



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 50 OF 2014 (OS)

ELISHA NJERU JAMES.....PLAINTIFF

VERSUS

**FELISTER NGIMA ELIJAH (being sued as the administratrix of
the estate of Elijah Njagi Henry).....DEFENDANT**

RULING

1. By a chamber summons dated 17th June 2019 brought under **Order 10 Rule 11, Order 12 Rule 7 of the Civil Procedure Rules** (hereafter *the Rules*), **Sections 3 and 3A of the Civil Procedure Act (Cap. 21) and all enabling provisions of the law**, the Defendant sought the following orders:

a. That service of this application be dispensed within in the first instance and the same be heard ex-parte.

b. That the honourable court be pleased to set aside the judgement and decree herein passed on 22nd January 2019 and 25th February 2019 respectively and all other consequential orders therein pending the hearing and determination of this application inter partes.

c. That the honourable court be pleased to set aside the ex-parte judgement entered on 22nd January 2019 against the Defendant/Applicant unconditionally and in event allow the Defendants to defend the suit or cause.

d. That in the interim there be stay of further dealings, transfer, registration, sale of LR. No. Kagaari/Kanja/4793, 4794, 4795 and 4796 pending the hearing and determination of this application.

e. That costs of this application be provided for.

2. The said application was based upon the several grounds set out on the face of the summons and the supporting affidavit of the Defendant sworn on 17th June 2019. It was contended that the Plaintiff had never served the Defendant with summons to enter appearance, the pleadings and other court process since the commencement of the suit. It was further pleaded that the Plaintiff had also failed to serve the Defendant with a notice of entry of the *ex-parte* judgement dated 22nd January 2019. The Defendant, therefore, considered the *ex-parte* judgement as irregular and wanted it set aside.

3. The Plaintiff filed a replying affidavit sworn on 29th July 2019 in opposition to the said application. The Plaintiff stated that the Defendant was always aware of the existence of the suit and that she was served with court process at all material times. It was contended that the process server was always accompanied by police officers because of the violent nature of the Defendant.

4. The Plaintiff further stated that at some point in the course of the proceedings, the Defendant had an advocate who entered an appearance and even filed a response to the suit in 1996. It was contended that after filing a defence the Defendant lost interest in the case hence should not be allowed to revive an old suit due to her own default. The Plaintiff considered the Defendant's application as lacking merit and urged the court to dismiss it with costs.

5. The Defendant filed a further affidavit sworn on 23rd September 2019 in response to the Plaintiff's said replying affidavit. She denied service of any court process and further stated that the suit properties were the subject of some succession proceedings and that the concerned beneficiaries were not joined in the instant suit.

6. When the said application was listed for hearing on 25th September 2019 only the Defendant's advocate attended court. The Plaintiff did not attend court. The Defendant's advocate sought and obtained 14 days to file written submissions on the said application. The record

indicates that by the time of preparation of the ruling, however, the Defendant had not filed any submissions.

7. The court has considered the Defendant's said application and her further affidavit, the Plaintiff's replying affidavit in opposition thereto as well as the material on record. The main question for determination is whether the Defendant has made out a case for setting aside of the *ex-parte* judgement dated 22nd January 2019.

8. The provisions of **Order 10 Rule 11** of the **Rules** stipulate as follows:-

“Where judgement has been entered under this Order the court may set aside or vary such judgement and any consequential decree or order upon such terms as are just.”

9. Similarly, the provisions of **Order 12 Rule 7** of the **Rules** stipulate as follows:

“Where under this Order judgement has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgement or order upon such terms as may be just.”

10. The court has perused the affidavit of service on record for the originating summons dated 21st October 2010. It was sworn by a process server known as G.M. Karuoro on 6th December 2012. It was deponed that on 6th November 2012 he travelled to the Defendant's village in Munyutu in Kagaari North within Embu County and served her with the originating summons. It was stated that the Defendant was personally known to her as he had previously served her with court process in *Runyenjes Succession Cause No. 15B of 2006*. It was further sworn that she had accepted service by thumb printing the back side of the originating summons which was then annexed to the affidavit of service.

11. The court has noted from the application that the Defendant did not specifically respond to the contents of the said affidavit of service. It was not contended that she was not present at Munyutu village on the material date at 9.00am. when service was said to have been effected. She did not contend that the thumb print appearing on the back side of the affidavit of service was a forgery. It was not contended that the process server was never known to her or that he had never served her with any court process in connection with *Runyenjes Succession Cause No. 15B of 2006*. The Defendant merely made a bare denial of service without responding to the particulars contained in the initial affidavit of service.

12. The court has also perused the affidavit of service for service of the hearing notice before trial of the action. It was sworn on 6th June 2018 by a process server known as Monica Kimemu who is a senior court process server of this court. It was stated that on 30th May 2018 she picked up two police officers namely PC Paul Sang and PC Shadrack Kaunga from Mbunjeru police post and proceeded to Munyutu village for the purpose of serving the Defendant. It was stated that they found the Defendant, whom she personally knew, and her son Agapia Mugendi Njagi and that she refused to accept service. The Defendant and her son are said to have prevented the process server from dropping a copy of the hearing notice into her house whose door was open.

13. The court has noted again that the Defendant did not attempt to respond to those specific details on service of the hearing notice on 30th May 2018. She did not dispute that she and her son were present at home on the date of service. She did not dispute the presence of the two police officers either. The Defendant simply made a general and bare denial of service carefully avoiding the details on the affidavit of service on record.

14. The court is satisfied on the basis of the said affidavits of record that the Defendant was indeed served with the originating summons as well as a hearing notice before trial of the action. There is thus no basis for the Defendant's contention that the *ex-parte* judgement dated 22nd January 2019 was irregularly obtained without service of court process. The court believes the two process servers and finds that the judgement on record is a regular one.

15. The court has also considered the relevant case law on the subject and the principles which are applicable in setting aside an *ex-parte* judgement. The court has considered the principles applied in the cases of **Girado V Alam & Sons (U) Ltd [1971] EA 4480**, **Patel VI E.A. Cargo Handling Services Ltd [1974] EA 75** and **Mbogo & Another V Shah [1968] E.A. 93**. All these cases suggest that the court has a wide and unfettered discretion to set aside a default judgement even where it was regularly obtained. In the case of **Patel B V E.A. Cargo Handling Services Ltd (Supra)** it was held that,

“there are no limits or restrictions on the Judge's discretion except that if he does vary the judgement he does so on such terms as may be just.”

16. Although the court finds that the Defendant was properly served with court process and that no sufficient cause for non-appearance was shown, the court is, nevertheless, inclined to allow the application for setting aside in order to accord the Defendant another chance of being heard. The right to a fair hearing is now a constitutional right under **Article 50 of the Constitution of Kenya**.

17. The upshot of the foregoing is that the court hereby allows the Defendant's chamber summons dated 17th June 2019 in the following terms:

a) The *ex-parte* judgement dated 22nd January 2019 is hereby set aside on the following conditions.

i. The Defendant shall pay the Plaintiff thrown away costs of the application in the sum of Kshs.20,000/- within 21 days from the date hereof.

ii. The Defendant shall file and serve a response to the originating summons dated 21st October 2010 as well as her witness statements and documents within 21 days.

iii. The Defendant shall file and serve her trial bundle duly bound and paginated within 21 days from the date hereof.

b) The court shall give directions on the hearing of the originating summons and fix a hearing date upon delivery of the ruling.

c) In the event of the Defendant defaulting on any of the conditions set out in order (a) above, the notice of motion dated 17th June 2019 shall stand dismissed and the *ex-parte* judgement shall be reinstated without further order.

18. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 17TH day of OCTOBER, 2019.

Plaintiff and Defendant present in person and in the absence of the Defendant's advocate.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

17.10.19