



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 78 OF 2018

REUBEN CHELAGAT.....PLAINTIFF

VERSUS

PAULINA KOBILO KIPKELWON [Sued in her Capacity as the Administrator

of the Estate of Symon Kipkelwon Chebet (Deceased)].....DEFENDANT

RULING

[NOTICE OF MOTION UNDER CERTIFICATE OF URGENCY DATED 12TH AUGUST, 2020 AND FILED ON 14TH AUGUST, 2020]

1. The Defendant filed the above application, seeking for the setting aside of the *ex parte* judgment delivered on the 25th October, 2018 and leave to file his defence out of time. The application is based on the ten (10) grounds on its face and supported by the affidavits of **Paulina Kobilu Kipkelwen**, the Defendant, sworn on the 12th August, 2020 and 27th October, 2020. The Defendant's case is that she was not served with summons to enter appearance and was therefore condemned unheard. That the judgment was delivered on the 25th October, 2018 without notice being served upon her, and she stands to suffer substantial loss. That she has a good defence that raises triable issues to the Plaintiff's claim, and the judgment should be set aside to allow her defend the suit. That she only got to know of the suit when she received the Surveyor's letter dated 3rd August, 2020 on the 7th August, 2020 conveying that the Surveyor would visit the suit land to carry out subdivision as ordered by the Court on 25th October, 2018. That she contacted her advocate who perused the Court record and thereafter filed this application. She disputed the contents of the affidavit of service by **Jackson K. Cheburet**. She also annexed a draft replying affidavit to her affidavit to show she has a good defence to the Plaintiff's case.

2. The Plaintiff opposed the application through his replying affidavit sworn on 25th August, 2020 and that of **K. Jackson Cheburet**, process server, sworn on 5th September, 2020. It is the Plaintiff's case that on the 17th May 2018, he accompanied the process server to the Defendant's home at their village at **Kapsoo** and pointed out her house for service. That the process server effected service and took her photograph from which he confirmed she was the Defendant. That on 9th January 2019, the process server served the Defendant with the decree. That his efforts to have her transfer the land to him was not successful prompting him to request the Deputy Registrar to sign the same. That it is not true for the Defendant to claim she only got to know of the case on 7th August, 2020. That the Defendant was a witness in the sale agreement between him and the deceased on 20th February, 1993 and knew he had been in open, actual and uninterrupted possession of the suit land for about 32 years.

3. The learned Counsel for the Defendant and Plaintiff filed their submissions dated 27th October, 2020 and 26th September, 2020 respectively.

A. DEFENDANT'S SUBMISSIONS

That the Defendant has tendered sufficient evidence to show she was not served with summons to enter appearance, and has a good defence that raises triable issues. The learned Counsel referred to the Court of Appeal case of ***James Kanyita Nderitu & Another Vs Marios Philotas Ghikas & Another [2016] eKLR, James Wanyoike & 2 Others Vs CMC Motors Group Limited & 4 Others [2015] eKLR, and Patel Vs E. A. Cargo Handling Services Limited [1974] E. A. 75*** in support of their submissions.

B. PLAINTIFF'S SUBMISSIONS

That the Plaintiff has availed sufficient evidence to confirm that the Defendant was served with the summons to enter appearance and appropriate affidavits of service filed in accordance with **Order 5 Rule 15 of Civil Procedure Rules**. That the Defendant did not enter

appearance or file defence within the time given in **Order 7 Rule 1 of Civil Procedure Rules**. The learned Counsel referred to the case of **Nicholas Kiptoo Arap Korir Salat Vs Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR**, **Shah Vs Mbogo [1967] E. A. 166**, **Kennedy Makasembo Vs Kenya Union of Post Primary Education Teachers [2017] eKLR**, and **Rukenya Buuri Vs M'arimi Minyora & 2 Others [2018] eKLR**, in support of their submissions.

4. The following are the issues for the Court's determinations;

(a) **Whether the Defendant has made out a reasonable case for setting aside of the judgment delivered on 25th October, 2018.**

(b) **Whether the Defendant has a good defence to the Plaintiff's claim.**

(c) **Who pays the costs of the application?**

5. The Court has after considering the grounds on the Motion, affidavit evidence tendered, learned Counsel's submissions, the record, come to the following determinations;

(a) That the Plaintiff commenced this proceeding through the originating summons dated and filed on the 8th May, 2018 seeking to be declared to be in adverse possession for over 12 years of 1¼ acre of **Baringo/Kapropita/308** since 1983.

(b) That the Court through the Deputy Registrar on the 24th August, 2018 confirmed that the Defendant had been served and had not filed a defence. That on the 26th September 2018, the learned Counsel for the Plaintiff submitted that the Defendant had not filed any defence and the court delivered its judgment on the 25th October, 2018 granting the prayers sought.

(c) That as can be seen in the draft replying affidavit annexed to the supporting affidavit, the Defendant has stated that the Plaintiff had leased the suit land from 21st January, 1989 for five years which expired in 1993. That thereafter, the land was leased to two other persons after which her family took over the use of the parcel. That appears to be a reasonable defence to the Plaintiff's claim based on adverse possession.

(d) That though the Defendant appears to have a reasonable defence, it is not explained why she did not seek legal advice, as she had done now, to defend the suit at that time. That from the evidence tendered by the Plaintiff, she had been served with the suit papers as detailed by the process server in the affidavits of service filed. That therefore, the Defendant should meet the costs of this application, even though it has merit.

6. That in view of the foregoing, the Court finds merit in Defendant's Motion dated 12th August, 2020 and filed on the 14th August, 2020 and orders as follows;

a. That the judgment delivered on the 25th October, 2018 and all consequential orders be and are hereby set aside.

b. That the Defendant is granted leave to defend the suit and to file and serve her replying affidavit in 21 (twenty-one) days.

c. That the Plaintiff be at liberty to file and serve a further affidavit in 21 (twenty-one) days after service if need be responding to the issues deponed to in the replying affidavit.

d. That the Defendant do pay the Plaintiff thrown away costs of Kshs.20,000 [twenty thousand] within thirty (30) days and in default, the other orders above to stand vacated and the judgment of 25th October, 2018 reinstated.

Orders accordingly.

Delivered virtually and dated at Eldoret this 9th day of December, 2020.

S. M. KIBUNJA

JUDGE

In the presence of:

Plaintiff: Absent.

Defendant: Absent.

Counsel: Mr. Manani for Plaintiff.

Mr. Bett for Defendant.

Court Assistant: Christine

and the Ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.