REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 58(A) OF 2017

HAJI ABDUL WEKESA MAUNGO..... PLAINTIFF/APPLICANT

VERSUS

DAVID KILONGI MASINDANO ..... 1ST DEFENDANT/RESPONDENT

MATANDA FRED WEKESA.....2ND DEFENDANT/RESPONDENT

MUUTULI SAMSON .....3RD DEFENDANT/RESPONDENT

PAUL SANYANDA .....4TH DEFENDANT/RESPONDENT

R U L I N G

What calls for my determination in this ruling is the application by the 1st, 3rd and 4th defendants dated 24th February 2020 seeking the following orders: -

1. **Spent**

2. **Spent**

3. **Spent**

4. **That the ex – parte Judgment entered against the defendants on 18th December 2017 and all consequential orders be varied, discharged and/or be set aside.**

5. **That upon grant of prayer (4) above, the 1st, 3rd and 4th defendants be granted leave of this Court to file their defence.**

6. **That the annexed draft defence herewith attached be deemed as having been duly filed and served upon payment of the requisite charges.**

7. **That costs be in the cause.**

The application is premised on **Sections 1A, 1B, 3, 3A** and **63 of the Civil Procedure Act**, **Order 10 Rule 11**, **Order 22 Rule 22** and **Order 51 Rule 1 of the Civil Procedure Rules** and **Article 50 (1) of the Constitution**. It is founded on the grounds set out therein and also supported by the affidavit of **DAVID KILONGI MASINDANO** the 1st defendant herein and also sworn on behalf of the 3rd and 4th defendants.

The gravamen of the application is that whereas the plaintiff herein has obtained a Judgment and orders to evict them from the land parcel **NO NORTH MALAKISI/SOUTH WAMONO/843** (the suit land), they were never served with summons to enter appearance and only learnt about this case on 18th February 2020 when the plaintiff and a stranger served them with copies of the eviction order and upon perusal of this file, they discovered that the case had proceeded ex – parte against them on 18th December 2017 yet the 2nd defendant had passed away in 2016.

That upon perusal of the file, they discovered further that the process server one **KISEMBE KILISWA** had alleged in his affidavit that he had served the defendants with the summons to enter appearance and plaint on 12th May 2017 yet no such service had been effected upon them. That they are law abiding citizens and there is no way they would have failed to appear in Court to defend themselves. That they have been in occupation of the suit land from their childhood and that is the only place they call home and therefore they have a good defence and

the failure to file their defence was not deliberate but was because they were not served with any pleadings.

Annexed to the application is the eviction order, the affidavit of service by **KISEMBE KILISWA** and the defendants' joint defence in which it is pleaded, inter alia, that the plaintiff fraudulently registered himself as the proprietor of the suit land by forging the signature of the then registered owners **ZIPORAH NANYAMA, MAUNGO SANYANDA** and **SAMWEL KIMUNGUI** (all deceased). Further, that the plaintiff's claim was infact statute barred and a Preliminary Objection would be raised at the trial.

The application is opposed and in his replying affidavit dated 4th March 2020, the plaintiff has deponed, inter alia, that the process server served the defendants with summons and filed a return of service, that the defendants did not defend the suit in which the plaintiff sought eviction orders against them and the case proceeded to formal proof culminating with a Judgment in his favour. That he is the registered proprietor of the suit land since 9th April 2002 and holds the title thereto and this application is an afterthought and the defendants are trespassers who only intend to annoy him. That the suit land is family land which was gifted to him and this application should be dismissed so that he can proceed with the eviction process.

When the application was placed before me on 10th March 2020, it was agreed by consent that the same be canvassed by way of written submissions. The matter would thereafter be mentioned on 27th May 2020 since I was proceeding on leaved. However, by 27th May 2020, only the defendant's counsel had filed his submissions.

I have considered the application, the rival affidavits and annextures thereto which include the defendants' defence and the submissions filed.

Before I delve into the application, a brief summary of this case is important.

The plaintiff, then acting in person, filed this suit against the defendants on 20th April 2017 seeking the main remedy that the defendants had encroached onto the suit land in 2002 and ought to be evicted therefrom. The record shows that one **KISEMBE KILISWA** a process server of this Court filed an affidavit of service dated 24th July 2017 in which he deponed that on 12th May 2017 he travelled to **CHEPUKUI** village and served the 1st and 4th defendants with summons to enter appearance, verifying affidavit and supporting documents. That the 1st and 4th defendants also accepted summons on behalf of the 2nd and 3rd defendants but declined to sign. The matter was then listed before **MUKUNYA J** on 7th December 2017 where the plaintiff testified and by a Judgment dated 18th December 2017, it was ordered that the defendants be evicted from the suit land by Court Brokers with the assistance of the Officer Commanding Malakisi Police Station. Although the eviction order was issued, it is clear from the record that the same has not been effected and the defendants are still in occupation of the suit land.

The 1st, 3rd and 4th defendants seek the setting aside of the ex – parte Judgment dated 18th December 2017 and all consequential orders. It is their case that they were not served and that infact the 2nd defendant died in 2016. The plaintiff in response has stated that service was proper and that the 2nd defendant actually died in 2018 and not 2016. Given the conflicting dates as to when the 2nd defendant actually died and in the absence of the Death Certificate, this Court is unable to determine when exactly the 2nd defendant died. However, if indeed the 2nd defendant died in 2016, then there is no way that he could have been served with any documents on 12th May 2017.

Setting aside of ex – parte Judgment, is a common feature in our Courts. In **SHAH .V. MBOGO & ANOTHER 1967 E.A 116**, the Court stated that the discretion to set aside an ex – parte Judgment is intended to avoid hardship or injustice resulting from accident, inadvertence or excusable error but not to assist a person who had deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.

In **PATEL .V. E.A CARGO HANDLING SERVICES LTD 1974 E.A 75, DUFFUS P** stated as follows: -

> ***"The main concern of the Court is to do justice to the parties, and the Court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular Judgment as is the case here, the Court will not usually set aside the Judgment unless it is satisfied that there is a defence on the merits. In this respect, defence on merit does not mean, in my view, a defence that must succeed. It means, as SHERIDANJ put it, "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."*** Emphasis added

In **JAMES KANYITA NDERITU & ANOTHER .V. MARIOS PHILOTAS GHIKAS & ANOTHER 2016 eKLR**, the Court of Appeal discussed the principles to guide a Court in an application such as this one and said: -

> ***"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 had 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 others."***

The Court then went on to add as follows: -

> ***"In an irregular default Judgment on the other hand, Judgment will have been entered against a defendant who has not been***

served properly 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 the party once it comes to its notice that the Judgment is irregular, it can set aside the default Judgment on it's own motion. In addition, the Court will not venture into considerations of whether there has been inordinate delay in applying to set aside the irregular Judgment. The reasons why such a 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 is a cardinal principle of Natural Justice. Further, **Article 50(1) of the Constitution** provides for the right to a fair hearing in the following terms: -

"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body."

The principle set out by the House of Lords in in the case of **EVANS.V. BARTLAM 1973 2 ALL E.R 647** and which has been followed in this country is:-

" ……. that unless and until the Court has pronounced a Judgment upon the merits or by consent, it is to have the power to revoke the expression of it's coercive power when that has been obtained only by a failure to follow any of the rules of procedure"

Having perused the record herein, I am not satisfied that the there was proper service of the summons and plaint upon the defendants as envisaged under the law. When this trial proceeded ex – parte on 7th December 2017, it was on the presumption that the defendants, though served, had neither entered appearance nor filed any defence. Indeed, the record for that day reads: -

"Plaintiff – present

Defendant – absent – served"

However, in his affidavit of service dated 24th July 2017, **KISEMBE KILISWA** a process server of this Court has deponed as follows in paragraphs 1 and 4 which are relevant for purposes of this ruling: -

1: "That on 11th May 2017 I received summons to enter appearance, verifying affidavit and supporting documents from HAJI ABDUL WEKESA MAUNGO the plaintiff herein with instructions the same to be served upon DAVID KILONGI MASINDE 1st defendant, MATANDA FRES WEKESA 2nd defendant, MUTULI SAMSON 3rd defendant and PAUL SANYANDA 4th defendant all of CHEPUKUI village LWANDAYI LOCATION BUNGOMA WEST SUB – COUNTY."

4: "That about 3:30 pm I served the said summons to enter appearance on the 1st and 4th defendants who also accepted the summons of 2nd and 3rd defendants but declined to sign on the copy herein returned."

An affidavit is defined in **BLACK'S LAW DICTIONARY 10TH EDITION** as follows: -

"A voluntary declaration of facts written down and sworn to by a declarant, before an officer authorized to administer oaths."

Therefore, according to the affidavit of service of the process server, he only served the defendants with ***"summons to enter appearance, verifying affidavit and supporting documents."*** There is no evidence that he served the defendants with a copy of the plaint. This is in contravention of the mandatory provisions of **Order 5 Rule 1(1)** and **(3) of the Civil Procedure Rules** which provide as follows: -

1(1) "When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein"

(2) –

(3) Every summons shall be accompanied by a copy of the plaint." Emphasis added.

It must be remembered that it is the plaint which notifies the defendant of the case which he has to meet. That is why the law places a high premium on the requirement that the defendant be notified at the earliest opportunity about the allegations that he has to traverse so that he can make an informed decision on how to proceed with the case. I do not consider the requirements of service of the summons and plaint to be mere technicalities that can be cured by the provisions of **Article 159(2)(d) of the constitution**. The defendants were clear in their response that they were not served with the plaint.

In paragraphs 8 and 9 of his replying affidavit dated 24th February 2020, **DAVID KILONGI MASINDANO** the 1st defendant herein has deponed as follows: -

8 "That we tried to obtain the necessary pleadings from the Court and upon perusal we discovered that there is an allegation by one KISEMBE KILISWA (a Court Process Server) that he served us with S.T.E.A and plaint on 12/5/2017 (Hereto annexed and

marked DKM 2 is a copy of the affidavit of service).”

9 “That I or the other defendants have never been served with the Court pleadings in this case and we shall be pleased if the said KISEMBE KILISWA attends this Court for cross – examinations.”

It is of course not necessary to summon the said **KISEMBE KILISWA** for cross – examination given the fact that in his own affidavit of service, he makes no reference to having served the defendants with a copy of the plaint. If anything, the process server infact corroborates the averments of the defendants. The results of the failure to comply with the mandatory provisions of the law with regard to service of summons and plaint is that the ex – parte proceedings and subsequent Judgment dated 18th December 2017 must be set aside ex debito justitiae.

The importance of service of the plaint was re – emphasized by the Court of Appeal in the case of **PATRICK OMONDI OPIYO t/a DALLAS PUB .V. SHABAN KEAH & ANOTHER 2018 eKLR** where the Court stated that even where an amended plaint is not served, any subsequent proceedings predicated on such amended plaint are a nullity and any Judgment emanating therefrom would be set aside as a matter of course.

Even assuming that the ex – parte Judgment dated 18th December 2017 was a regular one, I would till exercise my unfettered discretion in favour of the defendants. This is because, as was held in **PATEL .V. E.A CARGO HANDLING SERVICES LTD** (supra), I am satisfied from a perusal of the defence annexed to the application that the same raises a weighty triable issue which touches on limitation. While this ruling is not a determination of the main suit herein, it is clear from the plaint filed on 20th April 2017 that in paragraph 4 thereof the plaintiff alleged that the defendants encroached on the suit land in 2002. This suit was filed 15 years later and in paragraph g(vi) of their defence, the defendants have pleaded that a Preliminary Objection would be raised that the suit offends the provisions of the **Limitation of Actions Act Chapter 22 Laws of Kenya**. That is clearly a triable issue that entitles the defendants to leave to defend the claim against them.

The up – short of the above is that the defendants’ Notice of Motion dated 24th February 2020 is allowed in the following terms:

1. The ex – parte Judgment entered against the defendants on 18th December 2017 and all the consequential orders are hereby set aside.

2. The defendants are granted leave to file their defence and the annexed draft defence dated 24th February 2020 is deemed as duly filed and served subject to the payment of the requisite Court charges.

3. Costs shall be in the cause.

Boaz N. Olao.

J U D G E

18th June 2020.

This ruling is dated, signed and delivered this 18th day of June 2020 by electronic mail due to the measures restricting Court operations following the **COVID – 19** pandemic and with notice to the parties.

Boaz N. Olao.

J U D G E

18th June 2020.