



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 85 OF 2006**

JUSTUS KILONZI MUTUNGI.....1<sup>ST</sup> PLAINTIFF

KITILLO MUTUNGI KAMINA.....2<sup>ND</sup> PLAINTIFF

VERSUS

MUTUA KAMINA .....1<sup>ST</sup> DEFENDANT

KIMONDIU KISYANGA .....2<sup>ND</sup> DEFENDANT

**RULING**

1. In the Application dated 12<sup>th</sup> October, 2017 and filed on the same day, the Defendants are seeking for the following orders:

*a. That a temporary injunction do issue restraining the Plaintiffs/Respondents whether by themselves and/or their agents, servants or anybody claiming on their behalf from carrying out the eviction exercise by Faith Agencies Auctioneers scheduled for 13<sup>th</sup> October, 2017 on the parcel of land known as Nzau/Kalamba/55 and/or executing the Judgment/Decree herein pending the hearing and determination of the main suit.*

*b. That this Honourable Court be pleased to set aside the default Judgment herein delivered on 30<sup>th</sup> June, 2017.*

*c. That the draft Defence herein be deemed as duly filed and served.*

*d. That costs of this suit be provided for.*

2. The Application is premised on the grounds that the Defendants have never been served with Summons to Enter Appearance; that the Defendants' permanent structures and only homes stand to be demolished and that the Defendants have been in possession of the suit property since the year 1970.

3. The 1<sup>st</sup> Defendant deponed that after purchasing the suit property measuring approximately 4 acres, him, together with the 2<sup>nd</sup> Defendant, took immediate possession of the suit property and built permanent structures thereon; that he has lived on the suit land since 1982 while his Co-Applicant has occupied the land since 1970's.

4. The 1<sup>st</sup> Defendant finally deponed that upon the purchase of the suit land from Mutiso Mulinge Nguli, the same was transferred to them and that they have extensively developed the suit property.

5. It was the 2<sup>nd</sup> Defendant's deposition that on 19<sup>th</sup> September, 2017, he was called to the office of the sub-chief of Kalamba location in the presence of the 1<sup>st</sup> Plaintiff and was served with a copy of the Decree in this matter; that he consulted his advocate who perused the court file and that he has never been served with the Summons to Enter Appearance or any court papers in this matter.

6. In reply the 1<sup>st</sup> Plaintiff deponed that the Defendants were personally served with the Summons to Enter appearance by the process-server; that the Defendants have been aware of the matter since the year 2006; that the Defendants' purported draft Defence and Counter-claim is a mere afterthought and that the purported Sale Agreement in respect of the suit land has not been exhibited

7. The process-server, PW1, informed the court that he served the Defendant with the summons to Enter Appearance and swore an Affidavit to that effect. According to the Affidavit of Service sworn by PW1 on 19<sup>th</sup> January, 2017 and filed in court on 23<sup>rd</sup> January, 2017, he received copies of the Summons from the Plaintiffs' advocate on 30<sup>th</sup> September, 2016.

8. According to PW1, on 4<sup>th</sup> October, 2016, he went to Kalamba Sub-County in Nzaui District, Makueni County and found the 1<sup>st</sup> Defendant at his home which is near Kalamba Market; that he had served the 1<sup>st</sup> Defendant previously and therefore knew him and that the 1<sup>st</sup> Defendant sent one of his sons known as Vincent to call the 2<sup>nd</sup> Defendant.
9. After serving the two Defendants with the Summons, PW1 informed the court that the Defendants requested Vincent to sign the process-server's copy on their behalf.
10. In cross-examination, PW1 stated he had served the 1<sup>st</sup> Defendant previously in Machakos Miscellaneous No. 253 of 2015; that it is Vincent, the son of the 1<sup>st</sup> Defendant who signed the Summons on behalf of the Defendants and that he did not know the said Vincent before the said service.
11. The Defendants' advocate submitted that being a 2006 matter, it was not established why the process-server swore an Affidavit on 19<sup>th</sup> January, 2017; that Mutiso Mulinge acquiesced with the Defendants' stay on the suit land that Harrison Mulei acquired the Title Deed in respect of the suit land fraudulently.
12. The Defendants' counsel submitted that the Defendants will stand to suffer if the default Judgment is not set aside because they will be evicted from the suit land without being heard; that the suit land was purchased in 1970 before the amendments to Section 3(3) of the Law of Contract Act was done and that the Application should be allowed.
13. The Plaintiff's advocate submitted that this file was reconstructed vide Miscellaneous Application Number 253 of 2015; that the court ordered for issuance of fresh Summons to Enter Appearance and that the Defendants were served with the Summons to Enter Appearance on 4<sup>th</sup> October, 2016.
14. Counsel submitted that the depositions by the process-server were never challenged by the Defendants; that the Defendants have all along been aware of the suit and that the filed draft Defence does not raise triable issues. According to Counsel, the Defendants have deliberately sought to obstruct or delay the cause of justice.
15. This suit was commenced by way of a Plaint dated 6<sup>th</sup> September, 2006. In the Plaint, the Plaintiffs alleged that they are the registered proprietors of a parcel of land known as Nzaui/Kalamba/55 and that the Defendants trespassed on the land in January, 2006. The Plaintiffs have sought for the eviction of the Defendants from the suit land.
16. It would appear that the original file disappeared from the registry. Consequently, on 4<sup>th</sup> April, 2016, the court allowed the Plaintiff's Application dated 23<sup>rd</sup> November, 2015 to open a skeleton file. The court further ordered that Summons to Enter Appearance to be re-issued. In his Affidavit of Service sworn on 19<sup>th</sup> January, 2017, the process-server deposed that he served the 1<sup>st</sup> Defendant with the Summons at his home which is near Kalamba Market; that he also served the 2<sup>nd</sup> Defendant at the 1<sup>st</sup> Defendant's home and that it is the 1<sup>st</sup> Defendant who sent his son, Vincent, to call the 2<sup>nd</sup> Defendant for the purpose for being served with the Summons. It is on the basis of the said Affidavit of Service that this court proceeded with the trial on 24<sup>th</sup> May, 2018.
17. The Defendants are seeking for an order setting aside the proceedings that were conducted in their absence on the ground that they were never served. The evidence on record shows that the Defendants were indeed served with the Summons to Enter Appearance on 4<sup>th</sup> October, 2016. I say so because the 1<sup>st</sup> Defendant did not deny that his home is near Kalamba Market. The 1<sup>st</sup> Defendant did not also deny that he has a son by the name "Vincent" who was sent to call the 2<sup>nd</sup> Defendant.
18. The 2<sup>nd</sup> Defendant deposed that he hails from Kalamba location, and that the 1<sup>st</sup> Defendant is his uncle. This confirms the process-server's deposition that the two Defendants, being relatives, were living in the same locality. That explains why it was easy for Vincent, the 1<sup>st</sup> Defendant's son, to call the 2<sup>nd</sup> Defendant who upon answering the said call, was served with the Summons at the 1<sup>st</sup> Defendant's Home.
19. The Defendants having not denied that Vincent is the son of the 1<sup>st</sup> Defendant, and in the absence of an Affidavit from the said Vincent to deny the depositions in the Affidavit of Service, I find and hold that the Defendants were duly served with the Summons to Enter Appearance. However, they failed to enter appearance or file a Defence as prescribed by the law. Consequently, the Judgment that was entered by the court in this matter was regular.
20. Indeed, as was held in the case of *Patel vs. East Africa Cargo Handling Services Ltd (1974) E.A 75*, a regular Judgment will not normally be set aside unless the court is satisfied that there is a Defence on merits.
21. The Plaintiffs' case is that they were registered as the proprietors of the suit land vide a confirmed Grant in Nairobi High Court Succession Cause No. 2897/2002 (*in the matter of the Estate of Harrison Mulei Mutungi*); that the said Harrison Mulei Mutungi had been the registered proprietor of the suit land since 6<sup>th</sup> September, 1994 and that the suit land was never registered in the name of Mutiso Mulinge Nguli as alleged by the Defendants.
22. In their Defence, the Defendants averred that they purchased 4 acres of the suit land in the year 1970 from the late Mutiso Mulinge Nguli (*deceased*); that the suit land was never transferred to them and that they have been living on the said land since then.
23. It is the Defendants' case that the Plaintiffs obtained the Title Deed to the suit land fraudulently and that in any event, they have acquired prescriptive rights over the suit land.

24. The Defendants annexed on their Affidavits photographs of houses with rusted iron sheets. The Defendants also exhibited a copy of the Land Certificate in respect of the suit land in the name of Mutiso Mulinge Nguli dated 19<sup>th</sup> November, 1982.

25. The issue of whether Mutiso Mulinge Nguli (*deceased*) ever owned the suit land can only be determined at trial. Indeed, considering that the Plaintiffs have claimed that the suit land was always owned by their late brother Harrison Mulei Mutungi, the issue of whether the said Harrison Mulei Mutungi obtained a Title Deed in 1994 lawfully becomes pertinent, and therefore a triable issue.

26. Further, the Plaintiffs are seeking for an order of eviction of the Defendants from the suit land. The Defendants have on the other hand claimed that they are entitled to the land having acquired prescriptive rights over the same. This in my view is a triable issue that has to be ventilated at trial.

27. In the circumstances, and considering the prejudice that the Defendants will suffer if they are evicted from the suit land without being heard, I find that the Defendants should be given a hearing.

28. From those reasons, I allow the Defendants' Application dated 12<sup>th</sup> October, 2017 in the following terms:

*a. The default Judgment delivered on 30<sup>th</sup> June, 2017 and the Decree be and is hereby set aside.*

*b. The Defendants to file and serve their Defence and Counter-claim within fourteen (14) days of the date of this Ruling.*

*c. Each party to pay his own costs.*

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 8<sup>TH</sup> DAY OF MARCH, 2019.**

**O.A. ANGOTE**

**JUDGE**