



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 157 OF 2017

ENOS ANGOYA LWUGI.....PLAINTIFF

VERSUS

NICHOLAS MWALE LUMEZANI.....1ST DEFENDANT

ISAAC WEPUKHULU FUCHAKA.....2ND DEFENDANT

RULING

1. By an application dated **11/3/2019** and filed in court on the same date the plaintiff sought for orders following orders:-

- (1) That the ex parte judgment entered herein on 24th September 2018 be set aside together with all consequential orders.**
- (2) That the 2nd defendant/applicant be allowed to file his defence within such time as to be described by court.**
- (3) That in the meantime and pending hearing and determination of this application this honourable court be pleased to issue orders of stay of further execution of the court's judgment.**
- (4) Costs be provided for.**

2. The grounds relied upon by the applicant are contained on the face of the application and in the supporting affidavit dated **11/3/2019**. They are that the 2nd defendant was not served with summons to enter appearance and that he has a good defence and that it is in the interest of justice to grant the orders sought. Attached to the application is a draft defence.

3. The application is opposed. The reply of the respondent is contained in his sworn affidavit dated **9/4/2019**. To the replying affidavit of the respondent is attached a copy of an affidavit of the process server who allegedly served the summons upon the applicant on **8/10/2017**.

4. The background to the application is that judgment was entered against the defendants on the 24th September 2018 condemning them to an order nullifying the sale agreement dated 20/3/2013 between the plaintiff and the 1st defendant, eviction from the suit land and costs of the suit.

5. In the judgment the court noted that the 2nd defendant was served and took notice of an affidavit of service dated **14/11/2017** now exhibited by the respondent.

6. The 1st defendant entered appearance and filed a defence on **21/11/2017**; however he never attended the hearing of the suit. This court was satisfied that he was served with the hearing notice for the hearing that took place on **12/7/2018**. He has not applied for this judgment to be set aside, yet the defence of the 2nd defendant hangs on the success of his defence.

7. The court must consider the circumstances of the case in an application for setting aside, whether any defence has been brought to the notice of the court, the merits of such a defence.

8. This court has unfettered discretion to set aside a judgment on conditions that in its opinion appear just. However the discretion must be exercised judiciously to avoid granting orders to a litigant who has deliberately attempted by his conduct to delay the conclusion of the suit.

9. In the current case the applicant avers that he was not served. He denies that the person served at his instructions was his wife. He does not deny that he lives in Bidii yet his draft defence states expressly that he took possession of the land from the 1st defendant. The very fact that eviction is sought is testament to his occupation of the suit land. The plaintiff must be deemed to know the land he sold and the process

served depones that the plaintiff accompanied him to the suit land during the service of process. He alleges to have been served with a notice to show cause in this matter on **5/3/2019**. He does not aver that he never knew of this suit before. In my view the applicant's statements in the supporting affidavit are quite evasive and unreliable.

10. I am not convinced that the applicant was not served with the summons or that the person served never gave him the document served upon her in his behalf. I am not also convinced that there is any good defence to the claim in the draft defence annexed to the application. Besides, the draft defence is not accompanied by any other documentary evidence that could make this court believe that the 2nd defendant was convinced that the 1st defendant had fully complied with his contractual duties and responsibilities owed to the plaintiff under the agreement dated **20/3/2008** between them.

11. The 1st defendant having acquiesced under the judgment there is no miracle the setting aside of the judgment can perform in favour of the 2nd defendant to grant him any relief from the default of the 1st defendant.

12. I find that the application dated **11/3/2019** has no merit and the same is dismissed with costs to the respondent.

Dated, signed and delivered at Kitale on this 6th day of May, 2019.

MWANGI NJOROGE

JUDGE

6/5/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Munialo for plaintiff

Mr. Ingosi holding brief for Arunga for 2nd defendant

N/A for 1st defendant

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

6/5/2019