

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 385 OF 2016

ANDREW KIPKOECH KURGAT.....PLAINTIFF

VERSUS

JOSEPH KIPLAGAT.....DEFENDANT

RULING

The application herein is dated 27.11.2018 wherein the defendant/applicant prays that the *exparte* proceedings and subsequent *exparte* judgment and all consequential proceedings and orders be set aside and the matter to be heard *de-novo*.

The application is based on grounds that the *exparte* judgment was entered against the defendant who was not served with summons to enter appearance and all pleadings in this matter. The applicant contends right to be heard was violated and that the applicant has a good defence and triable issues.

The plaintiff in response states that the defendant was served through his agent one Mr. Too with the summons, plaint, verifying affidavit, list of documents and witnesses and witness statements. The defendant failed to enter appearance as required by law. The plaintiff applied for interlocutory judgment and the matter was fixed for hearing on 8.2.2017. Hearing notice was served on the defendant's caretaker, Mr. Too. She received the same.

I have considered the application, supporting affidavit and replying affidavit and do find that the plaintiff has not annexed the original summons to the affidavit of service as required by Order 5, Rule 15 of the Civil Procedure Rules, 2010. Moreover, it is not clear whether the summons was served upon Mrs. Too referred to the affidavit of service sworn by Vincent Ogutu on 18th January, 2017 or Mr. Too referred to in the affidavit of Andrew Kipkoech Kurgat sworn on 31st August, 2019. Mr. Andrew Kipkoech Kurgat appears to refer to Mr. Too and Mrs. Too as agent and caretaker respectively of the defendant. It is not clear whether he is referring to the same person or two different persons. I do find that there is a likelihood that the defendant was not served as the plaintiff has not proved that there was proper service.

Ultimately, I do set aside the *exparte* proceedings and subsequent judgment and all consequential orders herein and the matter to begin *de-novo*. Costs in the cause. Orders accordingly.

Dated and delivered at Eldoret this 30th day of May, 2019.

A. OMBWAYO

JUDGE