



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO 93 OF 2015 (OS)

FRANCIS KAAI M'RINTUARA.....1ST PLAINTIFF

FRANKLIN MURITHI KAAI.....2ND PLAINTIFF

VERSUS

SAMSON MWORIA RUKWARU.....DEFENDANT

RULING

1. Applicant/defendant has filed an application dated 5.9.2016 seeking orders for the setting aside of the Interlocutory Judgment dated 5.9.2016. Applicant desires to be given an opportunity to file his defence.
2. The basis upon which the application is made is that applicant was not served with the suit papers.
3. This claim is denied by the respondents who aver that indeed the applicant had been served with the suit documents as well as all the hearing notices.
4. The application was canvassed by way of written submissions which submissions have been duly filed and exchanged.
5. Applicant contends that he was served with the hearing notices of the case and that is how he came to know about the matter. He however submits that he has never been served with summons to enter appearance.
6. The respondents on the other hand aver that the interlocutory judgment was regularly entered against the applicant. In support of their arguments, respondents have proffered the following authorities;
 - **Philip Kiptoo Chemold & Mumias Sugar Co. Ltd versus Augustine Kubende (1982 – 1988) KAR 1036.**
 - **Amayi Okumu Kajiaka & 2 others versus Moses Okware Opari & Another Kisumu court of Appeal C.A No 15 of 2010.**
 - **Shah versus Mbogo 1967 EA 116.**
 - **Shamsudin Jiwah Mitha versus Abdulaziz Ali Ladak (1960) IEA 1054.**
7. I note that the dispute is on service of summons to enter appearance and not the hearing notices of the case.
8. Firstly, I find that the respondents have not annexed the affidavit of service in respect of the suit papers yet they have availed the other affidavit of services in respect of the hearing notices as annexure FMK 2 and 3 respectively.
9. Nevertheless, that affidavit of service in respect of the suit papers is on record in this file. It was filed on 28.1.2016. It shows that service was affected upon the applicant on 18.11.2015. The originating summons and its supporting documents were however filed on 8.10.2016. How can it be that service of summons to enter appearance were being served before the filing of the suit. Even the request for judgment was made on 28.1.2016, several months before the filing of the suit.
10. What is apparent is that the pleadings of the plaintiff are dated 9.2.2015 and the assessment for filing fees was done on same date that is 9.2.2015. The sum for filing fees was Kshs.1,500 + 150 + 75 hence a total of Kshs.1,800. This amount was paid on 8.10.2016 which gives

credence to the stamp on the Originating Summons for the date of 8.10.2016.

11. I therefore conclude that applicant has shown sufficient cause as to why he did not enter appearance, see; ***Shamsudin Jiwah Mitha versus Abdulaziz Ali Ladak*** (Supra).

12. In the circumstances the application dated 25.4.2017 is allowed in the following terms:

(i) The interlocutory Judgment entered herein and all consequential orders are hereby set aside.

(ii) The applicant is granted leave, 14 days to file and serve his memorandum of appearance and response to the Originating Summons.

(iii) Respondent is condemned to pay costs of this application.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 18th APRIL, 2018 IN THE PRESENCE OF:-

Court Assistant: Janet/Galgalo

Kiongo holding brief for E. Mwangi for applicant – present

M. Kariuki holding brief for Ashaba for respondents

HON. LUCY. N. MBUGUA

ELC JUDGE