



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**E & L CASE NO. 354 OF 2016**

**SAMUEL KIPKURGAT SOI.....PLAINTIFF**

**VERSUS**

**JOHN KIPKOECH SOI.....DEFENDANT**

**RULING**

The defendant has moved this court basically for the setting aside, varying and or review of the judgment and decree issued on 14<sup>th</sup> December, 2017 and all consequential orders related thereto and to grant the applicant leave to file defence and to be heard on merit. The defendant claims that he was never served with summons to enter appearance, hearing notice or notice of entry of judgment nor notice of eviction.

The defendant claims that his son was issued with eviction notice on 12.4.2019 at 3.00 p.m. but the eviction was to be conducted on 15<sup>th</sup> April, 2019. That the plaintiff/respondent did not give 30 days' notice as ordered by the court.

The plaintiff on the other hand states that the defendant was duly served with summons to enter appearance. The notice of eviction was also duly served. The defendant has been evicted and has moved to his own land a few meters away.

I have looked at the affidavit of service by Robinson O. Getange dated 9<sup>th</sup> December, 2016 and do observe that in paragraph 3, the name of the village elder is Joshua Lagat whilst in paragraph 4, the name is Johana Lagat.

The defendant has denied the existence of such a person as a village elder. It was prudent for the plaintiff to file an affidavit sworn by the village elder confirming that he indeed met the process server. In the absence of the same, it is doubtful that such an elder assisted the process server to serve.

In the affidavit of service of Robinson O. Getange sworn on 15<sup>th</sup> November, 2017, it is not clear as to which location Mr. Daniel Rotich represents as the chief.

In *James Kanyiita Nderitu & Another -vs- Marios Philotas Ghikas & Another [2016] eKLR*, the court of appeal expressed itself thus,

***“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 other”.***

I have considered the submissions by parties and do find that there is doubt as to whether the defendant was served and therefore this is sufficient reason for setting aside. The right to be heard is sacrosanct and cannot be taken away without good reasons.

The defendant deserves to be heard. The application is allowed. Judgment and decree dated 14<sup>th</sup> December, 2017 and all consequential orders related thereto are set aside. The defendant to file defence within 10 days. The plaintiff to file reply to defence within 10 days of service. The plaintiff is restrained from selling, charging or leasing the land or dealing with it in any manner whatsoever pending hearing and determination of the suit. Costs in the cause. Orders accordingly.

**Dated and delivered at Eldoret this 22<sup>nd</sup> day of July, 2019.**

**A. OMBWAYO**

**JUDGE**