



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 321 OF 2012

DANIEL KYALO LUA.....1ST PLAINTIFF

WAMBUA LUA - (*Suing as Administrators to the Estate*

of the late JAMES LUA MAIA)2ND PLAINTIFF

VERSUS

RICHARD MUINDIDEFENDANT

RULING

1. In the Notice of Motion dated 14th April, 2015 and filed on 15th April, 2015, the Defendant is seeking for the following orders:

a. That the court be pleased to set aside its Judgment dated the 13th March, 2015.

b. That the court does enlarge the time allowed by the law to enable the Applicant to defend the suit and the Draft Defence be admitted as the Defendant's Defence.

c. That costs of this Application be costs in the cause.

2. In his Affidavit in support of the Application, the Defendant deponed that he was never served by Andrew Kyalo Mwanzia on 2nd April, 2013 or at all; that he does not own a business at Nunguni known as Kanini Kaseo General Enterprises as alleged by the process-server and that on 2nd April, 2013, he left Nunguni at 9.00a.m. and returned in the evening at 7.30 p.m

3. According to the deposition of the Defendant, on 2nd April, 2013, he was inspecting construction works at Mukuyuni Primary School and that in any event, he has no interest in Plot No. 12 Kilome Land Adjudication Section.

4. The Defendant deponed that the plot he is living on is not Plot No. 12 and that he has invested more than Kshs. 60 million on his land. The Defendant finally deponed that his Draft Defence raises triable issues and should be allowed on record.

5. In his Replying Affidavit, the 1st Plaintiff deponed that the Defendant was served with all documents in this matter; that the process-server swore an Affidavit explaining how he effected service on the Defendant and that the Defendant is a person well known in the Society.

6. In his Supplementary Affidavit, the Defendant deponed that he is not interested in the suit land; that he owns parcel of land known as 2163 Kilome Land Adjudication Section and that execution of the Judgment against him cannot be executed in respect of parcel number 12 Kilome Land Adjudication Section.

7. In his submissions, the Plaintiffs' advocates submitted that the suit land belongs to Estate of the late James Lua Maia; that the Defendant purports to have purchased part of the suit land and that the Defendant was served with court documents.

8. The Defendant's advocate submitted that the admission by the Plaintiffs that the Defendant caused Plot No. 12 Kilome to be fraudulently sub-divided calls for the court to set aside its Judgment; that the Applicant does not own Plot No. 12 Kilome but owns land known as Makueni/Kilome/2163 and that the Application should be allowed.

9. The Plaintiff by the Plaintiffs shows that it was filed on 24th August, 2012. According to the Affidavit of Service of Andrew Kyalo Mwanzia, the process-server, he travelled to Nunguni town on 2nd April, 2013 and served the Defendant with the Summons and Plaintiff in his Hardware shop known as Kanini Kaseo General Enterprises. In the said Affidavit, the process-server stated as follows:

“4. That he accepted the service by retaining his copies but refused to sign our copy and instead wrote a note saying that he bought the said plot from Deon Musau which I attach to this Affidavit and return to this Honourable Court duly served upon the said Defendant.”

10. The Defendant has denied that he was served with the Summons to Enter Appearance as stated by the process-server. According to the Defendant, he does not own a Hardware by the name of Kanini Kaseo General Enterprises. The Defendant further denied that he was in Nunguni town on the day he was allegedly served by the process-server.

11. Although the process-server stated in his Affidavit that upon serving the Defendant with the Summons, the Defendant did a note stating that he purchased the land from Deon Musau, he did not annex the said note. In the circumstances, there is no evidence before me showing that the Defendant ever wrote such a note.

12. The process-server did not also explain how he identified the Defendant before serving him with the court summons. Indeed, the process-server did not inform the court if he knew the Defendant before the date he allegedly served him with the summons, and if not, the person who identified the Defendant or his Hardware shop to him.

13. Having failed to state the time that he allegedly served the Defendant with the Summons to Enter Appearance, and having failed to state how he identified the Defendant or his Hardware shop, if at all, I find that there is no evidence to show that the Defendant was ever served with the Summons to Enter Appearance.

14. The law relating to setting aside default Judgment is now settled. In the case of *Reuben Nzuve Mwangangi vs. Mukene Musau & Another, Machakos ELC Case No. 21 of 2006*, this court held as follows:

“23. On the basis of the evidence before it, this court is required to establish if the default Judgment of 21st October, 2008 was regular or irregular. Where the court finds that the Judgment was irregular, it ceases to have discretion in the matter. The court must proceed to set aside such Judgment ex debito justitiae. The distinction between a regular and an irregular Judgment was stated by the Court of Appeal in the case of James Kanyiti Nderitu & Another vs. Marios Philotas Ghikas & Another (2016) eKLR as follows:

“From the onset, it cannot be gainsaid that a distinction has always existed between a default Judgment that is regularly entered and one, which is irregularly entered. In a regular default Judgment, the Defendant will have been duly served with Summons to Enter Appearance, but for one reason or another, he had failed to enter appearance or to file Defence, resulting in default Judgment. Such a Defendant is entitled, under Order 10 Rule 11 of the Civil Procedure Rules, to move the court to set aside the default Judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default Judgment, and will take into account such factors as the reason for the failure of the Defendant to file his memorandum of appearance or Defence, as the case may be; the length of time that has elapsed since the default Judgment was entered; whether the intended Defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default Judgment among others.”

15. In the above matter, the Court of Appeal addressed an irregular Judgment as follows:

“In an irregular default Judgment, on the other hand, Judgment will have been entered against a Defendant who has not been served or properly served with Summons to Enter Appearance. In such a situation, the default Judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the Judgment is irregular; it can set aside the default Judgment on its own Motion. In addition, the court will not venture into considerations of whether the intended Defence raises triable issues or whether there has been inordinate delay in applying to set aside the irregular Judgment. The reason why such a Judgment is set aside as of right, and not as a matter of discretion is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates over the entire justice system. (See *Onyango Oloo vs. Attorney General (1986 – 1989) EA 456.*”

16. Having found that the Defendant was not served with Summons to Enter Appearance, I shall set aside the Judgment of this court dated 13th March, 2015 *ex debito justitiae*.

17. For those reasons, I allow the Application dated 14th April, 2015 as follows:

- a. **The Judgment of this court dated 13th March, 2015 is hereby set aside.**
- b. **The Defendant to file his Defence within fourteen (14) days from the date of this Ruling.**
- c. **The Plaintiffs to pay the costs of the Application.**

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 26TH DAY OF JULY, 2019.

O.A. ANGOTE

JUDGE