



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAROK**

**ELC CAUSE NO. 58 OF 2017**

**ITUIKU FARMERS CO. LTD.....PLAINTIFF/RESPONDENT**

**VERSUS**

**ELIJAH MISOI.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**SIMON KIMETTO.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**JOSEPH KOECH.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**RULING**

By a Notice of Motion dated 7<sup>th</sup> December, 2017 the Applicant herein sought for the setting aside of the exparte Judgement and decree and/or the court to vary and review the orders. The Applicants also sought for orders to be granted leave to file and serve their Defence and out of time. The Applicants further sought for stay of execution of the decree arising from the aforesaid judgement.

The Application was based on the grounds that the Defendants were not accorded a fair hearing and that the Plaintiff/Respondent had concealed from the court certain material issues. The Applicants further stated that they were never served with the pleadings and that they stand to suffer irreparable loss and damage if they are not heard as the case raises serious and weighty issues of law.

The Application was also grounded on the Affidavit of the 1<sup>st</sup> Applicant/Defendant in which he deponed that he was never served with the pleadings of the suit herein and he only knew about it when he was called by his previous advocates in another matter who saw the suit listed for hearing and upon checking with the court he found that the suit was heard and was at execution stage.

It is the Applicants' contention that even though there were various affidavits of service on record he never met the process server on the dates alleged. He further averred that the 3<sup>rd</sup> Defendant is deceased and couldn't be served with summons on 22<sup>nd</sup> February, 2014.

The Applicants further averred that the Respondent have not disclosed that there was a Sale Agreement and evidence of full purchase price for that parcel of land known as Cis Mara/Ololulunga/137 and despite the foregoing the Respondent have obtained exparte judgement and are threatening to evict the Applicants despite the fact that they were never served with any Notice for Hearing, entry of Judgement or notice to show cause.

The Application was opposed by the Plaintiff by way of a Replying Affidavit filed by Geoffrey Mungai Kubwa. The Respondent contend that despite the Applicants contention they were duly served with summons to enter appearance.

The Respondent further contend that the Applicants have not denied the address of service that was used to serve them. The Respondent further contend that the death certificate that is attached to the Application is for Joseph Cheruiyot Koech and not Joseph Koech.

I have read the Application before me and the submissions filed by the parties. This is an Application in which the Applicant is seeking the discretionary orders of the court to set aside its exparte judgement. The Applicants main contention is that they were not properly served. The Respondent contends that there was proper service.

Having considered the rival submissions, I find that where there are doubts on the issue of service and a party comes to court ready to defend suit unless exceptional negligence can be attributed to that party it shall serve the wider interest of justice that such a party be accorded every opportunity without resorting technicalities to close the door on him. In the instant case the Applicants have vehemently denied proper service was effected on them and more so the 2<sup>nd</sup> Defendant was deceased at the time when he is alleged to have been served. The Respondent did not even attach any affidavit from the process server to controvert that position and in the circumstances I find that service of the summons on the Applicants and subsequent Hearing Notices were different and in the circumstances I will allow the Notice of Motion dated 7<sup>th</sup> December, 2017 in the following terms:

1. That the exparte Judgement and other consequential orders be and are hereby set aside.
2. That the Applicants do file and serve their statement of defence within 14 days.
3. That the matter be mentioned on 28<sup>th</sup> October, 2019 for pre-trial directions.

**DATED, SIGNED and DELIVERED** in open court at **NAROK** on this **26<sup>th</sup>** day of **September, 2019**

**Mohammed Kullow**

**Judge**

**26/9/19**

In the presence of: -

CA:Chuma

Mr Lel for the Defendant/Applicant

N/A for the Respondent/Plaintiff

**Mohammed Kullow**

**Judge**

**26/9/19**