



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 288 OF 2012**

**PETER K GITAHIL.....1<sup>ST</sup> PLAINTIFF**

**NDUNGU MUGOYA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**AKUISI FARMERS CO. LTD.....1<sup>ST</sup> DEFENDANT**

**JOHN KAGAI.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. I have before me for determination the defendants Notice of Motion dated 11<sup>th</sup> October 2019. The application is expressed to be brought under Order 51 Rule 1, Order 10 Rule 11 of the Civil Procedure Rules and Section 3 of the Civil Procedure Act, Cap 21 Laws of Kenya. The applicants sought the follows orders:-

*(a) That this matter be certified urgent and be heard ex-parte in the first instance.*

*(b) That this honourable Court be pleased to suspend execution of the warrant of arrest against the 2<sup>nd</sup> defendant herein and stay execution of the decree herein pending hearing of this application inter-parties.*

*(c) That this honourable Court be pleased to set aside the judgment entered against defendants together with all consequential orders and the Defendants be granted leave to defend this suit.*

*(d) That costs of this application be proved for.*

2. The application was supported on the grounds set out on the face of the application and the affidavits sworn in support by Joseph Githaiga Ndirangu and John Kagai together with the supplementary affidavit sworn by Ann Wangari Mbugua. In support of the application, the applicants aver that they were never served with summons to enter appearance or any pleadings in the case. The 2<sup>nd</sup> defendant contended that he was not a director of the 1<sup>st</sup> defendant and therefore he was improperly enjoined as a party in the suit. The 1<sup>st</sup> defendant vide the supporting affidavit sworn by Joseph Githaiga Ndirangu a director of the 1<sup>st</sup> defendant on 11<sup>th</sup> October 2019 contended that the 2<sup>nd</sup> defendant was not a director, or an employee of the 1<sup>st</sup> defendant at all material times it was alleged he was served with Court process on behalf of the 1<sup>st</sup> defendant. The deponent averred that the 1<sup>st</sup> defendant had offices located at Akuisi Kiremba farm in Solai where any documents could have been served and service acknowledged by its Staff by signing and stamping with the Company's official stamp. The 1<sup>st</sup> defendant annexed a CR 12 from the companies Registry to confirm the particulars of the current directors of the company. The supplementary affidavit sworn by Ann Wangari Mbugua affirmed she was an employee of the 1<sup>st</sup> defendant and was the secretary /Receptionist at the office. She stated that the office was open all the time and that no court documents were ever delivered to the office relating to the instant case.

3. In the replying affidavit filed by the 1<sup>st</sup> plaintiff he averred that the 1<sup>st</sup> defendant never had an office and that the office alluded to by the 1<sup>st</sup> defendant was only opened recently. He stated the change of directors was equally effected recently with a view of defeating the ends of justice. The 1<sup>st</sup> plaintiff averred the 2<sup>nd</sup> defendant was a director and a former chairman of the 1<sup>st</sup> defendant and that when he was served he accepted service though he declined to sign. He averred that the defendants have all along been aware of the suit and had not demonstrated any sufficient reason to warrant the Court to set aside the judgment.

4. The 1<sup>st</sup> plaintiff swore a further supplementary affidavit dated 4<sup>th</sup> February 2020 filed in Court on 5<sup>th</sup> February 2020 responding to the

applicants averments that they were not served summons to enter appearance and subsequent notices. The 1<sup>st</sup> plaintiff/respondent in particular annexed various affidavits of service by process servers. The respondent averred that the affidavits of service filed show that the applicants were served but failed to enter appearance and /or file any defence.

5. The application was agued by way of written submissions. The applicant's submission was filed on 24<sup>th</sup> January 2020 while the respondents' submissions were filed on 5<sup>th</sup> February 2020. I have read and considered the filed submissions. The contention of the 1<sup>st</sup> applicant is that it was never served with summons to enter appearance and contended that the 2<sup>nd</sup> defendant was not a director of the company and therefore he could not be served on behalf of company as depicted on the copies of the affidavits of service filed. The applicants submitted that the 2<sup>nd</sup> defendant's name was not amongst the list of Directors as per the CR12 issued by the Registrar of Companies. The Respondents though contending the 2<sup>nd</sup> defendant was a director and chairman of the 1<sup>st</sup> defendant did not furnish any evidence to support their assertion. The 2<sup>nd</sup> defendant indicated that though he had been a director of the 1<sup>st</sup> defendant he had retired though no evidence of the date of his retirement was given. The respondents by their submissions insisted that the 2<sup>nd</sup> defendant was served and he accepted service on behalf of the 1<sup>st</sup> defendant as its chairman.

6. In the suit instituted by the plaintiff/respondents it is clear the 2<sup>nd</sup> defendant was sued as a director of the 1<sup>st</sup> defendant although the plaint does not disclose why he was sued in his individual capacity yet the 1<sup>st</sup> defendant was a limited company with a separate legal identity and therefore capable of being sued independently. In the draft defence annexed, the 2<sup>nd</sup> defendant has pleaded misjoinder and that would be a triable issue. The issue whether the 1<sup>st</sup> defendant had allocated land and balloting for the plots had been done before the institution of the suit would equally be a triable .

7. The respondents have not proved that the 2<sup>nd</sup> defendant was a director of the 1<sup>st</sup> defendant when the suit was filed so that he could be served on behalf of the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant's joinder as a party to the suit is questionable and to the extent that there is no evidence that he was a director of the 1<sup>st</sup> defendant as at the time the suit was filed I have no basis to hold that the 1<sup>st</sup> defendant was appropriately served with summons to enter appearance. As per the CR 12 exhibited as "JGN2" it is evident that the 2<sup>nd</sup> defendant is not a director of the 1<sup>st</sup> defendant. This evidence has not been rebutted. The 2<sup>nd</sup> defendant not being in the management of the 1<sup>st</sup> defendant, he could not have had any say in the affairs of the 1<sup>st</sup> defendant except perhaps as a share holder if he still was a shareholder of the 1<sup>st</sup> defendant.

8. Having regard to the circumstances surrounding the service of summons to enter appearance and the subsequent processes I am not satisfied appropriate and proper service was effected on the defendants. I accordingly exercise my discretion and hereby order set aside the exparte judgment entered against the defendants on 14<sup>th</sup> July 2016 and all the consequential orders flowing therefrom. I grant leave to the defendants to file their defence within 21 days from the date of this ruling.

9. The costs of the application shall be in the cause.

**Ruling dated signed and delivered electronically at Nakuru this 30<sup>th</sup> day of April 2020.**

**J M MUTUNGI**

**JUDGE**