



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**E.L.C CASE NO. 170 OF 2017**

**PETER BITA MORWABE.....PLAINTIFF**

**VERSUS**

**STEPHEN NYABUTO MWATA.....1<sup>ST</sup> DEFENDANT**

**EZEKIEL MOSINGI OSINSI.....2<sup>ND</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. This ruling is in respect of the Defendant's application brought by way of Notice of Motion dated 24.10.2019 seeking orders:

- i. Spent
- ii. That this honourable court be pleased to set aside the interlocutory judgment against the 2<sup>nd</sup> Defendant and all consequential orders issued thereafter pending the hearing and determination of this suit.
- iii. That upon prayer 2 being granted, this honourable court be pleased to grant leave to the 2<sup>nd</sup> Defendant to file his defence in terms of the draft defence annexed herewith.
- iv. That the draft annexed defence annexed herewith be deemed as having been duly filed and served upon the Plaintiffs upon payment of the requisite court fees.
- v. That the Plaintiff be at liberty to file a Reply to defence.
- vi. That the costs of this application be provided for.

2. The application is based on the grounds stated on the face of the Notice of Motion, key among them being that the 2<sup>nd</sup> Defendant was not served with Summons to enter appearance and only learnt of the suit when he was arrested in execution of the decree issued herein. It is also supported by the Applicant's affidavit sworn on 24.10.2019 and Supplementary affidavit sworn on 6.12.2019.

3. The application is opposed by the Plaintiff through his Replying affidavit sworn on the 11<sup>th</sup> November 2019 in which he deposes that the Applicant was duly served with summons to enter appearance.

The application was canvassed by way of written submissions and both parties filed their submissions which I have considered.

**ISSUES FOR DETERMINATION**

4. The following issues fall for determination:

- i. Whether the Applicant was served with Summons to enter appearance.
- ii. Whether the Applicant has a defence that raises triable issues.
- iii. Whether the interlocutory judgment should be set aside.

## ANALYSIS AND DETERMINATION

5. The principles that guide the court in the exercise of its discretion to set aside an ex-parte judgment are now settled. In the case of **Yamko Yadpaz Industries Ltd Vs Kalka Flowers 2013 KLR**, Justice Havelock citing the Court of Appeal decision in **Maina Vs Mugiria** stated as follows:

*“The principles governing the exercise of the judicial discretion to set aside an ex- parte judgment obtained in default of either party to attend the hearing are as follows:*

*a) Firstly, there are no limits or restrictions on the judge’s discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.*

*b) Secondly, this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice. **Shah V Mbogo 1967 EA 116at 123.***

*c) Thirdly, the Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that the judge misdirected himself in some manner and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice. **Mbogo V Shah 1967 EA 93.***

*d) The court has no discretion where it appears there has been no proper service **Kanji Naran V Velji Ramji 1954 21 EACA 20.***

*e) A discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrarily and idiosyncratically, **Smith V Middleton 1972 SC 30.***

6. In the instant case, the Applicant denies that he was served with Summons to enter appearance. He contends that he only learnt about the suit herein when he was arrested in execution of the decree after the Plaintiff obtained an interlocutory judgment against him. Counsel for Applicant submitted that the Plaintiff had failed to prove service and the interlocutory judgment was therefore irregular and ought to be set aside *ex debito justitiae*. He cited the case of **National Bank of Kenya v Puntland Agencies Limited & 2 Others (2006) eKLR** where the court stated as follows:

*“Once service is denied by the Defendant the evidential burden shifts to the Plaintiff to prove that service was in fact effected.*

*On any allegation that summons has not been properly served, the court may examine the serving officer on oath or cause him to be so examined by another court in accordance with Order 5 Rule 16 of the Civil Procedure Rules 2010.”*

7. I have perused the Affidavit of service of one James Moracha Ntabo, the Process Server who alleges to have served the 2<sup>nd</sup> Defendant on 28<sup>th</sup> September 2017 at Kisii law courts as he had accompanied his wife who had a case –Kisii Criminal Case No. 2803 of 2016. He has averred that he served the Applicant in the presence of the Plaintiff. The affidavit shows that the Applicant acknowledged receipt of the summons by signing on the back of the summons. Even though the Applicant has denied service and avers that he was in Nairobi on the 28.9.2017, he does not dispute the signature on the summons nor did he request that the process server be cross-examined on his affidavit. The inference I draw from this is that the Applicant would not be able to challenge the process server on his affidavit. I have perused the proceedings on record and I note that before the Applicant was committed to civil jail on 2.4.2019, the Deputy Registrar noted that he acknowledged the signature on the various court processes served upon him. It is therefore my finding that the Applicant was duly served with summons.

5. I will now turn to the second issue which is whether the Applicant has a defence that raises triable issues. I have perused the draft statement of defence filed by the 2<sup>nd</sup> Defendant and the same mainly consists of denials. However, I note from the plaint that the Plaintiff alleges to have purchased the land from the 1<sup>st</sup> Defendant and not the 2<sup>nd</sup> Defendant. In the circumstances, I am inclined to exercise my discretion in favour of the Applicant. This being a land matter, I am of the view that the same ought to be heard on the merits so that the Applicant is not condemned unheard.

6. I must however consider that justice cuts both ways and the interests of the Plaintiff who has obtained a judgment in his favour must also be taken into account. I therefore allow the 2<sup>nd</sup> Defendants’ application and set aside the interlocutory judgment, together with all the consequential orders thereto on condition that the 2<sup>nd</sup> Defendant/Applicant pays the Plaintiff/Respondent thrown away costs of Kshs. 15,000/= within 21 days from the date hereof failing which the orders herein shall automatically lapse.

The costs of this application shall be borne by the Applicant.

**Dated signed and delivered via zoom this 20<sup>th</sup> day of May 2020.**

**J.M ONYANGO**

**JUDGE**