



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 196 OF 2014

TABITHA NGINA KAUNDAPLAINTIFF

VERSUS

FRANCISCO KAUNDA WAMBUADEFENDANT

RULING

1. In the Application dated 10th July, 2017, the Defendant/Applicant is seeking for the following orders:
 - a. That this Honourable Court do review and/or set aside the Judgment and Order issued by this Honourable Court in this matter on the 27th January, 2017 and 18th May respectively.*
 - b. That this Honourable Court do grant leave to this Applicant to file his Defence out of time.*
 - c. That pending the hearing and determination of this Application, Respondent be ordered to return and/or deposit in this Honourable Court, the original title documents for Land Parcel Numbers Iveti/Kiandani/3729 and Makindu/Kalii /1542; that were released to the Respondent by this Honourable Court on the 24th May, 2017.*
 - d. Costs of this Application.*
2. The Application is premised on the grounds that the matter proceeded ex-parte without the knowledge of the Applicant; that the Applicant has never been served with the Summons to Enter Appearance and that the Judgment was obtained irregularly given that the title documents in respect to the suit land were stolen when thieves broke into the Applicant's house.
3. In response, the Plaintiff/Respondent deponed that the Application has been filed after inordinate delay; that the order dated 27th January, 2017 and issued on 18th May, 2017 laid to rest all the issues concerning this case; that the Defendant was made aware of the suit by way of an Originating Summons and that the matter proceeded for hearing by way of viva voce evidence on 29th June, 2016.
4. According to the Plaintiff, the Application is unfounded because he was served at his place of business and that the Application should be dismissed.
5. In the Supplementary Affidavit, the Defendant deponed that the Affidavit he has filed raises triable issues.
6. The Defendant's/Applicant's counsel submitted that he has a right to be heard and that he should be given ample opportunity to cross-examine the court process-server who purportedly served him with the

court documents.

7. The Plaintiff's advocate on the other hand deponed that the Applicant has not provided a draft reply to the suit; that the Applicant has continued to sub-divide the suit land and that the Applicant has not provided any justifiable cause for lack of appearance.

8. Counsel submitted that the Applicant was served with the Summons and that he was aware of the matter.

9. The Plaintiff's advocate submitted that the Defendant has neither denied the contents of the Affidavits of service nor did he seek to cross-examine the process-server.

10. The suit was commenced by way of an Originating Summons dated 2nd December, 2014.

11. In the said suit, the Plaintiff sought for the division of the suit properties between her and the Defendant equally. It was the Plaintiff's case that as a wife of the Defendant, she contributed to the purchase of the suit properties directly.

12. The Affidavit of service filed in court on 18th December, 2014 by the process-server shows that on 13th December, 2014, he served the Respondent at his place of residence in Malili Trading Center, Kathongole Hill View Inn, with the Originating Summons.

13. In his Affidavit in support of the Application, the Defendant has not denied that he resides in Malili Trading Center, Kathongole Hill View Inn. Indeed, the Defendant's advocate did seek the leave of the court to cross-examine the process-server on the contents of his Affidavit.

14. In the circumstances, I am satisfied that the Defendant was served with the Originating Summons by the process-server on 13th December, 2014.

15. Although the court has the discretion of setting aside an ex-parte Judgment even where proper service was done, the court ought to consider the nature of the action, the draft defence, if any and consider whether the Plaintiff can be compensated by way of costs (*See Sebei District Administration vs. Gasyali & Others (1968) E.A 300*).

16. The Plaintiff's case is that being married to the Defendant, she contributed directly to the acquisition of the suit properties.

17. I have gone through the Defendant's Affidavits and I have not come across any deposition in which he has denied the Plaintiff's claim. Indeed, the Defendant did not annex on his Affidavits a draft response to the Plaintiff's claim to enable the court determine if indeed there are triable issues.

18. In the circumstances, I find that the Defendant has not met the threshold of setting aside a regular ex-parte Judgment.

19. For those reasons, I dismiss the Application dated 10th July, 2017 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 23RD DAY OF FEBRUARY, 2018.

O.A. ANGOTE

JUDGE