



**REPUBLIC OF KENYA**

**High Court at Bungoma**

**Civil Case 63 of 2011**

**AGGREY K.**

**MUDINYU.....PLAINTIFF**

**VS**

**THADDEUS**

**ANYONYI.....DEFENDANT**

**RULING**

On 6/7/2011 the Plaintiff filed this suit seeking the eviction of the Defendant from land parcel no.Bungoma/Naitiri/207 which was registered in his name. His case was that the Defendant had been given permission to stay on the parcel and on being requested to leave he had declined. The suit proceeded by way of formal proof when the Defendant did not enter appearance or file defence. Judgment was entered on 9/11/2011. The Plaintiff had amended the Plaint. On 7/3/2012 the Defendant filed the present application under Order 10 rule 11 of the Civil Procedure Rules seeking to have the *ex-parte* proceedings, judgment and consequential orders set aside and for him to be allowed to defend the claim. The grounds were that he was not at all served with summons to enter appearance and other papers, and that he had a plausible defence which should be heard. The application was contested.

Regarding service, the Defendant stated that he only learnt of the case long after judgment. When he perused the court record and saw the return of service he noted that it did not disclose the place and time of service. It did not state that he had been served with all documents. He, however, did not seek to cross-examine the process server Harrison Nyongesa Maratani whose affidavit shows that he was served summons to enter appearance and plaint on 15/7/2011 and amended plaint on 27/7/2011.

I have looked at the affidavit of service. It states that the Defendant was served with summons and plaint on 15/7/2011 at his residence at Soysambu scheme in Tongaren in Bungoma North District. The affidavit states that the process server was pointed out by one John Moyo who was the Plaintiff's agent. On 27/7/2011, the process server went back to serve the amended plaint. It is quite clear, and I agree with the Plaintiff, that the Defendant was served with the process as was demanded by the law. The date and place of service were indicated and the documents served were shown. It is clear that he declined to sign on the papers served. The result is that the default judgment on record was regularly entered.

Where there is a regular judgment the Defendant has to show merits of the defence. In **Express (Kenya) Limited v. Manju Patel, Civil Appeal no.158 of 2000 at Nairobi** it was observed that:

*“It is trite that once the judgment is regular, before it is set aside, the applicant ought to show merits of the defence..... The court ought to be satisfied that the applicant is not applying to set aside a regular judgment with a view to delaying the inevitable.”*

I am, further, aware that in dealing with such an application the court has a wide and unfettered discretion. The main concern is to do justice between the parties and to make sure that the Defendant is not locked out from his right to have the case decided on merits.

In the proposed defence it was stated that the Defendant bought the parcel from the Plaintiff and that the transaction received the blessings of the Land Control Board. Then, that the Defendant took possession of the suit land which he lawfully occupies. The Plaintiff swore a replying affidavit in which he denied selling the suit land or there being consent of the Board. It was stated that the Defendant was on the land

on permission. The Defendant did not swear a further affidavit. In my view, if there was any sale the agreement would be available and ought to have been exhibited. The same for the consent of the Land Control Board. None of these was shown to exist. I find that the Defendant has failed to demonstrate that he has any defence to the claim. The suit land is registered in the name of the Plaintiff and he is entitled to own, occupy and use it. The application is dismissed with costs.

Dated, signed and delivered at Bungoma this 9<sup>th</sup> day of October, 2012.

**A. O. MUCHELULE**  
**JUDGE**