



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO.147 OF 2013

JUSTUS NGUMA.....PLAINTIFF

VERSUS

GONA BAHARI AND 7 OTHERS.....DEFENDANTS

RULING

1. By this Notice of Motion application dated and filed herein on 14th November 2016, the Defendants/Applicants pray for a stay of execution of the Decree issued by this Court on 18th May 2015 and that the Judgment entered herein be set aside and urge that they be allowed to file their Written Statement of Defence.

2. The application which is supported by an affidavit sworn by the 3rd Defendant Kazungu Gona is based on the grounds:-

i) That the Defendants have never been served with summons to enter appearance;

ii) That the affidavit of service on record is full of falsehoods and the same ought not to be believed;

iii) That the Defendants only learnt of this matter when a draft decree was left at the Office of the area Chief who accordingly notified them; and

iv) That the Defendants have a good defence with overwhelming chances of success and would wish to be heard thereon.

3. The Plaintiff-Justus Nguma is opposed to the application. In a Replying Affidavit sworn and filed herein on 7th April 2017, he avers that he filed this suit on 23rd August 2013 and the Defendants were served with summons through a duly instructed Process Server on 20th September 2013. Despite such service the Defendants neither entered an appearance nor filed a defence.

4. The Plaintiff further avers that in all the occasions when this matter came up for pre-trial and the hearing of the suit, the Defendants were similarly served with notice thereof but they failed and/or refused to attend Court on the appointed dates.

5. The Plaintiff accuses the Defendants of misleading the Court that they were not served with an order to deny the Plaintiff the fruits of his Judgment.

6. I have perused and considered the application together with the response thereto. I have equally perused and considered the Written Submissions placed before me by Mr. Lughanje the Learned Advocate for the Plaintiff.

7. All the eight Defendants herein aver that they were never served with summons to enter appearance herein and hence their failure to participate in the proceedings which led to the Judgment delivered herein against them by the Honourable Justice Angote on 28th November 2014. The Plaintiff on the other hand insists that the Defendants were duly served and that this present application is but a gimmick to deny the Plaintiff the fruits of his Judgment.

8. In support of his case that the Defendants were so served with the summons, the Plaintiff relies on an Affidavit of Service sworn on 15th October 2013 and filed herein on 18th February 2014 by one Morris Mwavuo Ngunyo, a Licensed Process Server of this Court. In the said Affidavit, the Process Server deposes at Paragraphs 1 to 4 thereof as follows:-

1. That on the 20th September, 2013 I received Copies of Summons to Enter Appearance, Plaintiff annexed with Verifying

Affidavit, Plaintiff's List of Documents, Plaintiff's List of Witnesses and Plaintiff's Statements from the firm of M/s K. Lughanje & Company Advocates with instructions to effect service upon the Defendants who reside at Magarini Village in Magarini District in Kilifi County.

2. That on the same day 20th September 2013 at about 10.00 a.m I proceeded to the Defendants residence at Magarini Village whereby I served the above mentioned Court documents upon the Defendants who were personally known to me at the time of service as am related to the 1, 2, 3, and 4th Defendants.

3. That the said Defendants accepted service by receiving but declined to sign at the back of the original copies that I Retained.

4. That I left the said all Defendants (sic) with copies of the above mentioned documents and took with me the unsigned original Copy that I retained and I herewith return the same to this Honourable Court as duly served upon the Defendants.

9. Service of Summons is provided for in Order 5 Rules 6 and 7 of the Civil Procedure Rules. Those Rules are explicit that service of summons shall be made by delivering or tendering the duplicate thereof; and Rule 8(1) in particular provides that:-

“Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.”

10. In his Affidavit of Service herein, the Process Server merely asserts that he served the defendants who were personally known to him at the time of service on the basis that he is related to the 1st, 2nd, 3rd and 4th Defendants. He does not explain the nature of the relationship he had with the four, nor does he explain whether he served the 5th, 6th, 7th and 8th Defendants and how he came to know them.

11. Even if the Process Server was related to the 1st to 4th Defendants as he purports there was no evidence that his purported relatives had been appointed by the 5th to 8th Defendants as their agents for purposes of receiving the summons and/or that he did serve any or all of them as such agents.

12. In the premises, I am satisfied that on the material placed before me, one cannot make a satisfactory conclusion that all the Defendants herein were served and/or made aware of the proceedings leading to the impugned Judgment.

13. In the result, I am satisfied that this is a proper case for the exercise of the Courts discretion to set aside the default Judgment and to allow the Defendants to participate in the proceedings. The application dated 14th November 2016 is accordingly allowed and the Judgment delivered on 28th November 2014 is hereby set aside.

14. The Defendants have 21 days from today to file their joint and/or several defences together with any documents, statements and/or materials they wish to rely on in support of their case.

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

Dated, signed and delivered at Malindi this 29th day of April, 2020.

J.O. OLOLA

JUDGE