



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELCC No. 129 OF 2017

VINCENT MUKANGAYI ACHANDO.....PLAINTIFF

VERSUS

CHRISTOPHER IMBIAKHA.....DEFENDANT

RULING

1. This matter proceeded to hearing without participation of the defendant. Judgment was ultimately delivered on 21st November 2018 as follows:

1. A permanent injunction be issued to restrain the defendant whether by himself, his servants, agents, heirs, personal representatives and or any other person acting on his behalf from interfering with, tilling, constructing, disposing off or in other manner dealing with the parcel of land known as Butsotso/Shikoti/13847.

2. The defendant, his family members, servants, agents, heirs, personal representatives and or any person acting on his behalf are to vacate from the parcel of land known as Butsotso/Shikoti/13847 within the next six (6) months from the date of this judgement and in default vacation notice to issue forthwith.

3. The OCS, Kakamega Police Station to enforce the eviction order against the defendant.

4. Costs of this suit to the plaintiff.

2. The Defendant later filed Notice of Motion dated 17th October 2019, seeking the following orders:

1. [Spent]

2. [Spent]

3. THAT this Honourable Court be pleased to set aside the interlocutory Judgement entered herein on 21st November, 2018 against the Defendant/Applicant and all consequential Orders and proceedings thereto.

4. THAT the costs of this Application be provided for.

3. This ruling is in respect of the application. The application is supported by an affidavit sworn by the defendant/applicant. He deposed that he was not aware of any proceedings in this matter until 16th October 2019 when a team of armed police officers from Kakamega Police Station accompanied by the area chief served him with copies of a decree issued on 19th March 2019 and a judgment. He urged the court to grant him the orders sought on the ground that he was never served with summons to enter appearance.

4. The plaintiff/respondent filed a replying affidavit in which he deposed that the defendant was served with summons to enter appearance together with the plaint and other accompanying documents on 9th May 2017 and several mention notices, hearing notices and even a taxation notice on various subsequent dates by a process server known as Habil Juma Wanyama. He annexed copies of various affidavits of service. He added that the applicant was evicted from the suit property on 25th October 2019 and that the application is therefore overtaken by events and is aimed at denying him the fruits of the judgment.

5. The applicant filed a supplementary affidavit in which he deposed that he has never met the process server. The respondent filed a further

affidavit in which he reiterated that the applicant was served.

6. The application was canvassed through written submissions which both sides duly filed. I have considered the application, the affidavits and the submissions. Only two issues arise for determination: whether the applicant was served with summons to enter appearance and whether the orders sought should issue.

7. Was the applicant served with summons to enter appearance? The respondent has been emphatic that the applicant was served. In that regard, the respondent annexed an affidavit of service sworn by Habil Juma Wanyama, a process server who deposed that he served the applicant with summons to enter appearance, the plaint and other accompanying pleadings on 9th May 2017. The process server deposed further that on the said date, he travelled from Kakamega to Eshisiru Trading Centre where he met the plaintiff who led him and pointed out the applicant to him “from a distance at his home” where he approached him and effected service but the applicant declined to acknowledge service by signing.

8. The process server has not stated exactly where the applicant’s home was. Was it within Eshisiru Trading Centre? If not, how far was it from the centre? No features of the homestead that can really show that the process server actually went to the homestead have been mentioned. It is also not stated at what part of the compound the process server met the applicant and what the applicant doing at the time of service. All those questions remain unanswered. I also note that the respondent strongly opposed attempts by the applicant to have the process server orally examined.

9. The respondent has sought to rely on affidavits of service in respect of mention notices and hearing notices to support his argument that the applicant was served with summons to enter appearance. I do not think subsequent service can be equated to service of summons to enter appearance. The latter is the entry point to litigation since it is what gives notice to a defendant that a suit has been filed against him and calls upon him to defend himself. The former merely gives notice of dates set for mention or hearing following valid service of summons. A matter cannot validly proceed to hearing in the absence of proof service of summons to enter appearance. Service of summons to enter appearance goes to the very core of the right to a hearing.

10. In view of the gaps in the information regarding the place and circumstances of service, which gaps cannot be filled by oral examination of the process server, I find that the applicant was not served with summons to enter appearance.

11. The law relating to an application for setting aside where there was no service is that such an applicant is entitled to setting aside as of right. The Court of Appeal reiterated as much in James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR where it stated:

In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See Onyango Oloo v. Attorney General [1986-1989] EA 456) ...

12. It follows therefore that the respondent’s arguments as to whether the applicant has a defence with triable issues and whether the application is overtaken by events are neither here nor there. The applicant herein is therefore entitled to an order of setting aside of the judgment delivered on 21st November 2018.

13. The respondent deposed in his replying affidavit that the applicant was evicted from the suit property on 25th October 2019. The applicant did not challenge that claim and I take it that the current status on the ground is that the respondent is in possession. Even as I grant setting aside, I will preserve the current status as regards possession so as to avoid causing confusion and upheavals on the ground. Parties are encouraged to expeditiously set down the suit for hearing and determination.

14. I therefore make the following orders:

a) The judgement delivered herein on 21st November, 2018 is hereby set aside.

b) The current status quo on the suit property as regards possession shall be maintained pending hearing and determination of the suit.

c) Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 23RD DAY OF NOVEMBER 2021.

D. O. OHUNGO

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

MR OSANGO FOR THE PLAINTIFF

NO APPEARANCE FOR THE DEFENDANT

COURT ASSISTANT: E. JUMA