



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC. CASE NO. 297 OF 2013 (O.S)

IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN'S PROPERTY ACT (1882)

C A O.....PLAINTIFF

VERSUS

J O.....DEFENDANT

RULING

1. J O, the Defendant, filed the notice of motion dated 12th July 2017 seeking for the following orders among others;

- a. the judgment made on the 13th July 2016 and all consequential orders thereafter, be set aside;**
- b. the ruling reserved on the 23rd November 2016 and delivered on the 1st December 2016, be set aside and reviewed;**
- c. the defendant be granted leave to defend the originating summons and all subsequent motions, and**
- d. the Defendant be granted leave to file reply to the originating summons out of time in terms of the annexed draft replying affidavit.**

The application is based on the seven grounds marked (a) to (g) on its face and is supported by the undated affidavit sworn by the Defendant. That the main ground of the application is lack of service and failure to disclose some three listed properties.

2. The application is opposed by C A O, the Plaintiff, through her replying affidavit sworn on the 21st November 2017 among others, disputing the existence of any other matrimonial properties and restating that the Defendant was properly served but voluntarily opted not to participate in the proceedings.

3. The application came up for hearing on the 23rd November 2017 when by consent the learned counsel for the parties agreed to file and exchange written submissions. The counsel for the Defendant and Plaintiff filed their written submission dated 20th December 2017 and 20th January 2018 on the 20th December 2017 and 3rd May 2018 respectively.

4. The following are the issues for the court determinations;

- a. Whether there was proper service of the originating summons and other court services upon the Defendant.
- b. Whether the Defendant's draft replying affidavit discloses triable issues that would amount to a reasonable cause to set aside the judgment and other subsequent orders.
- c. Who pays the costs of the motion.

5. The Court has after considering the grounds on the Notice of Motion, the affidavit evidence, the written submissions and record, come to the following determinations;

- a. That this proceeding was commenced by the Plaintiff through the Originating Summons dated 23rd October 2013 and filed on the

29th October 2013. That the suit was over Land Parcel Kakamega/Sergoit/[particulars withheld] which is situated within Kakamega County which falls under the Environment and Land Court, Kakamega. That though the Defendant has properly stated that the suit should have been filed with the Court in Kakamega County, this Court is aware that there was no Judge in the Environment and Land Court, Kakamega until the start of 2017. That accordingly, the filing of the suit in this court cannot be faulted nor can it suffice to set aside a lawful and regular judgment.

b. That though the Defendant has taken issue with the affidavits of service sworn by Stephen Otaget Ofula and James Obondi in respect of the various services in this matter, terming them **“...false and couched in standard style showing they were preconceived and are not reflective of honest judicial officers who carried out the tasks they were detailed to undertake...,”** the claim is challenged by the Plaintiff who depones that the Defendant was actually served. That the Court has considered the affidavits of services annexed to the supporting and replying affidavits and the following are the relevant excerpts from them;

- **“2. On 2nd of May 2014, I received Originating Summons.....from the firm of M.A. OCHANJI OPONDO & CO. ADVOCATES....to serve upon one J O, defendant herein.**

3...on the 3rd day of May 2014, I proceeded to Eldoret Town, to Soyi and to Likuyayi junction...and reached the defendant’s homestead, where I met the defendant’s wife and workers.

4...the defendant’s wife called defendant who was then in Eldoret Town and upon being authorized to accept service on behalf of defendant, I effected service upon defendant’s wife...” {The above are excerpts from Stephen Otaget Ofula affidavit of service sworn on 24th June, 2014}.
- **“2... on 14th April 2016, I received a plaintiff’s statement...with instructions to effect service upon the Defendant herein.**

3...on the 15th April, 2016, I went to Eldoret and then Soyi and finally Lukuyani where the Defendant’s home is; which home I had previously served the Defendant’s wife in.

4.That the Defendant’s wife, N N, I recognized her having found her in the home before.

5.That I proceeded to service her.....she accepted on behalf of the Defendant saying that the Defendant was out of the Country.” {The above are excerpts from James Obondi affidavit of service sworn on the 18th April 2016}.
- **“2. That on 18/11/2014, I received a mention notice....with instructions to effect service upon the Defendant herein.**

3.That on the same day, using directions given by the plaintiff, I proceeded to Eldoret....to Lukuyani junction and on to the Defendant’s home which was known to me as I had effected service therein on two previous occasions.

5.That the said the said lady identified herself to me as N N and she accepted service on behalf of the Defendant.” {The above are excerpts from James Odhiambo Obondi’s affidavit of service sworn on the 3rd December 2014}.
- **“2. That on 7th of August, 2015, I received a Notice of Motion.....to effect service upon the Defendant herein in Soyi, Eldoret, in the Defendant’s home.**

3.That on the same day, I proceeded to the Defendant’s home near Lukuyani junction, which home I had already served the defendant in previously.

4.That I found the Defendant home and effected service upon him. He accepted service but declined to sign....” {The above are excerpts from James Odhiambo Obondi’s affidavit of service sworn on the 11th January 2016.}
- **2. That on 19th of January 2010, I received a hearing notice dated 26th November 2015.....**

3. That on the same day, I proceeded to the defendant’s home.... I found a lady whom I knew as the Defendant’s wife, N N, having found her in that homestead before.

4. That I proceeded to serve her with the hearing notice, she accepted on behalf of the Defendant saying that the Defendant was away for the day;....{The above are excerpts from James Obondi’s affidavit of service sworn on the 25th February 2016.}

c. That though the Defendant’s claim that the affidavits of service are couched in standard style, the five affidavits annexed to the supporting affidavits, and from which the foregoing excerpts have been taken from, are in compliance with the form of such affidavits. That there are obviously differences on the details of the documents being served under each affidavit and on the person served. That the only similarity is the address or location of the Defendant’s home. There is however no evidence that the Defendant’s home or address is in a different place from that described in the affidavits.

d. That the Defendant's claim that he had participated in the divorce proceedings, and that had he been served in this case, he would have equally participated, has been disputed by the Plaintiff who has annexed a copy of the Decree Nisi issued in **Maseno P.M.C Divorce Cause No. 172 of 2012**. That though the Court cannot verify whether the Defendant had filed any pleadings in the divorce cause, the decree nisi clearly shows he did not participate in the hearing. That further the affidavit of service by James Odhiambo Obondi, sworn on the 11th January 2016 shows that the Notice of Motion was served upon the Defendant at his home. That the Defendant has not specifically denied the contents of that affidavit or sought for the process server to be availed for cross-examination. That the court can only conclude that the Defendant indeed received the notice of motion on the 7th August 2015, but opted not to move the court as appropriate. That as for the other services that were reportedly effected on N N, described as the wife of the Defendant, there is no evidence tendered by the Defendant disputing their contents. That service of court summons upon an adult member of a party's family is proper service upon the party.

e. That upon the court being satisfied that the Defendant had been duly served with the necessary court processes but had neither entered appearance nor filed replying papers, the court was in order to allow the Plaintiff, as it did on the 20th April 2016, to file written submissions and to proceed to write and deliver its judgment that was delivered on the 13th July 2016. That the court's judgment and ruling of the 1st December 2016 were lawful and regular and may only be interfered with if the court is satisfied that the defendant has a defence that raises triable issues that deserve to go to hearing and be decided on merit.

f. That in his effort to show the court the nature of the defence that he would proffer if the application is allowed, the Defendant has annexed to his supporting affidavit the **"DRAFT REPLYING AFFIDAVIT TO THE ORIGINATING SUMMONS."** That the claim that there exists three other properties in the United States of America has been disputed by the Plaintiff and in any case, the parties are at liberty to move the appropriate court on their distribution if they do exist. That the reason why the originating summons was filed in this court and not in Kakamega Environment and Land Court has been addressed in (a) above. That pursuant to order (a) of the ruling of 1st December 2016, the name of the Plaintiff was on the 28th June, 2017 added in the register of Kakamega/Sergoit/[particulars withheld] as an equal proprietor with the Defendant. That the Defendant's claim that the property has been "liquidated by way of sale" is therefore without basis and a mere allegation. That accordingly the court finds the Defendant's draft replying affidavit do not contain or raise any triable issues to the Plaintiff claim and hence is insufficient to be the basis of setting aside a regularly and lawfully obtained judgment.

6. That flowing from the foregoing, the court finds no merit in the Defendant's notice of motion dated 12th July 2017 and the same is dismissed with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 11TH DAY OF OCTOBER 2018

In the presence of:

Plaintiff Absent

Defendant Absent

Counsel Mr. Ogonda for Opondo for Plaintiff.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE