



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 118 OF 2017

JOHN TUKEI LONGUROKOI.....PLAINTIFF

VERSUS

GEOFFREY MEPRO CHEPSHOKAN.....DEFENDANT

R U L I N G

1. The application dated 13/1/2018 filed by the defendant seeks an order setting aside the *ex parte* judgment delivered by this court on 20/12/2017 and all the consequential orders and that the defendant be allowed to file his defence.
2. It is based on non-service of summons upon the defendant and non-service of a mandatory 10 day notice of entry of judgment. It is also alleged that the orders issued as regards judgment are “illegal, irregular and unlawful”. The affidavit of service leading to the hearing is alleged to be false.
3. The application is supported by the affidavit of the defendant which promptly clarifies that his proper name is Geoffrey Mepro Chepshokan. It reiterates the grounds at the foot of the application but in greater detail. The deponent avers that he became aware of the suit when he was summoned to appear before the DCIO West Pokot County on 3/12/017, that he was condemned unheard yet he has a good defence to the claim.
4. The affidavit of Pamela Cherop Mopuro is also annexed to the application. In that affidavit she denies that she was served with summons in this case as alleged because on 7/7/2017 she left her home at 9.00 am for the market place and only returned home at 5.00 pm; she was therefore not present at the time service is alleged to have been effected.
5. The application is opposed. The plaintiff filed his affidavit sworn on 22/1/2018 in which he reiterates that summons were served upon the defendant’s wife, and that he personally pointed out the defendant’s wife for the purposes of the service. In addition, he states that the draft defence exhibited by the defendant does not raise any important issue to warrant a grant of the prayers sought.
6. The defendant filed his submissions on the application on 21/1/2017 and the plaintiff on 23/2/2017. The defendant relies on the cases of *Tree Shade Motors Ltd -vs- DT Dobie & Co. (K). Ltd and Another, Nairobi Civil Appeal No. 38 of 1998* and *Remco Ltd -vs- Mistry Jadva Parbat & Co. Ltd and 2 Others, Nairobi (Milimani) Civil Suit NO. 171 of 2001*. I agree with the latter case when the court states as follows:-

“First if there is no proper or any service of the summons to enter appearance to the suit the resulting default judgment is an irregular one which the court must set aside *ex debito justitiae* (as a matter of right) on application by the defendant. Such judgment is not set aside in exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself.

Secondly if the default judgment is a regular one, the court has an unfettered discretion to set aside such judgment and any consequential decree or order upon such terms as are just as ordained by Order 1XA Rule 10 of the Civil Procedure Rules. Case law on the exercise of discretion is plenty. The cases show that the main concern of the court is to do justice between the parties: *Patel -vs- E.A. Cargo Handling Services [1975] EA 75*. The discretion is intended 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”.

7. In that cited case the court observed that facts both “prior and subsequent” should be considered as well as all the respective merits of the parties. The court observed that to deny a person a hearing should be the last resort of the court. The questions that arise in the instant application for this court to determine are first whether the defendant’s wife was served and secondly, if it is established that she was served, whether that service was proper service on the defendant.
8. In contrast to the Remco case cited above where there was oral evidence of witnesses on the issue, this court did not have the advantage of

any oral evidence either of the process server or the defendant's wife. It had to rely on the filed affidavits on the record. It has been alleged that the defendant's wife was not at home at the time service is alleged to have been effected. The defendant and his wife have nothing to show for this. The plaintiff on the other hand has asserted that he pointed out the defendant's wife to the process server for purposes of service. There is no reason for this court to doubt that the plaintiff knows the defendant's homestead. There is also no reason to doubt that the plaintiff pointed out the defendant's wife to the process server or that the process server is lying when he admits that he was shown the homestead and the defendant's wife by the plaintiff. It is also noteworthy that the defendant's wife conceded in her affidavit that her name is "Pamela". The person alleged to have been served also bears that name. I have no reason to believe that the defendant's wife was not served. She was served with the summons and plaint in this matter.

9. The next question to consider is whether that service as effected, amounts to proper service upon the defendant. **Order 5 Rule 12 of the Civil Procedure Rules** provides that where after a reasonable number of attempts have been made to serve the defendant, and the defendant cannot be found, service may be made on an agent of the defendant empowered to accept service or on any adult member of the family of the defendant who is residing with him.

10. I have not heard the defendant to say that the process server did not attempt service on him. I also find that by going with the summons to the very dwelling where the defendant resides, that was an attempt to serve the defendant personally, which attempts failed as the defendant could not be found in the home, prompting the summons and plaint to be served upon the defendant's wife. I therefore find that the service was proper.

11. The third question is whether the judgment entered in favour of the plaintiff should be set aside. It is to be noted that even where service was regular and there was default of defence, this court has power to exercise its discretion to set aside the judgment in default. As said earlier, facts both precedent and subsequent must be looked at, and the denial of a citizen's right to be heard on the merits of his defence should be the last resort. So do the facts surrounding this case warrant a setting aside order?

12. The draft defence exhibited by the defendant states, that his land is Plot No. West Pokot/Kisiaunet/277 measuring 24.9 Hectares and the same are intact. I have further looked at the other exhibits in the replying affidavit of the defendant and I find that there are more facts regarding the land and its origins which have not come to the knowledge of this court. This does not necessarily mean that the plaintiff misrepresented or concealed any facts from this court, for a plaintiff is in order to present facts as will aid his case and omit, of course at his risk, those which he may consider unnecessary baggage.

13. Considering those exhibits has convinced this court that justice may be better served if the judgment herein obtained is set aside to pave the way for a hearing of the parties' claims on their respective merits. Of course the defendant will have caused all the delay in the hearing of the dispute by reason of his conduct as described above, that is failure to respond to the suit when served.

14. I therefore find that the defendant's application dated **13/1/2018** has merits. I therefore grant **prayer No. 3** of that application and order the defence to be filed and served within 7 days of this order. I also order that the defendant shall bear the costs of this application.

Dated, signed and delivered at Kitale on this **20th** day of **April, 2018**.

MWANGI NJOROGE

JUDGE

20/4/2018

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Barongo holding brief for Chebii for Applicant

Mr. Changorok (absent) for Respondent

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

20/4/2018