



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 9 OF 2016

JAMES KITERIE ALFAYO.....PLAINTIFF

VERSUS

WILLIAM KIPNUSU.....1ST DEFENDANT

THE COUNTY LAND ADJUDICATION &

SETTLEMENT OFFICER.....2ND DEFENDANT

RULING

1. The application dated **21/9/2018** filed by the defendant seeks an order setting aside the *exparte* judgment delivered by this court on **25/4/2018** and all the consequential orders and that the defendant be allowed to file his defence.
2. The application is expressed under the provisions of Sections **1A** and **3A** of the Civil Procedure Act, **Order 10 Rule 11** and **Order 51 Rule 1** of the Civil Procedure Rules 2010.
3. The application is grounded on the grounds stated on the face of the application and the annexed affidavit **C. M. Kingori Advocate**. Essentially the grounds relied upon by the applicant are *inter alia* that:-
 - i. **The non-appearance on the part of the WILLIAM TUITAI MNAIBEI sued as WILLIAM KIPNUSU was not intentional or negligent default, in view of the fact he was not served with a summons to enter appearance hence the current course of events.**
 - ii. **Accordingly, WILLIAM TUITAI MNAIBEI sued as WILLIAM KIPNUSU the 1st Defendant never had the opportunity to appear and defend this suit.**
 - iii. **Unless this application is granted the Plaintiff/ Respondent will proceed with the execution of the judgment and the consequential orders herein.**
4. Other grounds in support of the application are contained in the affidavit annexed to the said application sworn by the applicant, Mr. William Tuitai Mnaibei who avers *inter alia* that he is he owner and in possession of **Plot number 30** and **467** at Kitalale Settlement Scheme, which is the subject matter of herein and that he is wrongly sued as William Kipnusu.
5. In that affidavit he denies that he was served with summons or any other court process in this case as alleged between **1/2/2016** and **7/12/2016** as he is settled in Baraton and has no home at Kitalale Scheme, is not a resident nor an elder in the said area.
6. The applicant further contends that he is ready, eager and willing to have the suit heard *interpartes* speedily without delay for purposes of enhancing administration of justice.
7. The application is opposed. The plaintiff filed his affidavit filed on **3/10/2018** in which he reiterates that summons were served upon the 1st defendant at Kiungani area, and that he his failure to enter appearance was deliberate and intentional as is clearly evidenced by the affidavit sworn by the process server. He further contends that his claim in this suit is in respect of parcel of land formally known as **Plot No. 80** measuring **2.5 acres** and he has no claim whatsoever over **Plot Nos. 30** and **467**. In addition, he states that the draft defence exhibited by the defendant does not raise any important issue to warrant a grant of the prayers sought.

8. The 1st defendant filed his submissions on the application on 24/1/2019 and the plaintiff on 20/11/2018. The defendant relies on the cases of *YALWALA -vs- INDUMULI & ANOTHER(1989) KLR 373* where the court held that:-

(i) Service of process is so crucial a matter that courts must encourage the best service i.e. personal service

(ii) Before a process server can be heard to say that personal service was not practicable, he must make more than one attempt to effect such service for where service is made on adult member of the defendant family who is residing with him, such service is valid only where there is reasonable ground to believe that such a defendant cannot be found.

9. I have read and duly considered the submissions filed by the parties herein and I note that the only issue that presents itself for the determination by this court is whether the applicant is entitled to the orders for setting aside the *ex-parte* judgment entered on the and all consequential proceedings.

10. The well-established principles of setting aside interlocutory judgements were laid out in the case of *Patel v East Africa Cargo Handling Services Ltd (1974) EA 75* as per *Duffus P.* who held:-

“The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as SHERIDAN J. put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

11. In the instant case, the defendant/applicant stated that he did not defend the suit because the plaintiff and summons to enter appearance were not served on him.

12. This court did have the advantage of taking the oral evidence of the process server, a Mr. Godfrey Masinde Sitati on 12/11/2018 pursuant to **prayer 3** of the application being granted. In his evidence, he stated that he met a woman who introduced herself as a caretaker who in turn introduced him to another female in the defendants homestead and not the 1st defendant’s mother as alleged in the affidavit of service. That the said woman upon introduction by the process server, gave the him the 1st defendant’s contacts and directed him to where he met the defendant as Kiungani area and effected service.

13. It is worth noting that there was a contradiction in his evidence as the allegation of meeting the 1st Defendant’s mother as evidenced in Paragraph 4 of his affidavit of service filed in court on 19/1/2017.

14. This allegation is also contradicted by the further affidavit of service filed in court on the 7/3/2018. **Paragraph 6** of the said affidavit states:-

“That the 1st defendants being a well known person by virtue of being an elder in Kitalale Settlement scheme in Kitalale area, I was shown the way by a bodaboda rider who took me to the 1st Defendants home which is near the river. At his compound, I found a lady who was drawing water for, a borehole and upon introducing myself to her and the purpose for my visit she told me she was the 1st defendant’s mother and called the defendant who was inside his house.

15. **Paragraph 7** states as follows:

“That I introduced myself to the 1st defendant and the purpose of my visit in the presence of his mother and the bodaboda rider and he admitted to be the 1st defendant and I duly tendered to him the said plaint, verifying affidavit, list of documents and witness statement and having read through them he said he would deliver them to his advocates however he declined to sign on the principal copy upon my request”.

16. With these set of facts, the integrity of service is in question and it highly doubtful that such summons to enter appearance were ever served as alleged. It then follows that summons were never served and that the judgement entered was not regular

17. In the case of *Mbogo v Shah (1968) EA 93* it was observed as follows:

“When the respondent sought to enforce the judgment against the company it applied to the High Court under O.9 ru.10 of the Civil Procedure (Revised) Rules 1948 to set it aside and to grant it leave to defend in the name of the appellants. The learned judge who heard the application was the same judge who had entered judgment. He did not doubt the right of the company as an interested party to bring the application nor did he doubt his power to grant it if he chose to do so. He refused it, however, on the ground, as I understand his judgment, that while the court would exercise its discretion to avoid injustice or hardship resulting from inadvertence or excusable mistake or error it would not assist a person who has deliberately sought to obstruct or delay the course of justice which, in his view, the company had done in the present case. Order 9, r. 10 gives the High Court an unfettered discretion to set aside or vary an ex parte judgment (Evans v. Bartlam, [1937] 2 All E.R. 646) and it was in the exercise of his discretion that the learned judge refused the application”.

18. It is trite law that the court’s wide discretion to set aside ex parte judgment should only be exercised in most deserving cases and upon the applicant demonstrating that it has genuine and compelling reasons for not filing its defence on time or at all.

19. In *Sebei District Administration -vs- Gasyali& Others (1968) E.A. 300* the Judge stated as follows:-

“In my view the court should not solely concentrate on the poverty of the applicant’s excuse for not entering appearance or filing a defence within the prescribed time. The nature of the action should be considered, the defence if one has been brought to the notice of the court however irregularly should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of a court. It is wrong under all circumstances to shut out a defendant from being heard. A defendant should be ordered to pay costs to compensate the plaintiff for any delay occasioned by the setting aside and be permitted to defend.”

20. The applicant has stated that the annexed draft defence is meritorious and raises triable issues that ought to be determined upon full trial. He further claims to be entitled to **plot numbers 30 and 467** situate in Kitalale Settlement Scheme. The respondent on the other hand contend that the defence is a sham. That his claim is in respect of a parcel of land formally known as **Plot no. 80** measuring **2.5 acres** and that he has no claim over **Plot No. 30 and 467**. To this extent, I find the issues raised therein have convinced this court that justice may be better served if the judgment herein obtained is set aside to pave the way for a hearing of the parties’ claims on their respective merits. The application dated **21/9/2018** is therefore granted. The judgment is therefore set aside as prayed in **prayer No. 4** thereof.

Dated, signed and delivered at Kitale on this 28th day of February, 2019.

MWANGI NJOROGE

JUDGE

28/2/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Elias

Mr. Ingosi for Applicant

N/A for the plaintiff/respondent

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

25/2/2019