



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO.13 OF 2016

MARY CHELANGAT CHUMO..... PLAINTIFF

VERSUS

ELIZABETH CHEPKORIR NGENO.....DEFENDANT

RULING

Introduction

1. This Ruling relates to the Defendant's application dated 24th August 2018 seeking the following orders:

- a. Spent
- b. That this Honourable court be pleased to stay the execution of its order issued on 30th July 2018 pending the inter partes hearing of this application
- c. That this Honourable court be pleased to set aside the ex-parte judgment delivered on 14th December 2017 together with all consequential orders
- d. That the Defendant/Applicant be allowed to file her defence and the case be heard afresh on merit
- e. That the Plaintiff/Respondent be restrained from destroying or removing the Defendant's developments on the occupied portion
- f. That any necessary directions be given by this Honourable court
- g. That the costs of this application be provided for.

2. The application is based on the grounds inter alia that the Defendant /Applicant was not served with Summons to enter Appearance. It is supported by the Defendant's affidavit filed in court on the 24th August 2018 in which she deposes that she was never served with Summons to enter appearance and she only learnt about the existence of the suit when the O.C.S Litein went to evict her. She deposes that she has been wrongly referred to as Elizabeth **Chepkorir** Ngeno, while her name is Elizabeth **Chepkirui** Ngeno. She further deposes that she has a good Defence to the suit as the suit land belongs to her late mother who was married to the Plaintiff through a woman-to-woman marriage and that she has lived on the suit land all her life and is therefore not a trespasser as alleged by the Plaintiff.

3. The application is opposed by the Plaintiff/Respondent through her Replying affidavit sworn on the 6th September 2018. In the said affidavit the Plaintiff deposes that the Defendant's affidavit is full of falsehoods as she was aware of the suit and was served with summons. She deposes that L.R No KERICHO/LITEIN/263 which belonged to the Defendant's late mother is no longer in existence as it was subdivided and L.R No. KERICHO/LITEIN/1816 transferred to the Plaintiff through transmission. She further avers that the Defendant's claim lies in the Succession matter as the plaintiff acquired the suit land pursuant to the confirmation of Grant in respect of the estate of the Defendant's late mother.

Issues for determination

4. The issues for determination are as follows:

1. Whether the Defendant/Applicant was properly served with Summons to Enter Appearance

2. Whether the judgment is regular
3. Whether the Defendant/Applicant's defence raises triable issues
4. Whether the Defendant/Applicant is entitled to the orders sought.

Analysis and determination

5. On the first issue regarding service of Summons to Enter Appearance, the Defendant/Applicant depones that she was not served. She has challenged the affidavit of service prepared by the process server who allegedly served her with summons. With regard to service of summons she states that the Process Server does not indicate whether she was accompanied by the plaintiff to the Defendant's home or who identified the applicant to him. Furthermore, she points out that one of the names on the suit is not hers as her middle name is **Chepkirui** and not **Chepkorir**.

6. Order 5 rule 15 (1) of the Civil Procedure Rules provides as follows:

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 were served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons..."

7. In the case of **National Bank of Kenya V Peter Oloo Aringo 2004 eKLR** Warsame J (as he then was) faced with a similar situation stated as follows:

"The legal requirement is that a process server should specify the time and date when he serves the document as well as the person who points out the alleged residence of the person to be served in compliance with Order 5 of the Civil Procedure Rules. Failure to comply with the provisions set out in Order 5 of the Civil Procedure Rules make any such service defective. If there is no proper service, there is no regular judgment"

8. In the instant case, the process server mentions in his undated Affidavit of Service that he met the Defendant at her home weeding her maize in her garden, without saying who introduced her to the Defendant. This falls short of the requirements of Order 5 Rule 15 (1) of the Civil Procedure Rules.

9. The second issue as to whether the judgment was regular is answered by the finding in the **Oloo Aringo** case cited above which I find useful. This position is reinforced by the case of **Frigonken Limited V Value Pak Food Ltd** which was cited in the case of **James Kanyita Nderitu & Another V Marios Philota Ghikas and Another** (2013) eKLR where it was held that:

"It is common knowledge that if there is no proper service or any service of Summons to Enter Appearance to the suit, the resulting default judgment is an irregular one which must be set aside ex debito justitiae"

10. The third issue that the court must determine is whether the Defendant/Applicant has a Defence that raises triable issues. In arriving at a determination on this issue I rely on the case of **Tree Shed Motor Limited V D T Dobie Civil Appeal No 38 of 1998** cited in the case of **James Wanyoike & 2 Others V CMC Motors Group Limited & 4 Others. (2014 eKLR** where the court held:

"Even if service of summons is valid, the judgment will be set aside if the defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence to the plaintiff's claim. Where the defendant shows a reasonable defence on the merits, the court could set aside the judgment"

11. Furthermore in the case of **Patel V East Africa Cargo Handling Services Ltd (1974) EA 75** Duffus P stated as follows:

"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 on 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 to trial for adjudication"

12. This position is reinforced by the Court of Appeal in **CMC Holdings Ltd V James Mumo Nzioki 2004 eKLR** which was cited by learned Counsel for the Respondent.

13. I have looked at the Defendant's Replying Affidavit, and even though she has not attached a draft Defence to her affidavit, she has raised pertinent issues relating to her claim to the suit land. I am therefore persuaded that the Defendant ought to be given a chance to raise these triable issues which should be considered at a full hearing.

14. In determining the last issue as to whether the Defendant is entitled to the orders sought, I must consider that justice cuts both ways and the interests of the Plaintiff who has obtained a judgment in her favour must also be taken into account. It is not lost to me that the Defendant only moved the court to set aside the judgment when an eviction order was served on her. I have also take into account the fact that this is an

old case dating back to 2016. In the circumstances, I set aside the ex parte judgment and decree issued herein and direct that the Applicant pays the Plaintiff a sum of Kshs. 20,000 as thrown away costs. The defendant shall file her defence within 21 days. The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 26TH DAY OF OCTOBER, 2018.

J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Akinyi for the Defendant/Applicant
2. Mr. Bii for the Plaintiff/Respondent
3. Court assistant - Rotich