



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 180 OF 2017 (O.S.)

ABRAHAM LUCHELI LUVONGA (SUING AS

THE ADMINISTRATOR OF THE ESTATE OF

BUSHASHA LUCHERI (DECEASED).....PLAINTIFF

VERSUS

FRED OKEA *alias* FRED OKEYA.....1ST DEFENDANT

KIPKORIR ROTICH CHEBOL.....2ND DEFENDANT

RULING

1. The plaintiff filed the Originating Summons herein on the **15th November 2017**. The defendant never filed any documents in response to the originating motion and he never attended the hearing. An affidavit of service of Joash Mageto Otachi had been filed on **3rd January 2018** prior to the hearing, indicating that service of the originating summons had been effected. The suit was heard on **28/5/2018** when the plaintiff alone testified in favour of his claim. Judgment was delivered in favour of the plaintiff on **12/6/2018**.

2. Now the 2nd defendant has filed an application dated 26th October 2018 seeking stay of execution of the judgment in this suit as well as the setting aside of the judgment. He also seeks leave to file a replying affidavit, presumably if the first two prayers hereinabove are granted. The grounds upon which the application is brought are that he was not served and so he was condemned unheard. He avers that he resides in Elgeyo Marakwet District and that he learnt of the suit vide a decree shown to him by one Chebii, a village elder.

3. He avers that the evidence in the suit is insufficient to support a case of adverse possession. However, in my view, this is a premature ground and the 2nd defendant should first concern himself with his greatest problem: proof that he was not served.

4. The supporting affidavit of the applicant states that he is the registered owner of **Cherangany/Kapcherop /1700**; that he has built a house and he resides on the suit land; that his son who is alleged to have been served lives separately from the family due to some family disputes and that he was therefore condemned unheard.

5. The application is opposed. The sworn affidavit of the plaintiff was filed on **30/11/2018**. The plaintiff does not refute that the plaintiff's son who was purportedly served lives away from the family. He however insists that the son lives "less than one kilometre away." He also states that the 1st defendant was also served with summons, and that soon after discovering that the suit had been filed the 2nd defendant began issuing eviction threats to the plaintiff, put up some temporary structures on the land thus prompting an application for injunction which was granted on **19/4/2018**.

6. It is service that matters, and this court must be careful not to condemn any person unheard. Though I do not find any clear evidence that he was not aware of the suit, the 2nd defendant was not said to have been personally served.

7. **Order 8 Rule 1** states that unless the defendant has an agent empowered to receive service he shall be served in person.

8. However, it is not in all cases that personal service is required. In cases where the defendant can not be located the process server is mandated to affix the summons on the door or some other conspicuous part of the house in which the defendant resides.

9. In **Order 5 Rule 12** of the **CPR** it is provided that after a reasonable number of - futile, I believe - attempts to serve the defendant and the defendant can not be found service may be effect on his agent or on any adult member of his family who may be residing with him.

10. There is a dispute as to whether the son served resides with the 2nd defendant. The 2nd defendant avers that there are family differences between him and that son. One does not expect any or any good communication between the defendant and his said son in those circumstances. I have also not found no evidence of reasonable number of futile attempts to serve the 2nd defendant personally as provided by **Order 5 Rule 12**, and it is better to err on the right side of caution than to bar him from being heard.

11. For the above reasons I find that I have to accord the defendant a benefit of doubt. The judgment of this court dated **12/6/2018** and all consequential orders are hereby set aside.

12. The 2nd defendant will however pay thrown away costs of **Kshs. 20,000/=** to the plaintiff within **14 days** of this order. He shall also file a replying affidavit to the originating summons strictly within **14 days** of this order. In default of compliance with these directions the orders vacating the judgment issued herein above will lapse and the said judgment shall be automatically reinstated.

Dated, signed and delivered at Kitale on this 5th day of February, 2019.

MWANGI NJOROGE

JUDGE

5/02/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Kibe holding brief for Kaosa for the plaintiff

N/A for the defendant

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

5/02/2019