



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 306 OF 2013

**TERESA WANJIRU (Suing for an on behalf of GIBSON
REUBEN WAMWEA by virtue of a power of Attorney
No. IP/A60107/1.....PLAINTIFF**

- V E R S U S -

CHRISTOPHER ONGECHI OMBATI.....DEFENDANT

RULING

1. On 22nd May 2015, this court pronounced judgment in favour of the plaintiff and against the defendant in the following terms:

1. That a declaration be and hereby issued that the plaintiff is entitled to exclusive and unimpeached right of possession and occupation of the suit premises being Kahawa West House NO. CC22 Nairobi.

2. That a mandatory injunction be and is hereby directed to the defendant his agents and/or servants to give vacant possession of Kahawa West House No. CC22 Nairobi, within 30 day. In default, the plaintiff to be at liberty to forcefully evict the defendant.

3. That before executing (b) above, the plaintiff should serve the defendant and then appear before this court on 29/6/2015 to show proof of compliance of the directive on service by a competent process server.

4. Costs of the suit plus interest to the plaintiff.

2. The aforesaid judgment is as a result of exparte formal proof proceedings taken out before this court on 24th March 2015.

3. The defendant has now taken the motion dated 30th September 2016 the subject matter of ruling in which he sought for the following orders *inter alia*:

1. THAT the interlocutory and exparte judgment entered against the defendant herein be set aside and or varied and the defendant be allowed to defend the suit on merit.

2. THAT the defendant be granted leave to enter appearance and file defence and the draft defence annexed hereto be deemed as duly filed and served upon the plaintiff subject to payment

of court fees.

3. THAT the costs of the application be provided for.

4. The motion is supported by two affidavits sworn by the defendant. When served, the plaintiff filed the replying affidavit he swore to oppose the motion. When the motion came up for interpartes hearing, learned counsels recorded a consent order to have the motion disposed of by written submissions.

5. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the motion. I have also considered the rival submissions.

6. The defendant is basically saying that he was not served with the summons to enter appearance nor with the pleadings in this suit. The defendant stated that he never saw nor read the advertisement published in the Daily Nation newspaper of 19.6.2014 where service was effected pursuant to this court's order. The defendant further stated that he has a good defence and invited this court to consider the draft defence he annexed to the supporting affidavit.

7. The plaintiff on her part averred in her replying affidavit that the defendant was properly served with the summons to enter appearance through the newspaper advertisement as alleged by the defendant after the process server failed to trace the defendant.

8. She urged this court to find that the defendant was properly served by substituted service hence the default judgment should not be set aside. The plaintiff further argued that the defendant does not have a good defence hence it will serve no useful purpose to set aside the exparte judgment.

9. After a careful consideration of the rival submissions, I think the motion can be determined on the basis of two main grounds put forward and ably argued by the parties. First, is whether or not the defendant was properly served. It is not in dispute that the plaintiff served the summons by substituted service by advertisement in the Daily Nation of 19.4.2014. The defendant has averred that he did not read the aforesaid newspaper advertisement.

10. The plaintiff did not controvert this assertion but instead she concentrated on arguing that the mode of service was proper. In my humble consideration of the competing arguments, I am convinced that the defendant has told the truth. I have no reason to doubt the veracity of his assertion that he did not see nor read the newspaper advertisement inviting him to enter appearance.

11. The second ground is whether or not the defendant has put forward good grounds with triable issues. I have already set out the arguments of each side. I have critically examined the draft defence annexed to the supporting affidavit of Christopher Ongechi Ombati. The defendant is basically saying that he purchased the suit premises from the late Gibson Reuben Wamwea in 1988. He has even annexed to the supporting affidavit an agreement purportedly executed by the deceased. It is said that the deceased surrendered to the defendant all the documents relating to the house in dispute and that the property was transferred to him by the then Nairobi City Council. In my view, the draft defence raises good grounds with triable issues.

12. In the end, I find the motion dated 30.9.2016 to be well founded.

It is allowed in terms of prayers 1 and 2 with costs awaiting the outcome of the suit.

Dated, Signed and Delivered in open court this 2nd day of June, 2017.

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant