



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**ELC CIVIL CASE NO. 184 OF 2013**

1. VUE TAURE VUE

2. TSORI CHIWAI SUDI.....PLAINTIFFS

=VERSUS=

1. FELIX TSORI

2. DANCAN JAMES WAITA.....DEFENDANTS

**R U L I N G**

1. The Applications before me are dated 7<sup>th</sup> December, 2015 and 2<sup>nd</sup> April 2016.
2. In the Application dated 7<sup>th</sup> December, 2015, the 2<sup>nd</sup> Defendant is seeking for the following orders:-
  - (a) This honourable court be pleased to set aside the Judgment entered against the Applicant on 18<sup>th</sup> September 2015.
  - (b) The 1<sup>st</sup> Defendant/Applicant be allowed to file his defence out of the prescribed time
  - (c) The costs of this application be provided for
  - (d) This honourable court do make such other interlocutory orders as it may deem just and expedient pending the hearing and determination of this Application.
  - (e) This matter be set for trial on merits by taking of evidence of all parties on priority.
3. In the Application dated 2<sup>nd</sup> April, 2016, the “Defendants” are seeking for the following reliefs:-
  - (a) THAT the Judgment herein dated 30<sup>th</sup> July, 2015 be set aside
  - (b) THAT pending the hearing and determination of this Application the Plaintiffs their agents, servants, or employees be restrained by way of a temporary injunction order from alienating, or dealing adversely with the property originally known as Plot NO. Kilifi/Vyumbani/92 also subdivided into 5 plots namely Kilifi/Vyumbani 353, 354, 355, 356 and 357, situated in Kilifi County.

**(e) THAT costs of this Application be provided for.**

4. In support of the Application dated 7<sup>th</sup> December 2015, the 2<sup>nd</sup> Defendant has deponed that he was not aware of the existence of this matter until when the 1<sup>st</sup> Defendant informed him that he had been served with a decree; that he lives and works in Nairobi and that the matter proceeded without his participation.

5. According to the 2<sup>nd</sup> Defendant, he has a good defence that raises triable issues; that the issues raised in this matter are *res judicata* ELC No. 32 of 2013 and that he should be allowed to defend the suit.

6. The 1<sup>st</sup> Defendant on the other hand deponed that the Judgment and decree herein was obtained as a result of proceedings to which he was not a party of; that there was ELC No. 32 of 2013 between the Plaintiff and himself in which the Plaintiff claim was dismissed and that the Plaintiff was aware of the pending appeal in the Provincial Appeal Committee.

7. In his Replying Affidavit, the 1<sup>st</sup> Plaintiff deponed that the 2<sup>nd</sup> Defendant was served through his workers; that he is the one who pointed out the 2<sup>nd</sup> Defendant's workers and that the 2<sup>nd</sup> Defendant should apply for cross examination of the process server.

8. The Applicants' advocates filed their respective submissions which I have considered.

9. The Defendants have denied that they were served with Summons to Enter Appearance by the Plaintiffs.

10. In his Affidavit of Service filed on 31<sup>st</sup> October 2013, the process-server deponed that on 22<sup>nd</sup> October 2013 he served the 1<sup>st</sup> Defendant's wife and the 2<sup>nd</sup> Defendant's servants with the summons to Enter Appearance and the Plaintiff.

11. The Affidavit of Service of the process server shows that neither the 1<sup>st</sup> Defendant nor the 2<sup>nd</sup> Defendant were personally served with Summons to Enter Appearance.

12. Indeed, the people who purportedly received Summons to Enter Appearance on behalf of the 2<sup>nd</sup> Defendant cannot in law receive Summons on behalf of the 2<sup>nd</sup> Defendant .

13. Before the process-server purported to serve the 1<sup>st</sup> Defendant's wife, there is no evidence of the attempts he made to serve the 1<sup>st</sup> Defendant personally with the Summons to Enter Appearance.

14. Having not been served with the Summons to Enter Appearance, the decision of this court should be set aside *ex debito justitiae*.

15. For those reasons, I allow the Applications dated 7<sup>th</sup> December 2015 and 2<sup>nd</sup> April 2016 as prayed.

Dated, signed and delivered in Malindi this 16<sup>th</sup> day of **September**, 2016.

**O. A. Angote**

**Judge**