



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 231 OF 2000

**FATHER JOHN (GIOVAN) SAOVE PLAINTIFF/RESPONDENT
VERSUS**

**1. JOSEPH PILALO OLE MUTEMBEI
2. PAUL KINAI MATOLO DEFENDANTS/APPLICANTS**

RULING

1. The application dated 26/3/2012 seeks the following orders:-

- i. **Spent.**
- ii. **Spent.**
- iii. **That the Honourable Court be pleased to set aside the ex parte judgment and final judgment entered against the 2nd Defendant/Judgment Debtor on 13/5/2008.**
- iv. **That the 2nd Defendant/Judgment Debtor be allowed to file his defence out of the prescribed time.**
- v. **The annexed draft defence herein be deemed as filed and served.**
- vi. **The costs of this application be in cause.”**

2. According to the affidavit in support sworn by the 2nd Defendant/Applicant on 26/3/12, auctioneers proclaimed the Applicant’s goods on 17/3/2012 allegedly in a bid to recover the decretal sum of Kshs.1,708,686/= in respect of **HCCC Mks No. 231 of 2000**. It is the Applicant’s contention that he was not aware of the said suit but that a search carried out at the **High Court Registry, Machakos** established that indeed the said suit existed. The Applicant denies having been served with summons to enter appearance and therefore the interlocutory judgment and the subsequent final judgment were obtained irregularly. The Applicant further averred that he has a defence which raises triable issues and it would be unfair to condemn him unheard.
3. In opposition to the application, the Plaintiff/Respondent filed the grounds of opposition dated 17/9/12. It is stated in the said grounds that the Applicant was duly served with all the court process but failed to enter appearance. That the Applicant was given the opportunity to be heard but elected not to be heard and that the Applicant has no good defence to the Respondent’s claim. The application was canvassed by way of written submissions which I have duly considered.
4. I have perused the affidavit of service sworn by a process server, **Donald Mambo Mutiku** on 19/6/2001. The same reflects that the 2nd Defendant/Applicant was served with the summons to enter appearance and the plaint through the wife on 22/4/2001 as the Applicant was not at home.
5. **Order 5 rule 12 of the Civil Procedure Rules** provides as follows:

“Where in any suit, after a reasonable number of attempts have been made to serve the defendant, and defendant cannot be found, service may be made on an agent of the defendant empowered to accept service or on any adult member of the family of

the defendant who is residing with him.”

6. From the affidavit of service herein it is apparent that the process server did not make more than just one visit to the Applicant’s home. However, the court record for 14/5/2003 reflects that the 1st and 2nd Defendant were present. Indeed the 2nd Defendant stated in court on that date as follows:-

“I was never served”.

The court then proceeded to fix the case for hearing at 2.00 p.m. At 2.00 p.m. the case was adjourned to 26/5/2003 when the evidence of PW1 was recorded in the presence of the Defendants. Subsequently, on 24/7/2003 when the evidence of PW2 was recorded the court record reflects that both Defendant 1 and 2 were present. The court record reflects the presence of the 2nd Defendant/Applicant on further hearing dates on 9/10/2003 and on 12/11/2003.

7. I am therefore satisfied that the Applicant was served and was aware of the suit herein. Although it appears that no interlocutory judgment was entered against the Applicant and that no appearance was entered or defence filed by the Applicant, that is another matter all together that is not the subject of the application at hand. The Applicant had the opportunity to be heard and to raise any issues before the trial judge.
8. Having been in court from the date of the commencement of the trial to the year 2003, the Applicant went on a nine (9) year slumber until the 27th March 2012 when he filed the instant application. It is noteworthy that the Applicant has not given any explanation for this inordinate delay. The application is not only lacking in this very basic attribute but the application also fails to disclose that the Applicant was in court during the hearing of the case. The Applicant’s presence in court validates the question of service. The judgment entered was therefore regular as the Applicant participated in the trial and opted not to raise the issue of the filing of his defence before the trial judge.
9. I have considered the draft defence annexed by the Applicant. The same contains mere denials save for paragraph No. 8 where the Applicant has stated that there was a **RM’s Cr. Case No. 247 of 1996 at Kilungu Law Courts** between the same parties whose subject matter was the same as in the case herein in which the Applicant was acquitted.
10. With the foregoing, I find no merits in the application. Consequently, I dismiss the same with costs to the Respondent.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **15th** day of **May 2014**.

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B. THURANIRA JADEN

JUDGE