



REPUBLIC OF KENYA

High Court at Machakos

Civil Case 307 of 2011

KIHARA WAWERU CONSTRUCTION LTD. ... PLAINTIFF/RESPONDENT

VERSUS

1. LEKERIAN OLE SAMBU MURKUKU

2. ADAN ABDI IBRAHIM

DEFENDANTS/APPLICANTS

R U L I N G

The **Notice of Motion** dated 10/10/2012 is brought under **Order 10 rule 9 & 11 & Order 12 rule 2(b) & 7 of the Civil Procedure Rules**.

The application seeks orders to set aside the *ex parte* judgment herein dated 10/2/2012 and all consequential orders. The applicants also seek unconditional leave to defend the suit.

The application is supported by the affidavits of the 1st Applicant **Leikerian Ole Sambu Murkuku** sworn on 10/10/12 and the affidavit of the 2nd Applicant, **Adan Abdi Ibrahim** sworn on 10/10/12.

The gist of the Applicants' case is that they were not served with the summons to enter appearance. It is further averred that the ten (10) days notice of entry of judgment was also not served. According to the Applicants they became aware of the suit herein when the 1st Applicant's property was proclaimed by auctioneers in a bid to execute the decree. The Applicants asserted that they have a good defence to the Plaintiff's case and annexed a draft defence.

In opposition to the application, the Respondent swore a replying affidavit on 16/10/12. The Respondent's contention is that the Applicants were served with summons to enter appearance. A copy of the affidavit of service was exhibited. A letter purported to be signed by the 2nd Respondent conferring service of summons and agreeing to pay the decretal sum was also exhibited.

The Applicants were represented by **Njeru, Nyaga & Co. Advocates** while the Respondent was represented by **Muttisya & Company Advocates**. The application was canvassed by way of written submissions which I have duly considered.

The first thing I have looked at in the affidavit of service which was relied on when the *ex parte* judgment was entered. The said affidavit of service sworn on 26/1/2012 by the process server, **Francis W. Mwanzia** states in paragraph No. 2 shows the instructions given were to serve the 2nd Defendant **Mr Adan Abdi Ibrahim**. Paragraph No. 3 of the said affidavit shows that the 2nd Defendant was served. The said affidavit does not say who physically identified the 2nd Defendant to the process server. The 1st Applicant was not served and the service on the 2nd Applicant was not satisfactory. The agreement said to have been signed by the 2nd Defendant acknowledging service and agreeing to pay reflects the name **“Benjamin Kemazei Tumpey Adan Abdi”**. The 2nd Defendant herein is named as **Adan Abdi Ibrahim**. That discrepancy in names has not been explained by the Applicants. He who alleges must prove.

The Applicants in their submissions have referred the court to paragraph No. 17 of the sale agreement. It is clear from the said clause of the agreement that **“any dispute with regard to any matter in connection with that sale and purchase of the said property shall be referred to an arbitrator....”**

Martin Mutisya Muthengi Advocate witnessed the sale agreement and the advocates for the Plaintiff herein. **Martin Mutisya Muthengi** has even gone ahead and recorded a witness statement. The plaint is drawn and filed by **Muttisya & Co. Advocates**. I agree with the submissions by the Applicants’ counsel that there is a conflict of interest.

Having arrived at the conclusion that the Applicants were not served or properly served, they are entitled to the setting aside of the *ex parte* judgment as a matter of right and without any conditions.

Consequently, I allow the application with costs to the Applicants.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 2nd day of **May** 2013.

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JUDGE