



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 1 OF 2016

WAFULA KAROLI WERE.....PLAINTIFF

VERSUS

PHILIP OMONDI OPANY.....DEFENDANT

JUDGMENT

1. In the plaint dated **11/1/2016** which was filed in court on the same date, the plaintiff seek the following orders:-

(a) Vesting orders to transfer the land to the plaintiff.

(b) Costs.

2. According to the plaint, the plaintiffs' case is that he bought Plot No. **206 Kopomboi SFT** from the defendant in the year **2006** at **Kshs.600,000/=** and paid for it in full and in cash which payment the defendant acknowledged by signing the purchase agreement which the plaintiff produced as **P. Exhibit 1** at the hearing; that thereafter the plaintiff took possession of the land and the defendant handed over the allotment issued in his name to the plaintiff but refused or failed to transfer the land to the plaintiff. According to the plaintiff the land was charged to Settlement Fund Trustees and the loan amount increased daily, and he has partly repaid the loan on the basis of the above facts. The plaintiff seeks an order compelling the county Land Settlement Officer to transfer the land to the plaintiff and a vesting order do issue.

3. The defendant in this suit is said to have been served with the plaint as indicated in the affidavit of service dated **20/2/2016**. Despite being so served he never entered appearance nor filed any defence to the claim.

4. According to the affidavit of service dated **20/2/2016** received in court on **13/4/2018**, the defendant was served personally with the plaint. The court notes that even to the naked eye and without the use of an expert opinion the signature at the back of the said document is materially different from the other signatures attributed to the defendant which are on documents attached to the affidavit of service dated **20/2/2016**, **25/4/2018** and **25/6/2018**. A casual look shows that each set of documents bears a different signature but all are attributed to the plaintiff. It is not clear why the plaintiff would change his signature so often and in a span of two years. I find that unusual.

5. A written request for judgment against the defendant dated **17/4/2018** was filed on **18/4/2018**. The request for judgment was served by **Godfrey Masinde**, the Court Process Server, dated **25/5/2018** filed on the same date as per his affidavit of service.

6. A file memo in the file record dated **30/4/2018** signed by the Deputy Registrar indicates that the matter be fixed for formal proof on the basis of the contents of the affidavit of service dated **20/2/2018**.

7. At the hearing which took place on **28/1/2019**, the plaintiff and two witnesses testified. A bundle of documents was also produced by the plaintiff and the witnesses at the hearing. The plaintiff reiterated the matters contained in his plaint.

8. **PW2 James Osore** testified on **29/1/2019**. His evidence is that the defendant sold the suit land to the plaintiff and that he witnessed the agreement while at Nairobi. He also witnessed the payment of **Kshs.600,000/=** by the plaintiff to the defendant.

9. **PW3, Simon Wesala Okwako**, Land Adjudication and Settlement Assistant Trans-Nzoia County testified on **20/2/2019**. His evidence is that the suit land was allocated to the defendant. He produced a copy of allotment letter as **P. Exhibit 7**. He stated that the suit land measures **10** acres; that the allottee paid **10%** required as well as other payments that he owes the SFT **Kshs.61,684.87** as at **30/6/2017**; that a ground report shows that the suit land is occupied by the plaintiff and his family who have developed the suit land; he averred that from his file record he was able to see that the defendant and the plaintiff had entered into a sale agreement produced as **P. Exhibit 12**; that demand notices are made to allottee to repay loans but they defendant could not be traced and only the plaintiff can be traced on the ground. He described the process of allocation of land by SFT which having begun with a vetting committee ends in the hands of the cabinet secretary who approves the list of the beneficiaries and authorities the director of land adjudication to prepare letters of offer which are sent to the county land adjudication officer for issuance to the settlers.

10. I have anxiously considered this litigation and specifically the issue of service against the background of the sensitivity of land matters in Kenya. It would appear from the affidavit of service of Godfrey Masinde process server dated **20/2/2016** that only the plaint was served upon the defendant. This is a gross anomaly in the civil litigation process. Summons are meant to inform a defendant of the need to enter appearance and defence within a certain prescribed period. The steps to be taken in respect of summons are contained in **Order 5. Order 5 rule 1** states when a suit has been filed summons shall issue to the defendant ordering him to appear within the time specified therein. The summons shall be signed and sealed and shall be accompanied by a copy of the plaint and the time for appearance by the defendant shall be fixed with reference to the place of residence of the defendant so as to allow sufficient time to appear. **Order 5** provide in detail for the process of service of summon on a defendant. A whole order comprised of **34** rules and sub rules thereto having been devoted to the issue of preparation and service of summons it is clear that they pray a central role in litigation and cannot be ignored. Indeed it is the summon that are recognized as a principle document in **Order 5 rules 1 and 3** in relation to service upon a defendant. The plaint is to merely accompany the summons.

11. With the provisions of **Order 5** in mind I find that the omission to serve the summons and to place an affidavit of service which states in unequivocal terms that the defendant has been served with the summons as the principal document is grave error not to be taken lightly.

12. In this suit that is the fatal flaw in the plaintiff's case which this court can not ignore. It is not a mere procedural defect. It goes into the core of the issue whether the defendant has been made to understand that there is a legal claim pending against him in court and that he ought to answer that claim within a specified period in default of which a certain judgment may be entered against him. A defence who has not been served with summons in any suit cannot be deemed to have been called upon to answer to the plaintiff's claim.

13. Consequently I find that the plaintiff's claim must fail for non-service of summons and I hereby strike out the plaintiff's claim with no orders as to costs.

Dated, signed and delivered at Kitale on this 9th day of April, 2019.

MWANGI NJOROGE

JUDGE

9/4/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Plaintiff in person

N/A for the defendant

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

9/04/2019