



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**ENVIRONMENT AND LAND CASE NO. 15 OF 2012**

**BHAGWANI SINGH KALSI.....PLAINTIFF**

**VERSUS**

**NATIONAL HOUSING CORPORATION.....DEFENDANT**

**RULING**

This ruling is in respect of an application brought by way of Notice of Motion dated 13<sup>th</sup> February 2018 by the Defendant/Applicant for orders that:-

1. There be stay of the decree of this Honourable court given on 14/12/2017
2. The consolidated suits herein be set down for hearing on merits
3. The costs of this application be paid by the Respondent to the Applicant

The Applicant's application is premised on the grounds that a Hearing Notice was neither served on the Applicants nor its Advocates.

It was Counsel's submissions that even if the Hearing Notice was served upon the applicant, the notice as unreasonably short to enable the applicant prepare for the full hearing in Eldoret given that the Applicant and its Advocates are based in Nairobi.

Counsel further submitted that the Applicant will be condemned unheard yet it is the defendant's fundamental Constitutional right to a fair hearing.

It was further submitted that the subject matter of the suit is public land that was set apart by the Commissioner of Lands for the Applicant to develop a Housing Scheme vide its statutory mandate for sale of such houses to members of the public at affordable prices to alleviate shortage of housing in urban areas of which Eldoret is one of them.

The application was supported by an affidavit of Francis Wasuna Advocates of P. O. Box 34992 – 00100 Nairobi. Counsel stated that the hearing Notice which was purportedly served by way of Registered Post indicates that the address used in the certificate of posting as **P. O. Box 14992** Nairobi and yet its postal address is **P.O Box 34992** Nairobi and that all the papers filed in the court file refer to the same address.

He therefore submitted that the hearing notice was dispatched to the wrong address and if the renter of P. O. Box 14992 Nairobi received the mail, he did not cause it to be delivered to the applicant's advocates. Further that Counsel for the Applicant cannot explain why the renter of the said postal Box did not return the letter to Nyairo & Co. Advocates.

Counsel therefore urged the court to set aside the judgment as prayed in the application.

**RESPONDENT'S SUBMISSIONS**

Counsel for the Respondent filed submissions and opposed the application for setting aside the judgment stating that a hearing notice was properly served and the Defendant/Applicant failed to attend court.

Counsel further submitted that there is a valid judgment on record and the court must be satisfied that there is sufficient cause or reason to set aside the judgment. Counsel therefore urged the court to dismiss the application with costs to the respondent.

**ANALYSIS AND DETERMINATION**

This is an application for setting aside judgment on the ground that there was no proper service of a hearing notice.

The issue for determination in this matter is as to whether the Defendant/Applicant was served with a hearing notice to enable them come to court on the date set for hearing of the suit.

I notice from the certificate of posting that the address used was **P.O. Box 14992 Nairobi** and the address on the pleadings for Wasuna & Co. Advocates is P.O **Box 34992 Nairobi**. It is also evident from the previous hearing notices that the plaintiff's advocate has been using the said address **P.O.Box 34992** Nairobi. It is not explained why this time round the plaintiff used an address that does not belong to the defendant's advocates.

The plaintiff submitted that the defendant was properly served as the hearing notice was not returned unclaimed. This is not feasible as if the address was erroneous then it was not upon the defendant to prove that the same was not returned.

The renter of the address was not under a duty to return it on behalf of the defendant. He could have seen the error and ignored it as the letter did not belong to him or her.

Service of processes like summons, hearing notices are key in the administration of justice and a party cannot be locked out of the seat of justice by lack of proper service. Even if a judgment has been rendered, the court has to exercise its discretion to ensure that no injustice is occasioned to any party due to lack of proper service.

I do not know where the plaintiff got the address that they used to serve the defendant. I have considered the submissions of Counsel for both parties and find that there was no proper service of the hearing notice on the defendant.

I therefore allow the application and set aside the ex parte judgment.

**Dated and delivered at Eldoret this 22<sup>nd</sup> day of November, 2018**

**M.A ODENY**

**JUDGE**

Ruling read in open court in the presence of the Mr. Songok holding brief for Mr. Wasuna for Defendant/Applicant and in the absence of Nyairo counsel for the Plaintiff/Respondent.

Mr. Koech: Court Assistant.