



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT THIKA**  
**ELC CASE NO. 411 OF 2017**  
**(FORMERLY NAIROBI ELC CASE NO. 516 OF 2011)**

**BARUTHI BUNDI.....PLAINTIFF/RESPONDENT**

**VERSUS**

**IBRAHIM KANGETHE.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**ISAACK KAMAU KABUE.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**PETER NJOROGE KABOGO.....3<sup>RD</sup> DEFENDANT/TRESPONDENT**

**JOSHUA NJOROGE .....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**PETER MWANGI.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**DANIEL WATUKU.....6<sup>TH</sup> DEFENDANT/RESPONDENT**

**JOEL KINUTHIA WANDUA.....7<sup>TH</sup> DEFENDANT/RESPONDENT**

**PETER MURIGI NJUGUNA.....8<sup>TH</sup> DEFENDANT/RESPONDENT**

**JOSEPHAT WANGEKA.....9<sup>TH</sup> DEFENDANT/RESPONDENT**

**MUCHIRI NDIRANGU.....10<sup>TH</sup> DEFENDANT/RESPONDENT**

**PETER KINUTHIA.....11<sup>TH</sup> DEFENDANT/RESPONDENT**

**SAMUEL WAWERU.....12<sup>TH</sup> DEFENDANT/RESPONDENT**

**GABRIEL KAMAU WAWERU.....13<sup>TH</sup> DEFENDANT/RESPONDENT**

**ZACHARIA MUCHIRI.....14<sup>TH</sup> DEFENDANT/RESPONDENT**

**MWANGI KAMAU.....15<sup>TH</sup> DEFENDANT/APPLICANT**

**FRANCIS WAWERU.....16<sup>TH</sup> DEFENDANT/RESPONDENT**

**DAVID NDIRANGU.....17<sup>TH</sup> DEFENDANT/RESPONDENT**

**NDOGE NGUGI.....18<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

The matter for determination is the **Notice of Motion** Application dated 22<sup>nd</sup> July 2019, by the 15<sup>th</sup> Defendant/Applicant brought under

**Order 22 Rule 22, Order 10 Rule 11 and Order 51 Rule 1, Sections 1A and B and 3A of the Civil Procedure Act** and all other enabling provisions of law seeking for orders that;

*a) That the Judgment dated 6<sup>th</sup> December 2018, and the Decree issued thereafter on 30<sup>th</sup> January 2019, be set aside ex- debito justitiae and the 15<sup>th</sup> Defendant be given unconditional leave to defend this suit.*

*b) That the costs of this Application be provided for.*

The Application is premised on the grounds that the **Affidavit of Service** filed by the Process Server is **misrepresentative, erroneous** and **false** as it does not reflect a true and accurate account regarding service of Court process in this matter and that the Plaintiff has committed a fraud against the Court by withholding material facts and misleading the Court on the true position of service of Summons, pleadings, together with subsequent Notices thereafter as the parties had not been notified of the suit more so the Applicant. That the resultant Judgment and Decree are being enforced against a party who did not participate in this suit and therefore not given an opportunity to be heard. Further that the Applicant has never been served with Summons.

It was contended that there is an obligation to serve a hearing notice on all Defendants even after entry of Interlocutory Judgment. Further that the Judgment Debtor's/Applicant is aggrieved by the proceedings, Judgement and Decree entered as the same are irregular and they should therefore be set aside. It was contended that the 15<sup>th</sup> Defendant/ Applicant has a credible defence and he should be given a chance to be heard.

In his **Supporting Affidavit** sworn on **22<sup>nd</sup> July 2019**, **Mwangi Kamau** averred that he was never served with the pleadings hence denied a chance to enter appearance and defend the suit. He further averred that Interlocutory Judgment was never entered against him nor any Defendants in default of appearance as the matter proceeded on **7<sup>th</sup> November 2018**, under the Service Week despite lack of service. That the Plaintiff was granted the reliefs sought vide the Judgment delivered on **6<sup>th</sup> December 2018**, and by a decree issued on **30<sup>th</sup> January 2019**. He averred that he is apprehensive that the O.C.S and the O.C.P.D will proceed to evict him which will cause loss and harm on his side as there were people in the morning of **19<sup>th</sup> July 2019**, that descended on their properties and destroyed some of the structures. He further averred that he was not aware of the suit as summons were never served on him and therefore the Judgment entered is irregular and it should be set aside. It was his contention that a request for Judgment has never been filed by the Plaintiff and that the totality is that service was not effected and if service of summons to enter appearance was not served, then all subsequent actions would be nullities. It was his contention that he had a credible defence that raises triable issues and he should be granted unconditional leave to raise the same and be heard on merit,

The Application is opposed and the Plaintiff/Respondent **Baruthi Bundi**, swore a **Replying Affidavit** on **8<sup>th</sup> August 2019**, and averred that he participated in pointing out the 15<sup>th</sup> Defendant/Applicant to the Court Process Server and therefore the Applicant was at all material times duly served with Court process including Complaint, Summons, Mentions Notices and Hearing Notices as the affidavit of the **Return of Service** have been duly filed. He averred that the matter was initially filed in Nairobi and it came up for mention and hearing on various occasions and that the 15<sup>th</sup> Defendant/Applicant elected not to participate.

That on **1<sup>st</sup> March 2012**, when the matter came up before **Lady Justice Nyamweya**, the Hon. Judge considered the **Return of Service** on record and confirmed that all parties had been duly served with summons and pleadings and therefore directed that the matter be fixed for hearing at the registry. He further averred that the matter was subsequently transferred to Thika on **16<sup>th</sup> March 2017**, and fixed for hearing on **7<sup>th</sup> November 2018**, and that he was aware that Hearing Notices were served upon all the Defendants including the 15<sup>th</sup> Defendant/Applicant.

Further that Court delivered Judgment and directed **Viewline Auctioneers** to evict all the tenants. That the subject auctioneers visited the suit property on **19<sup>th</sup> July 2019**, and attempted to evict the Defendants but that the same was not done satisfactorily. It was his contention that service was properly effected on all Defendants and that the Application has been overtaken by events. He further averred that he has been advised by his Advocates that the 15<sup>th</sup> Defendant/Applicant has not established a *prima facie* Defence with chances of success as the annexed Defence is a mere denial and does not raise any triable issues. That the 15<sup>th</sup> Defendant/Applicant has not claimed any proprietary interest over the suit property and it is therefore **frivolous** and **vexatious**.

He averred that he is the registered owner of the suit property and the 15<sup>th</sup> Defendant/Applicant has not annexed evidence of ownership and he has failed to satisfy the Court on the well settled principles for grant of prayers sought in an Application of this nature.

Further **David Manyonge Saratuki**, a licensed **Court Process Server**, swore an **Affidavit** on **8<sup>th</sup> August 2019** and averred that he effected service of proceedings in this matter upon the Defendants herein including the 15<sup>th</sup> Defendant/Applicant and that the Plaintiff aided in pointing out the Defendants to him before he effected service. That he then deponed Affidavits upon effecting service, one dated **19<sup>th</sup> October 2011** and filed in Court on **27<sup>th</sup> October 2011**, evidencing service of Court Order dated **14<sup>th</sup> October 2011** and especially to the 15<sup>th</sup> Defendant in paragraph 14 therein, **Affidavit of Service** dated **9<sup>th</sup> November 2011** evidencing service of Hearing Notice for **10<sup>th</sup> November 2011** and that in paragraph 7 it evidences his affixing of the Hearing Notice on the 15<sup>th</sup> Defendant/ Applicant's Kiosk on the day of service, **Affidavit of Service** dated **28<sup>th</sup> February 2012** and filed in Court on **1<sup>st</sup> March 2012**, evidencing service of **Amended Notice of Motion** filed on **17<sup>th</sup> November 2011**, Order issued on **22<sup>nd</sup> November 2011** and Summons sealed by the High Court on **16<sup>th</sup> February 2011** and Summons sealed by the Court on **16<sup>th</sup> February 2012** to the 15<sup>th</sup> Defendant. **Affidavit of Service** dated **23<sup>rd</sup> July 2012** evidencing service of **Witness Statement** dated **25<sup>th</sup> June 2012** and **Hearing Notice** dated **25<sup>th</sup> June 2012** to the Defendants and the 15<sup>th</sup> Defendant/Applicant in paragraph 5. Further that **Affidavit of Service** dated **28<sup>th</sup> May 2019** in paragraph 7 evidencing 15<sup>th</sup> Defendant/Applicant was served with **Hearing Notice** dated **4<sup>th</sup> February 2014** but refused to sign on the copy, **Affidavit Of Service** dated **5<sup>th</sup> April 2017** service effected on the 1<sup>st</sup> Defendant who confirmed he was authorized to accept service by all Defendants including

the 15<sup>th</sup> Defendant/Applicant with a **Mention Notice** dated **20<sup>th</sup> March 2017**, **Affidavit of Service** dated **13<sup>th</sup> June 2017** evidencing service of mention dated **18<sup>th</sup> April 2017** through their Chairman who confirmed he had authority to receive service including authority by the 15<sup>th</sup> Defendant/Applicant, **Affidavit of Service** dated **31<sup>st</sup> October 2018** evidencing service of **Hearing Notice** dated **16<sup>th</sup> October 2018** and marked for hearing on **7<sup>th</sup> November 2018** to the Defendants. He therefore averred that he duly effected service upon the Defendants including the 15<sup>th</sup> Defendant and they were aware of the proceedings.

The Application was canvassed by way of written submission which the Court has carefully read and considered. The issue for determination is ***whether the 15<sup>th</sup> Defendant/Applicant is entitled to the orders sought.***

It is the Applicant's contention that he was never served with the Summons to enter appearance and that the Plaintiff/Respondent is misleading the Court and further that the **Affidavit of Service** by the Process Server is misleading, erroneous and false as it does not reflect a true and accurate account regarding service of court process in this matter. It is trite that **'he who alleges must prove'** as per **Section 107 and 108** of the **Evidence Act**.

The Court has gone through the **Affidavit of Service** in the court's record as deponed by the **Affidavit of Service** of **David Manyonge Saratuki** dated **8<sup>th</sup> August 2019**. Specifically the **Affidavit of Service** dated **28<sup>th</sup> February 2012**, narrates how the Summons to enter appearance was served upon all the Defendants and most importantly the 15<sup>th</sup> Defendant/Applicant. This Court further notes that the **Affidavit of Service** states how the 15<sup>th</sup> Defendant/Applicant was identified, how he was served, when he was served, the time and that the Process Server introduced himself.

This Court further notes that the Process Server has identified two people. Further, the Court notes that the **15<sup>th</sup> Defendant** has not disowned knowing the said persons. Therefore, the Court is satisfied that indeed service of Summons together with the Hearing Notice and Mention Notices were duly served to the 15<sup>th</sup> Defendant/Applicant. Without any evidence by the **15<sup>th</sup> Defendant/Applicant** to controvert the said narration, the Court finds and holds that he has failed to prove any misgivings on the Plaintiff/ Respondent's part.

Further this Court notes that the **15<sup>th</sup> Defendant/Applicant** has taken issue with the fact that Interlocutory Judgment was never entered. The Court has perused the Plaint dated **26<sup>th</sup> September 2011** and notes that the said claim by the Plaintiff/Respondent is not a liquidated claim and therefore as per provisions of **Order 10 Rule 4 (1) and (2)** of the **Civil Procedure Rules, 2010**, Interlocutory Judgment Could not be entered. See **Order 10 Rule 4 (1) and (2)** of the **Civil Procedure Rules, 2010** which provides;

***"4. (1) Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.***

***(2) Where the plaintiff makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.***

It is therefore not in doubt that since there was no liquidated demand, Judgment could only be entered upon the matter going through formal proof and the Plaintiff/Respondent given a chance to ventilate his case. See the case of **Mint Holdings Ltd & Another ...Vs... Trust Bank Ltd [2000] eKLR**, where the Court of Appeal held that:-

***"The prayers sought by the appellants in their plaint do not entitle them to an interlocutory judgment in any event. As pointed out there was no liquidated demand. Judgment could only have been entered upon formal proof. The entry of such interlocutory judgment was irregular as Order IXA (now Order 10) of the Civil Procedure Rules does not cater for entering of an interlocutory judgment when the nature of reliefs sought requires formal proof"***

It is the Court's considered view that the Judgment that was entered against the Defendants was therefore regular. However the Defendant has sought for setting aside of the default Judgement as envisaged under **Order 10 Rule 11** of the **Civil Procedure Rules** which provides:

***"Where judgment has been entered under this order, the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."***

In the case of **James Kanyiita Nderitu & Another...Vs...Marios Philotas Ghikas & Another [2016] eKLR**, the Court held that;

***"In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other..."***

From the above case law, it is quite clear that there are various principles that ought to be guiding the Court in exercising its discretion on whether or not to set aside default Judgment. First of all is the reasons for the failure to enter appearance, As already held above, the Court

finds that the 15<sup>th</sup> Defendant/Applicant has not given a satisfactory reason as to why he did not file a Memorandum of Appearance. However all is not lost as that is not the only factor. Further the Court notes that the Application was filed in Court on 23<sup>rd</sup> July 2019, while the Judgment was entered on 6<sup>th</sup> December 2018 and therefore the Application was filed 7 months after entry of Judgment.

The other factor that the Court ought to consider is whether the Defence raises a triable issue. In the case of Olympic Escort International Co. Ltd. & 2 Others ...Vs... Parminder Singh Sandhu & Another [2009] eKLR. The Court in relying on the case of Tree Shade Motors Ltd ...Vs... DT Dobie & Ano. [1995-1998] 1EA 324, stated that:-

*“Even if service of summons is valid, the judgment will be set aside if the defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff’s claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside.”*

Further in the case of Toshike Construction Company Limited ...Vs... Harambee Co-operative Savings & Another [2019]eKLR, the Court quoted the case of Sebei District Administration....Vs...Gasyali (1968) EA 300, where the Court held that;

*“The nature of the action should be considered, the defence that has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of a court.”*

The Court has perused the **Draft Defence** marked as **Annexure MK1** and notes that it is the 15<sup>th</sup> Defendant’s/Applicant’s defence that it is the Plaintiff/Respondent who has encroached upon their small scale business thus interfering with the normal operations. Further the Defendants avers that it is the Plaintiff/Respondent who has encroached on the land and continues to waste it. After carefully consideration the Court concurs with the Plaintiff/Respondent that the 15<sup>th</sup> Defendant/ Applicant has not laid any claim to the suit property. Infact he only alleges that the Plaintiff/ Respondent has encroached on “the land” and does not state whose land the Plaintiff/Respondent has encroached on.

It is not in doubt that this suit was filed in 2011 and by the time the Judgment was being delivered in 2018, the matter had been in Court for almost 7 years. To continue to have the matter in Court without any satisfactory defence, the defence by the 15<sup>th</sup> Defendant/Applicant being just that the Plaintiff has encroached on the land without laying any interest he has over the suit land, the Court finds that it would only prejudice the Plaintiff/Respondent who has demonstrated vide the detailed various Affidavit of service that the Defendants were sufficiently served.

Therefore the Court finds and holds that it is not in the interest of Justice that the Judgment dated 6<sup>th</sup> December 2018, be set aside. For the above reasons, the Court finds that the 15<sup>th</sup> Defendant/Applicant has not met the threshold required to warrant the Court to exercise its discretion in his favour and have the Judgment on record set aside.

Consequently, the Court finds and holds that the **Notice of Motion** application dated 22<sup>nd</sup> July 2019, is not merited. The same is dismissed entirely with costs to the Plaintiff/Respondent.

It is so ordered.

**Dated, Signed and Delivered at Thika this 21<sup>st</sup> day of May 2020**

**L. GACHERU**

**JUDGE**

**Court Assistant.....**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**By Consent of:**

**M/s Gikunda Miriti Advocates for the Plaintiff/Respondent**

.....for the 1<sup>st</sup> Defendant/Respondent

..... for the 2<sup>nd</sup> Defendant/Respondent

..... for the 3<sup>rd</sup> Defendant/Respondent

..... for the 4<sup>th</sup> Defendant/Respondent

..... for the 5<sup>th</sup> Defendant/Respondent

..... for the 6<sup>th</sup> Defendant/Respondent

..... for the 7<sup>th</sup> Defendant/Respondent

..... for the 8<sup>th</sup> Defendant/Respondent

..... for the 9<sup>th</sup> Defendant/Respondent

..... for the 10<sup>th</sup> Defendant/Respondent

..... for the 11<sup>th</sup> Defendant/Respondent

..... for the 12<sup>th</sup> Defendant/Respondent

..... for the 13<sup>th</sup> Defendant/Respondent

..... for the 14<sup>th</sup> Defendant/Respondent

.....for the 15<sup>th</sup> Defendant/Applicant

.....for the 16<sup>th</sup> Defendant/Respondent

.....for the 17<sup>th</sup> Defendant/Respondent

..... for the 18<sup>th</sup> Defendant/Respondent

**L. GACHERU**

**JUDGE**