



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAROK

ELC CASE NO. 28 OF 2019

NTARA OLE OLOIBOR.....PLAINTIFF

VERSUS

MUSANA OLE MASOI.....DEFENDANT

RULING

1. By a Notice of Motion dated 27th December 2019, the Defendant/Applicant sought for orders:-

i) Spent

ii) Spent

iii) That the honourable court be pleased to stay the execution of judgment passed on 28th October, 2019 and the subsequent decree issued on 6/11/2019 and all other consequential orders thereof.

2. The Application is based on the ground that the dispute between the plaintiff and Defendant that the defendant is a trespasser is incorrect and that the defendant is the registered Co-proprietor and in occupation of Land Parcel **Transmara/Kimentet ‘D’/1357** which shares a common border with Land parcel **Transmara / Kimintet ‘D’/ A90**.

3. The Application was further supported by the Affidavit of the Defendant/ Applicant in which he deponed that he is the co- proprietor of Land Parcel **Transmara/Kimintet ‘D’/1357** and that he is in actual possessions of said land and despite being in occupation the plaintiff/ Respondent have threatened him with eviction and he may consequently suffer loss, damages and inconvenience. He further stated that he was owner of the existence of the suit land was never served with the Plaintiff nor summons to enter appearance and he got to know of the existence of the suit when one Munyenye who was attending court on a different matter.

4. The Application was opposed by the plaintiff/ respondent by way of Replying Affidavit file sworn on 12th February 2021. In which he contends that upon filing of the suit in court the Applicant was served with summon to enter appearance and have annexed to the Replying Affidavit an Affidavit of service. He further stated that defendant / Applicant was also served with a Mention Notice for pretrial conference and later a Hearing Notice, contrary to the applicant’s assertion it is clear from the various Affidavit of service that he was properly served.

5. The Respondent averred that the Applicant continues to live on his land and the fact that he alleges to live on another parcel is false. The Respondent has suggested that the Transmara West Land Registrar be directed to visit the suit land to ascertain who actually live on the land. The Respondent further stated that there was no Affidavit from the alleged Mr. Munyenye in the allegation that he is the one that informed him about the existence of the case herein and the Respondent prays that the Application be dismissed with costs.

6. I have considered the Application before, the Replying Affidavit and the submission filed by the parties and the reasons for determination before me at this stage is:-

i) Whether there was proper service on the part of the defendant;

ii) Whether the Defendant Judgment should be set aside.

7. On the first issue it is the applicant’s contention that he was never served with Summons to Enter Appearance and/or Mention or Hearing Notice in respect of the suit. The Respondent states that the Applicant was served and there are various Affidavit of service that are on record. I have perused the said Application and I am convinced that indeed there was proper service that was effected upon the Defendant/

Applicant. During the proceeding of the intended Application the Applicant did not dispute the place of service and/or the person who was served and never elected to call the said Process server for cross-examination and in the circumstance it is my considered view that in the absence of lack of proof that he was properly served.

8. Having found that the applicant was properly served, I find no better reason to set aside the Judgment.

9. The upshot of the above is that the Notice of Motion dated 17th December 2019 lacks merits and I dismiss the same with costs.

DATED AND SIGNED AT NAROK THIS 27TH DAY OF OCTOBER 2021.

MOHAMED N. KULLOW

JUDGE