



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 19 OF 2015.**

**FRANCIS ALIGA OKUSO .....PLAINTIFF**

**VERSUS**

**DORCUS OMEGA .....DEFENDANT**

**R U L I N G**

Although this case was heard ex-parte by **MUKUNYA J** on 24<sup>th</sup> may 2017 and a Judgment delivered in favour of the plaintiff on 3<sup>rd</sup> October 2017, I have perused the pleadings and found that the subject matter is land parcel **NO KAKAMEGA/ SANGO/1541** which is situated in **KAKAMEGA COUNTY**. Even the title deed is issued by the Land Registrar Kakamega. It is therefore not clear how this suit was filed at the **BUNGOMA ELC** registry in January, 2015 when there is a competent **ELC** at **KAKAMEGA**. I therefore intend to make further appropriate orders in respect to the disposal of this suit once I determine the defendant's Notice of Motion dated 14<sup>th</sup> November 2017 which is the subject of this ruling.

The plaintiff herein filed this suit seeking the main remedy that the defendant be evicted from the land parcel **NO KAKAMEGA/SANGO/1541** and as I have already mentioned above, the trial proceeded ex – parte after the defendant failed to enter appearance or file a defence. A Judgment was delivered on 3<sup>rd</sup> October 2017.

By her Notice of Motion dated 14<sup>th</sup> November 2017, the defendant seeks the following substantive remedy: -

- (a) Spent
- (b) Spent
- (c) Spent
- (d) That there be a review and setting aside of the Judgment delivered on 3<sup>rd</sup> October 2017.
- (e) That costs of the application be provided for.

The application is based on the grounds set out therein and is also supported by the defendant's affidavit of even date.

The gist of the application is that the defendant was not served with the plaint and summons and that the affidavit of service by one **CALEB SASITA** is false as she does not live next to **KOGO PRIMARY SCHOOL** and there is infact no such school. That further, the affidavit of **MOSES KULOBA KEYA** who depones to have served her with a hearing notice on 23<sup>rd</sup> March 2017 at her residence at **SANGO MARKET in UASIN GISHU** is not true as she resides in **SANGO in KAKAMEGA COUNTY**. That she was condemned un – heard and the matter touches on land where she and her family have lived since 1995. That in any event, the plaintiff had previously sued her in **BUNGOMA CHIEF MAGISTRATE'S CIVIL CASE NO 92 OF 2010** which was dismissed on a point of law on 20<sup>th</sup> March 2013 and this suit is therefore res – judicata.

The application is contested and in a replying affidavit dated 18<sup>th</sup> January 2018, the plaintiff has deponed, inter alia, that service upon the defendant by both the two process servers i.e. **CALEB SASITA** and **MOSES KULOBA KEYA** was proper and that is why the suit proceeded ex – parte. That **BUNGOMA CHIEF MAGISTRATE'S CIVIL CASE NO 9 OF 2010** was dismissed on a point of law and does not render this suit res – judicata and in any event, there is no copy of the defence.

The application was canvassed by way of written submissions which have been filed both by **MS NANZUSHI** instructed by the firm of **LUCY NANZUSHI & CO ADVOCATES** for the plaintiff and **MS TUM** instructed by the firm of **BIRECH, RUTO & CO ADVOCATES** for the defendant.

I have considered the application, rival affidavits and the submissions by counsel.

The defendant seeks the main prayer that the ex – parte Judgment delivered on 3<sup>rd</sup> October 2017 be set aside. The main ground is that she was not properly served with the Court processes.

Before I consider that prayer, an issue of res – judicata has been raised by the defendant on the ground that the issues herein were previously canvassed in **BUNGOMA CHIEF MAGISTRATE’S CIVIL CASE NO 9 OF 2010** where the plaintiff’s claim over the same subject matter was dismissed. The defendant did not annexe the pleadings or ruling/Judgment in that case. All that she did was annexe the decree. A party pleading res – judicata is obliged to place before the Court the pleadings, rulings and/or Judgment in the previous case to enable the Court determine whether infact the subsequent suit is res – judicata. It is those pleadings which will show whether the issues and subject matter in the previous suit are the same and were canvassed and finally determined. As the **BUNGOMA CHIEF MAGISTRATE’S CIVIL REGISTRY** is just next door, I have taken the liberty to call for the **CIVIL CASE FILE NO 9 OF 2010** and confirm that indeed that case involved the same parties and the same land subject of this suit. However, that suit which had also been filed by the plaintiff herein was dismissed on 14<sup>th</sup> September 2010 by **HON UNITER KIDULA (CM)** following a Preliminary Objection raised by the defendant. A decree followed. The issue that I need to determine is whether the dismissal of the previous suit on a Preliminary issue amounts to res – judicata.

The Court of Appeal has taken two divergent views on that issue. In **NJUE NGAI .V. EPHANTUS NJIRU NGAI C.A CIVIL APPEAL NO 29 OF 2015 (2016 eKLR)** the Court took the view that the dismissal of a suit for non attendance of the plaintiff or for want of prosecution amounts to a Judgment in that suit and renders the subsequent suit res – judicata.

However, in **THE TEE GEE ELECTRICAL & PLASTICK CO .V. KENYA INDUSTRIAL ESTATES LTD C.A CIVIL APPEAL NO. 333 OF 2001 [2005 2KLR 97]**, the Court took the view that res judicata only applies where a matter has been heard and determined on the merits and not where the matter was disposed of by the Court due to want of jurisdiction.

Similarly, in **CANELAND LTD & OTHERS V DELPHIS BANK LTD C.A CIVIL APPEAL NO 20 OF 2000**, the Court held that for res – judicata to arise, the issue must have been heard and decided on merits otherwise the plea cannot be sustained.

In **MICHAEL BETT SIROR V JACKSON KOECH C.A CIVIL APPEAL NO 53 OF 2016 [2019 eKLR]**, the Court addressed the issue in the following terms: -

***“We accept that the dismissal of a suit for non – attendance or for want of prosecution can amount to a Judgment, however, such a Judgment does not satisfy the requirements of Section 7 of the Civil Procedure Act as the issues raised in the suit has not been addressed and finally determined by the Court but the Judgment is the result of what may be described as a technical knock – out.”***

All the above decisions are binding on this Court. **Section 7 of the Civil Procedure Act** which defines the doctrine of res – judicata reads as follows: -

***“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”*** Emphasis added.

It seems to me that the intention of the provision is that for res – judicata to apply, the previous suit ought to have been heard and determined on it’s merits and that is the more prudent route to take in the circumstances. If, like in **BUNGOMA CHIEF MAGISTRATE’S COURT CIVIL CASE NO 9 OF 2010**, the suit was dismissed on account of a Preliminary Objection based on jurisdiction, it can hardly be said that the issues in that suit were heard and determined. This is how **HON KIDULA** addressed herself in that matter: -

***“RULING***

***The Preliminary Objection is up-held given that counsel for the plaintiff is absent and further failed to file any reply to the defence to counteract the Preliminary Objection raised in the defence.***

***The suit is dismissed with costs to the defendant.”***

No appeal appears to have been filed against that ruling. However, it can hardly be argued that in the said ruling, the issues regarding the ownership of the land parcel **NO KAKAMEGA/SANGO/1541** were ***“heard and finally decided”*** by that Court. The plea of res – judicata is not properly taken and I dismiss it.

The principles of setting aside ex – parte Judgments have been enunciated in several leading authorities.

In **PATEL .V. EAST AFRICA CARGO HANDLING SERVICES LTD 1974 E.A 75 SIR DUFFUS** stated that:-

***“The main concern of the Court is to do justice to the parties and the Court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular Judgment as is the case here, the Court will not usually set aside the Judgment unless it is satisfied that there is a defence by the merits. In this respect, defence on the merits does not mean in my view, a defence that must succeed. It means as SHERIDAN J put it “ a triable issue” that is, an issue which raises***

*a prima facie defence and which should go for trial.”*

The discretion to set aside an ex – parte Judgment is however intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice – **SHAH .V. MBOGO 1967 E.A 116**. However, where the Court finds that there has been no proper service, it has no such discretion and must set aside the resultant ex – parte Judgment as a matter of course. In **MOHAMED & ANOTHER .V. SHOKA 1990 KLR 463**, the Court of Appeal held that:-

*“The test for the correct approach in an application to set aside a default Judgment are;*

*Firstly, whether there was a defence on merit; secondly whether there would be any prejudice and thirdly, what is the explanation for any delay.”*

Lastly, in **SEBEI DISTRICT ADMINISTRATION .V. GASYALI & OTHERS 1968 E.A 300**, the following guidelines are given: -

*“In my view, the Court should not solely concentrate on the poverty of the applicant’s excuse for not entering appearance or filing a defence within the prescribed time. The nature of the action should be considered, the defence if one has been brought to the notice of the Court however irregularly should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of a Court. It is wrong under all circumstances to shut out a defendant from being heard. A defendant should be ordered to pay costs to compensate the plaintiff for any delay occasioned by the setting aside and be permitted to defend.”*

Guided by the above principles, the defendant’s major complaint appears that she was not served with the plaint and summons. She describes both process servers as being dishonest and although she states in her supporting affidavit that she would like them cross – examined, no attempt was made to have them summoned for that purpose. However, from the perusal of the documents herein, it is clear to me that there was no compliance with the rules with regard to service of summons. **CALEB SASITA** the process server who served the summons on the defendant has deponed as follows in paragraphs 2, 3 and 4 of his affidavit of service dated 23<sup>rd</sup> April, 2015: -

*2: “That on 20<sup>th</sup> day of March 2015 I received copies of summons to appear, plaint, verifying affidavit, plaintiff’s list of documents and plaintiff’s list of exhibits and documents dated 23<sup>rd</sup> day of January 2015 from M/S LUCY NANZUSHI & CO ADVOCATES, P .O. BOX 602 – 50200 BUNGOMA with instructions from the plaintiff to effect service to the defendant’s home who situated at Sango Market Village Kogo next to Kogo Primary School.”*

*3: “That I proceeded to find MRS DORCUS OMEGA on the same day 20/3/2015 to Kogo Primary School where reside.”*

*4: “That on arrival, I served the aforesaid documents to the defendant, she accepted service at 12:30 pm but declined to sign on the return copy. I no (sic) the defendant at the time serving her.”*

**Order 5 Rule 15(1) of the Civil Procedure Rules** is couched in the following mandatory terms: -

*“The serving officer in all cases in which summons has been served under any of the foregoing rules of this order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in form No 4 of Appendix A with such variations as circumstances may require.”* Emphasis added.

In her supporting affidavit, the defendant has deponed in paragraph 9 that she does not know the said **CALEB SASITA** and the allegations that he served her with summons are untrue. **CALEB SASITA** himself has not in his affidavit of service deponed that he had known the defendant prior to 20<sup>th</sup> March 2015 when he allegedly served her with the summons, plaint and other documents. Infact he has deponed that he knew the defendant on that day. In the circumstances, it was important that he strictly complies with requirements of **Order 5 Rule 15(1) of the Civil Procedure Rules** and informs the Court how he was able *to identify the defendant bearing in mind that he was not accompanied by the plaintiff and was not previously acquainted with the defendant*. Proper service of Court processes is an important procedural requirement which can even affect the validity of a suit. The cornerstone of justice is that a party against whom a suit has been filed must be made aware of the case he is required to respond to and that is why a high premium is placed on proper service of summons and plaint because that is the point at which a party is made aware of what he has to answer to. And I do not consider the requirements of **Order 5** to be mere niceties that can be washed down by the provisions of **Article 159(2)(d) of the Constitution** as a mere technicality.

In light of that lacuna in the affidavit of service by **CALEB SASITA**, this Court must find that there was no proper service on the defendant on 20<sup>th</sup> March 2015 and set aside the resultant ex-parte Judgment as a matter of course – ex debito justitiae.

It is true that the defendant has not attached to her application any defence to the claim against her. However, her counsel did annex to her submissions a copy of the defence. That was irregular but in view of what I have just said above citing **SEBEI .V. GASYALI** (supra), that is not fatal and I shall make appropriate orders shortly.

Ultimately therefore and having considered the defendant’s application dated 14<sup>th</sup> November 2017, I make the following orders: -

1. The ex – parte Judgment dated 3<sup>rd</sup> October 2017 and all consequential orders are hereby set aside.
2. The defendant to file and serve her defence within 14 days of this ruling.
3. Thereafter, the parties to comply with all the pre – trial directions.
4. As the subject matter is land situated within KAKAMEGA COUNTY, this suit be and is hereby transferred to the ELC KAKAMEGA for mention on 28<sup>th</sup> November 2019 for further directions as to hearing.
5. Costs shall be in the cause.

**Boaz N. Olao.**

**J U D G E**

**14<sup>th</sup> November 2019.**

Ruling dated, delivered and signed in Open Court this 14<sup>th</sup> day of November 2019 at Bungoma.

Ms Nanzushi for Respondent present

Applicant absent

Joy – Court Assistant

**Boaz N. Olao.**

**J U D G E**

**14<sup>th</sup> November 2019.**