



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT ELDORET**

**ELC CASE NO. 230 OF 2017**

**ROBERT CHEBET.....PLAINTIFF**

**VERSUS**

**RAYMOND KIMELI KORIR.....DEFENDANT**

**RULING**

This is the ruling in respect of an application dated 12<sup>th</sup> February 2018 brought by way of notice of motion by the defendant/applicant for orders :

1. That pending the hearing and determination of the application there be stay of execution of the decree.
2. That judgment of the honourable court made on 22/11/07 and the consequential decree and orders be set aside.
3. That the defendant be allowed to file a replying affidavit to the application dated 14/8/17 and be accorded a hearing on the application.
4. Costs of the application be paid by the plaintiff.

The matter came up for hearing under certificate of urgency on 27/2/18 whereby the court granted a 20 day stay of execution. On 12/6/18 Counsel for the parties stated that this is a matter that can be negotiated and settled. Counsel therefore agreed to take a mention date to try an out of court settlement.

Counsel for the plaintiff informed the court that he had written a letter to Mr. Momanyi Counsel for the defendant but he indicated to him that he is yet to get to his client's instructions. They therefore fixed the application for hearing.

**Defendant's Submission**

Counsel for the defendant called the process server who served the summons and the application on the defendant. The process server stated that he is familiar with the provisions of order 5 Rule 15 of the Civil Procedure Rules. He further stated that there was nothing in the affidavit stating that he knew the person he was serving. He also stated that he did not indicate the names of the family members who identified the defendant.

On cross examination by Miss Kibichy, the process server confirmed that he had previously served the plaintiff and summons on the defendant whereby he entered appearance and filed a defence.

Mr. Momanyi submitted that there was no proper service of the application and prayed that the application be allowed.

Miss Kibichy submitted that the service was properly effected on the defendant as the process server confirmed to the court that he knew the defendant as he had previously served him with a plaintiff and summons to enter appearance. She prayed that the application be dismissed with costs to the plaintiff.

**Analysis and determination**

The issues for determination in this matter are as to whether the defendant/applicant was served with the application dated 14<sup>th</sup> August 2017 which stuck out the defendant's defence, whether the judgment entered is proper and regular in law and whether the defendant's defence

raises any triable issue capable of adjudication at a full trial.

On the 1<sup>st</sup> issue, the plaintiff's Counsel submitted that the defendant was properly served with the application and an affidavit of service filed in court to prove the same. It should be noted that Counsel for the defendant called the process server who served the application to court and was cross examined on the affidavit that he filed in court.

The process server confirmed that he knew the defendant as he had previously served him with summons to enter appearance and a copy of the plaint of which he entered appearance and filed a defence. There is no contrary evidence to show that the defendant was not served with the application. On this issue I find that the defendant was properly served with the application but only chose or ignored to file a response as required.

On the 2<sup>nd</sup> issue as to whether the judgment entered was proper and regular in law, it should be noted that the Civil Procedure Rules provides for steps to be taken when a party is served with a process and does not file any response. When a party has been properly served with an application or a hearing notice, the requirement is that an affidavit of service be filed in court to prove service. If the same has been filed then the court can proceed with the hearing if the party does not appear. Order 12 rule 2 of the Civil Procedure Rules provides thus:

*2. If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the plaintiff attends, if the court is satisfied—*

*(a) that notice of hearing was duly served, it may proceed ex parte;*

It further Order 13 Rule 2 provides that:

*2. Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.*

The plaintiff was right to make an application for judgment of admission as the defendant admitted the claim in his paragraph 3 whereby he stated that he admits paragraphs 3,4 and 5 which essentially is about the plaintiff's claim. The entry of judgment on admission by the defendant was regular and according to the law and procedure the defendant having been properly served with the application.

Even if the application setting aside the ex parte judgment was allowed it would be an exercise in futility as the result would be the same as the defence amounts to an admission and there would be no need to go for full trial. This answers the next question as to whether the defence raises triable issues. Having found that the defence amounts to an admission then there are no triable issues to await the full trial and determination.

The defendant was properly served and only woke up after execution process had commenced. I find that this application has no merit and as such is meant to delay the execution process. The upshot is that the defendant's application is dismissed with costs to the plaintiff.

**Dated, delivered and signed at Eldoret on this 15<sup>th</sup> day of November, 2018.**

**M.A ODENY**

**JUDGE**

Ruling read in open court in the presence of Miss Kibichy for Plaintiff/Respondent and Miss Tum holding brief for Mr. Momanyi for Defendant/Respondent.

Mr. Koech: Court Assistant.