



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**E & L CASE NO. 330 OF 2017**

**CATHY ALUCIA JEBOR KIPLAGAT.....PLAINTIFF**

**VERSUS**

**VINCENT KOMEN KRELKUT.....DEFENDANT**

**RULING**

**[MOTION DATED 4<sup>TH</sup> DECEMBER, 2020 AND FILED ON 6<sup>TH</sup> DECEMBER, 2019]**

1. The Defendants moved the Court through the Motion dated 4<sup>th</sup> December, 2019 and filed on the 6<sup>th</sup> December, 2019 seeking for the following;

- (a) Setting aside of the exparte judgment of 12<sup>th</sup> July, 2018.
- (b) Stay of execution of the judgment and or decree issued on 31<sup>st</sup> July, 2018.
- (c) Leave to file the defence and to defend the suit.
- (d) Leave for M/s Wabomba Masinde & Associates Advocates to come on record for the Defendant.
- (e) Costs.

The application is based on the nine (9) grounds on its face and supported by the affidavit of **Vincent Too Komen Krellkutt**, Defendant, sworn on the 4<sup>th</sup> December, 2019. It is the Defendant's case that he was not served with the summons to enter appearance and notice of entry of judgment. That he only got to know of the case on 1<sup>st</sup> November, 2019 when **Phillip Kiptoo**, one of the purchasers of his land, was charged in a criminal court for trespass as a result of this Court's judgment. That he had sold part of the suit land to **Phillip Kiptoo** and **Isaac Kiprotich** and will be greatly prejudiced if he is not allowed to defend the suit.

2. The application is opposed by the Plaintiff through her replying affidavit sworn on the 28<sup>th</sup> January, 2020. It is the Plaintiff's case that the Defendant has no legal interest on the suit land having sold it and relocated his family to Kilifi, and therefore has no locus to file the application. That she had bought five acres of the suit land from the Defendant. That the sale agreement become null and void for failure to get Land Control Board consent as the Defendant's whereabouts were unknown to her after relocating in February, 2005. That after the summons were served, the Defendant undertook the survey of the land on 2<sup>nd</sup> September, 2011, but failed to effect transfer of her portion to her, though he knew she was in possession. That the judgment in this suit only determined ownership of her portion and does not affect the interests of the other purchasers. That her advocate informed her that she had contacted the Defendant on the telephone number indicated on the affidavit of service, and that the Defendant had indicated that he was not going to incur expenses attending court when he had surrendered the land, and its documents to **Isaac Sugut** and **Phillip Cheptoo**, and relocated to Kilifi. That after the judgment, she processed the title to her portion of land. That one Phillip Cheptoo was charged in **Eldoret Chief Magistrate Criminal Case No. 2201 of 2019** for blocking part of her boundary. That the Defendant had filed bill of costs in respect of another defective suit she had filed and cannot claim not to have known of this case. That this application is aimed at defeating the criminal case against Phillip Cheptoo. That should the Defendant's application be granted, then the obtaining status quo on the land and register be maintained.

3. The Defendant filed a further affidavit sworn on the 13<sup>th</sup> February, 2020 deponing to the following among others;

- That he has locus to file the application as the Plaintiff is the one who enjoined him as a Defendant.

· That after the judgment, the Plaintiff extended her boundaries hence reducing the portions of other purchasers and the judgment should not be allowed to stay.

· That he is not opposed to the Plaintiff's ownership of the suit land but its boundary position.

4. That following the directions of the Court, the learned Counsel for the Defendant and Plaintiff filed their submissions dated the 19<sup>th</sup> February, 2020 and 1<sup>st</sup> April, 2020 respectively.

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

*(a) Whether the Defendant has made a reasonable case for setting aside the exparte judgment to enable him file defence and defend the suit.*

*(b) Whether the Defendant, has a reasonable defence that raises triable issues to the Plaintiff's claim.*

*(c) Who pays the costs?*

6. The Court has considered the grounds on the Motion, the affidavit evidence, the learned Counsel's submissions, superior courts' decisions relied upon, the record and come to the following conclusions;

(a) That the summons to enter appearance were issued on the 6<sup>th</sup> October, 2017 and according to the affidavit of service by **Laureen Isiaho** sworn on 31<sup>st</sup> October 2017, served upon the Defendant at the Plaintiff's advocate's chambers at Eldoret town on 10<sup>th</sup> October, 2017 after calling him on the given mobile number. That the Defendant has disputed going to the said advocate's chambers and though he had indicated that he would be seeking to cross-examine the said Laureen Isiaho on her affidavit of service, he appears to have later abandoned that move.

(b) That the said Laureen Isiaho has not disputed the Defendant deposition that he never went to her chambers through an affidavit. The Plaintiff's replying affidavit at paragraphs 12, 18, 19, 21, 26, 28, and 29 shows that she knew the Defendant had relocated to Kilifi, and she had been unable to trace him for purposes of Land Control Board consent and transfer of her portion. That nowhere in the said replying affidavit has the Plaintiff confirmed that she gave her Counsel the Defendant's mobile number that was used to get the Defendant go to her chambers. The Court has doubts as to whether the summons were actually served upon the Defendant as alleged and for that reason the Defendant's application has merit.

(c) That the affidavit evidence presented by the Defendant and Plaintiff shows that the two had some land transactions as detailed therein. That indeed, the Defendant has indicated at paragraph 14 of his further affidavit that he is not disputing the Plaintiff's ownership of the suit land but the boundary position of the parcel. That the suit land as per the originating summons is five (5) acres of **L.R. No. Moibeki/Moibeki/Block 1 (Moiben) 66** that was granted vide the judgment of 12<sup>th</sup> July, 2018. That portion has since been surveyed and registered as **Moibeki/Moibeki/Block 1 (Moiben) 71**, measuring 2.025 Hectares in the name of the Plaintiff as per the title deed issued on the 25<sup>th</sup> March, 2019 annexed to the Plaintiff's replying affidavit. That the Court's calculation of 2.025 hectares into acres comes to 5.005 acres. That indicates that the portion is larger than the five acres prayed for in the originating summons.

(d) That the finding in (c) above leads the Court find that the Defendant has a reasonable defence to the Plaintiff's claim and he deserves to be given an opportunity to be heard even though he did not annex a draft replying affidavit. That however, as the Defendant do not dispute that the Plaintiff is entitled to the suit land, and that the Plaintiff is in possession of the same, it is only fair and just that the parties do maintain the existing status quo in respect of the ground use, and occupation of the five (5) acres, and registration of Land parcel Moibeki/Moibeki/Block 1 (Moiben) 71, as the Defendant files his replying affidavit and defends the suit to final determination.

(e) That though the Defendant has succeeded in his application, the costs of the application be in the cause.

7. That having come to the foregoing conclusions, the Court finds merit in the Defendant's application dated 4<sup>th</sup> December, 2019 and filed on the 6<sup>th</sup> December, 2019 and orders as follows;

*(a) That the Court's judgment delivered on the 12<sup>th</sup> July, 2019 is hereby set aside to allow the Defendant file his defence and defend the suit on condition that the parties do maintain the status quo on the ground, occupation and registration of the five (5) acres registered as **Moibeki/Moibeki/Block 1 (Moiben) 71**, pending the hearing and determination of this suit.*

*(b) That the Defendant do file and serve his reply to the originating summons in twenty-one (21) days.*

*(c) The costs be in the cause.*

Orders accordingly.

**Delivered virtually and dated at Eldoret this 2<sup>nd</sup> day of December, 2020.**

**S. M. KIBUNJA**

**JUDGE**

**In the presence of:**

Plaintiff: Absent.

Defendant: Absent.

Counsel: Mrs. Isiaho for Plaintiff.

Mr. Keter for Wabomba 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.