

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 51 OF 2017

WILLIAM MAKUTSA

SIMON OMANI.....PLAINTIFF/RESPONDENT

VERSUS

SIMON AMUKOWA....DEFENDANT/APPLICANT

RULING

The application is dated 15th October 2018 and is brought under Order 22, Rule 22, Order 10 Rule 11, Order 51 Rule 1 of the Civil Procedure Rules 2010, Sections 1, 1A, 3, 3A of the Civil Procedure Act seeking the following orders;

- (a) That this application be certified urgent and be heard *ex parte* in the 1st instance.
- (b) That pending the interparties hearing of this application, the honourable court be pleased to issue temporary and/or interim orders of stay of execution of the *ex parte* judgment delivered on 23/1/2018 and any other subsequent orders therein.
- (c) That pending hearing and determination of this application interparties, the honourable court be pleased to set aside the *ex parte* judgment altered in this matter on 23/1/2018 and all consequential orders, decree and pronouncements and the defendant be granted leave to defend this suit in terms of the annexed draft defence.
- (d) That pursuant to prayer (c) above the annexed draft defence annexed herewith be deemed as properly file and served subject to payment of prerequisite court fees.
- (e) That the serving officer and/or process-server who purportedly effected service of summons to enter appearance be summoned to appear before the court for cross-examination on the service of the summons to enter appearance.
- (f) That the costs of this application be in the cause.

It is based on the grounds that, the respondent has obtained *ex parte* judgment of eviction and is in top gear towards the execution of the said orders to the detriment of the applicant yet the applicant has never been served with the summons to enter appearance. The applicant has never been made aware of the existence of this suit therefore he did not defend the claim. That the annexed draft defence raises purely triable issues sufficiently answering the plaintiff/respondent's claim and given leave to ventilate his defence and/or day in court, the orders made herein *ex parte* will definitely be overturned and the plaintiff's claim be dismissed. That the applicant is being condemned unheard and without being granted an opportunity to ventilate his defence before the court. That the subject matter of the suit herein is the same subject matter pending before Kakamega Succession Cause No. 320 of 2012 not yet determined as the process applied by the respondent to obtained the grant and subsequently registering himself as the owner of the land was by concealment of material facts. That the respondent is the uncle to the applicant and the suit land is a family land where the applicant has established his home from the time he was born, and if evicted, he has no other family land to settle on therefore prudent and for the best interest of justice that the applicant be granted chance to be heard. The applicant has never been served with summons to enter appearance and therefore the *ex parte* interlocutory judgment was obtained by the respondent misleading the court and without disclosing to the court that there is a pending succession before the court. That the respondent will not suffer in any way by the court granting the orders sought, and it will go a long way to serve the interest of justice by setting aside the *ex parte* judgment herein.

The respondent submitted that the applicant was served on 9th March, 2017 with the plaint and summons to enter appearance and the process server duly filed an affidavit of service. That again the defendant herein was served with a mention and the hearing dates. That in all the instances, the applicant chose not to attend court or file his defence. That the defendant/applicant is indolent and cannot claim that his rights to hearing have been violated when he was given an opportunity to appear and failed to do so. That there is no succession case pending before the Succession Cause number 320 of 2012. That Margaret Ayieko Amukoa passed on 26th July, 2015 and over three years have passed since without her being substituted. That the objection may have abated and or it was abandoned as no application has been made to substitute her. That even when Margaret Ayieko Amukoa was alive, there was no hearings of the application for revocation and from 2012 to 2015 when she died no hearing date was fixed for the application for revocation. That it is not true that the defendant has stayed on the land since he was born. That it is not true that land parcel number W/BUNYORE/ESIANDUMBA/505 is family land. The applicant's inheritance is found in land parcel number W/BUNYORE/ESIANDUMBA/506 which is in the name of the applicant's father. Annexed hereto and marked WM1 is a copy of the search certificate.

This court has carefully considered the application and the submissions therein. The applicant submitted that the respondent was served on 9th March, 2017 with the plaint and summons to enter appearance and the process server duly filed an affidavit of service. That again the defendant herein was served with a mention and the hearing dates. That in all the instances, the applicant chose not to attend court or file his

defence. I have perused the court file and indeed I find that the process server was the same and each time the respondent accepted service but refused to sign for the documents. Each time service was effected at his home at Immuli Imukusa Village, Ishandumba Sub location, Luanda location. He was identified by his neighbor one James Mayabi. I find that service was proper and that the applicant simply chose to ignore the same on all the occasions. I find this application is not merited and I dismiss it with costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26TH DAY OF FEBRUARY 2019.

N.A. MATHEKA

JUDGE