 3 & 3A of the Civil Procedure Act and Order 51 of Civil Procedure Rules^{21st} September 2020 seeking for the following orders;

a. Spent

b. That the ex-parte judgment entered in this matter be set aside and all consequential orders.

c. Spent

d. That the applicant be allowed an opportunity to file his response to the originating summons and that this matter be heard inter-partes and on merit.

e. That the attached replying affidavit be deemed duly filed and served upon payment of requisite court fees.

f. Spent

g. That the costs of this application be provided for.

2. The application was based on several grounds inter alia the following grounds;

i) That the applicant was never served with summons to enter appearance and or originating summons or any pleadings over this matter.

ii) That the affidavits on record purporting service of process amount to perjury and should be condemned and struck out.

iii) That the applicant has a meritorious defence.

3. The 1st Respondent and the process server swore separate replying affidavits dated 17th November 2020 and filed on 19th November 2020. The 1st Respondent deposed that he attended court on 19/2/2018 to testify and thereafter the judgment was delivered on 28/5/2019 in his favour awarding him a share out of L.R. BUNYALA/BULEMIA/535 measuring 2.8 ha. L.R. That he proceeded to subdivide the suit parcel into two portions and his portion was given the number BUNYALA/BULEMIA/5567 which he subsequently partitioned into 7 equal portions and distributed the portions and other parcels of land to his children as he did not want squabbles when he is gone.

4. The process server, Mr Peter Odwori Nanjala on his part deposed in paragraph two confirmed that the Applicant works in a highly restricted area but he reached to him through mobile phone and the Applicant directed him to leave the documents with the security details at the visitors' lounge. That he has always used the same method to serve the Applicant with court process. The process server added that he has previously served the Applicant at home and through guardian bus.
5. He deposed that he is surprised that the Defendant/Applicant has applied to set aside the said judgment yet he is aware that the Defendant had petitioned for Grant of Letters of Administration in High Court Succession Cause No. 243 of 2015. He further deposed that the applicant was aware of the existence of this suit as far back as 26th September 2018 as a consent order was recorded in the High Court Succession Cause 243 of 2015 in which the confirmation of grant was to await the outcome in ELC 19 of 2017. He deposed that this application is an afterthought and not genuine.
6. The Applicant filed a supplementary affidavit on 12th January 2021 in which he denied that he engaged with the process server over the phone while on duty and there is no record that the process server ever signed a visitor's book as is required. He further deposed that there was no visitor's card made in favour of the process server and as such there was no service ever made. He maintained that the respondents have never been in occupation of LR. NO. BUNYALA/BULEMIA/535 and he does not qualify as an adverse possessor.
7. The Applicant's advocate prayer to cross examine the process server was granted leading to the cross examination of the process server, Peter Nanjala Oduori, on 22nd February 2021. The server said he is aware of the provisions of the Civil Procedure Rules in regard to service of court process especially the rule requiring personal service. He agreed that he did not personally serve the defendant with the court process in this matter. He stated that he normally talks to the defendant on the phone which number he knew because they are relatives. The process server continued that he tried to access the Applicant at his workplace but he never came to the reception. As a result, he left the documents with a security officer. That he had nothing before court to show that the defendant had received the documents. Later the defendant called him and told him to serve Mr. Ashioya to appear for him during the taxation.
8. In the re-examination, the server stated that he sent the documents through Guardian Courier Service after he called the defendant. That while at he was at the work place he called the Applicant before he went to Embakasi Airport since they normally leave their phones at the reception. The witness said he was called Applicant through the extension and explained his reason for the visit. The server is aware there is an ongoing succession matter but he was not the one who served the Applicant.
9. Both parties filed their submissions which the court has read and considered. The Applicant submitted that he was served with the pleadings and that the lack of service denied him an opportunity to defend himself. The Respondents submitted that even though the court has the discretion of setting aside the judgment, it should not exercise that discretion where the applicant is clearly trying to delay justice. It was their submission that the subject matter of the suit no longer exists and setting aside the judgment will be an exercise in futility. They prayed that the application be dismissed with costs. The Applicant in reply to the Respondent's submissions urged the court to exercise its wide discretion and to set aside the default judgment and allow the applicant an opportunity to be heard since it is his constitutional right.
10. Order 10 Rule 11 of the Civil Procedure Rules empowers the court with discretion to set aside or vary judgment and any consequential decree or order upon such terms as are just. The ex-parte judgment sought to be set aside was delivered on 28th May 2019. The Applicant pleaded that he was not served with the summons to enter appearance or any subsequent court documents. From the cross-examination of the process server, it is not in dispute that personal service was not effected as stated in the affidavits of service. The process server testified that he left the documents at the reception and he was not in a position to confirm that indeed the applicant received the documents.
11. The applicant deposed that there is no record that the process server was ever at his workplace. The process did not during cross-exam or in his affidavit of service give a description of the security officer left with the documents by stating even the name of the company he/she worked for. The server said they are relatives with the Applicant and that he was aware the Applicant worked in a highly restricted area. If he intended to serve the Applicant through somebody else, he does not offer any explanation why he didn't not serve the Applicant's relatives at their home which he must be knowing by virtue of their relationship. Thirdly, the applicant attached a draft replying affidavit to the application and stated that it raises triable issues to warrant grant of leave to defend the suit.
12. The 1st Respondent argued that he already executed the judgment delivered on 28th May 2019 making the suit title that was the subject matter of this suit non-existent and as such setting aside the judgement to be an exercise in futility. First, the 1st Respondent has not presented any evidence to show that he had indeed subdivided the suit land amongst his children. Secondly, a party's right to be heard cannot be taken away merely because a judgement has been executed. Lastly, the Applicant has denied the Respondents' claim stating that he has a good defence.
13. The draft reply to the O.S denied that the Respondents had been possession of the suit parcel Bunyala/Bulemia/535 for a period to qualify them as adverse possessors. The Applicant added that the suit title had been apportioned to other beneficiaries in Busia CMC P& A 424 of 2019. These are triable issues that cannot be ignored where a party seeks to be heard.
14. In conclusion, I find that merit in the application dated 21st September 2020 and exercise my discretion in favour of the applicant. The application is allowed in terms of 2, 4 and 5 of the application; in summary, I hereby set aside the judgment entered on 28th May 2019 and all consequential orders and leave to the Applicant to defend the suit. Each party to meet their respective costs of the application.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 22ND DAY OF JULY 2021

A. OMOLLO

JUDGE