



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 158 OF 2017

ROBERT JUMA WASWA.....PLAINTIFF

VERSUS

KIMAIYO ARAP SAMOI.....1ST DEFENDANT

EMMANUEL SAMOEI KIPCHUMBA.....2ND DEFENDANT

RULING

1. This is a ruling on the application dated **28/1/2019** and filed in court on the same date. That application has been brought by the defendants seeking the following orders:-

- (1) That this application herein be certified as urgent and service of the same thereof be dispensed with in the first instance.**
- (2) That pending the hearing of this application inter-partes, there be a temporary stay of execution of decree of 17/7/2018 and all consequential orders emanating therefrom.**
- (3) That the proceeding of 22/3/2018 be set aside.**
- (4) ...spent...**
- (5) That the ex-parte judgment entered on 30/5/2018 and all consequential orders be set aside and the defendant be given unconditional leave to defend the suit.**
- (6) That the proposed draft defence be deemed to have been properly filed and served subject to payment of requisite court fees.**
- (7) That costs of execution proceedings be borne and paid for the plaintiff/respondent.**
- (8) That costs of this application be provided for.**
- (9) Any other or further relief that this court shall deem just and expedient to grant.**

2. The application is brought under **Order 10 Rule 11, Order Civil Procedure Rules 2010, Section 1A, 1B, 3 and 3A** of the **Civil Procedure Act Cap 21 Laws of Kenya**.

3. The application is supported by the affidavit Emmanuel Samoei Kipchumba the 2nd defendant sworn on **28/1/2019**. That affidavit reiterates the same matters set out in the grounds above. The grounds which appear on the affidavit in support of the application and on which the said application is made are that there was no personal service or at all of summons to enter appearance upon the defendants or any member of his household; that no Notice of Entry of ex-parte judgment in terms of **Order 22 rule 6** provisos of the Civil Procedure Rules 2010 was ever served upon the defendants as it mandatory required by law; that the defendants have only learned of the judgment when they were handed an application purporting to instruct the Deputy Registrar to sign transfer forms in favour of the plaintiff.

4. In the application the defendants sought to have the process server, one Raphael Nyongesa Simiyu summoned to court for purposes of his cross-examination on his affidavits of service sworn on 13/10/2017 and 6/6/2018 respective.

5. In his response to the application, the plaintiff filed replying affidavit sworn on **11/2/2019**. The summary of his contention in that affidavit is that the summons were served and the respondents were not sincere in their denial of service; that on 27/9/2018 and 19/11/2018 the 2nd defendant attended court and made oral application in court which was allowed and therefore the defendants were aware of the existence of this suit; that notice of judgment was served and acknowledged; that the defendants settled costs after being served with notice to show cause and therefore they must have been aware of the suit; that the defendant had in writing proposed an out of court settlement on 8/1/2018 and that their defence did not disclose any arguable defence.

6. The process server Raphael Nyongesa Simiyu was cross examined on 24/4/2019 while being led by Mr. Bororio he asserted that he was accompanied the plaintiff to Lessos for service and found the defendants at their home where he served them with the process in this matter. It was his evidence that the 1st defendant instructed the 2nd defendant to sign both summons and that service was therefore accepted by both. He also testified that he served the notice of judgment dated 4/5/2016 upon the 2nd defendant's wife while the 1st defendant declined service on the basis that he had already disposed of the land. The process server produced his credentials in court and maintained his version of events from the beginning of his cross-examination to the end. However it is noteworthy that he did not disclose in his affidavit of service that the 1st defendant gave authority to the 2nd defendant to receive summons on his behalf. He also admitted a "typing error" in the affidavit of service dated 6/6/2018 in that the 1st defendant was referred to as wife of 1st defendant whereas that document should have referred simply him as the 1st defendant. This is a typing error which he stated he realised while being cross-examined and he averred that the rest of the statement is testimony that reference to him as "wife of 1st defendant" was a mere error.

7. I have examined paragraph 3 of the affidavit of service of the process served sworn on 6/6/2018 and it indeed contains the averments that he met the wife to the 2nd defendant at Lessos. However his assertion that the rest of the statement shows that it the defendant who was served personally is not borne out in the contents of that sentence. That document is an affidavit made under oath. The contents therefore cannot be brushed away as just an error unless a fresh affidavit was sworn to correct and clarify the facts. None was sworn.

8. I have also examined the affidavit of service dated 13/10/2017 which shows that the process server accompanied by the plaintiff served summons of the two defendants and that they accepted service by signing the copies of the summons to enter appearance which he returned to court duly signed. However the signatures on both copies of summons purportedly served on the two defendants are similar. It is at this point that the explanation of the process server comes in to play. In his oral evidence he has explained that the 1st defendant instructed the 2nd defendant to sign both summons.

9. The 2nd defendant filed supplementary affidavit dated 28/2/2019. It addresses some of the issues raised in the replying affidavit some of which I will address herein below.

10. There is a written proposal in the form of a letter attached to the replying affidavit. However that letter is denied by the 2nd defendant who describes it a forgery and disputes the signature appended to it. Another discrepancy pointed out in the supplementary of the 2nd defendant is that whereas that letter is dated 5/1/2018 the plaintiff's advocate appears to have responded to a different letter dated 8/1/2018 in his letter dated 12/1/2018. Further the wife of the 1st defendant is said to have died in year 1999 and she could have therefore have been present to receive the summons.

11. Although the defendants aver that service must be effect on the person, **Order 5 rule 12** provides that where after a reasonable number of attempts have been made to serve the defendant and the defendant cannot be found service may be made on an agent of the defendant empowered to accept service or on any adult member of the family of the defendant who is residing with him.

12. That, apparently, is the rule that the process server appears to shelter under when he says he served documents on persons other than the 1st defendant.

13. However, I have considered the discrepancies in the evidence of the process server in this matter which make it doubtful that there was a proper service of process upon the defendants.

14. Applying the provisions of **Order 5 rule 12** to the facts regarding service in this case I find that the alleged service of notice of judgment on the wife of the 1st defendant who is alleged to have met her demise in 1999 that is twenty years ago, is irregular and unacceptable. I agree with counsel for the defendants that the contents of paragraph 3 of affidavit of service dated 6/6/2018 must be an afterthought. The court will therefore adopt the contents of the affidavit and rule that there was no proper service.

15. The purported process of service of the summons on the 2nd defendant on behalf of the 1st defendant was not properly described in the affidavit of service of summons. The process server's oral explanation during his cross examination that the 1st defendant instructed the 2nd defendant to receive summons on his behalf contradicts the contents of the affidavit of service. There is no good reason why that explanation was not included in the affidavit of service of summons in the first place. Consequently, I am in doubt as to the veracity of the depositions in the affidavit of service and in the process server's own oral evidence on cross-examination and I cannot be convinced that service of summons on the 1st defendant was properly effected.

16. Many cases I have addressed the issue of setting aside judgment in include **Patel -vs- E.A. Cargo handling Services Ltd [1974] EA 75, Sebei District Administration -vs- Gasyali & Others [1968] EA 300 and Pithon Waweru Maina -vs- Thuku Mugiria [1982-1988] KAR 171**. I also observe that setting aside for judgment when non-service has been proved, is not a matter of discretion but a matter of jurisdiction on the part of this court.

17. The main principle arising from these cases is that a court of law should as far as possible endeavour to determine cases on their merits and that where necessary a judgment may be set aside on such conditions as may be just.

18. This court has found that there was no proper service of the summons and notice of judgment in this matter. The law is that a litigant can only be summoned to answer a claim by way of proper service of summons without which they cannot be deemed to have been summoned in the case. It matters not that any of the parties attended any part of the proceedings in this matter.

19. For the above reasons the application dated **28/1/2019** succeeds. The judgment of this court entered on **30/5/2018** and all consequential orders are set aside. The defendants are hereby granted unconditional leave to defend the suit. They shall file and serve their defence to the claim within 14 days of this order.

Dated, signed and delivered at Kitale on this 31st day of July, 2019.

MWANGI NJOROGE

JUDGE

31/7/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Collins

Mr. Bungei for Applicants

Mr. Bororio for Respondents

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

31/7/2019