



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.232 OF 2013

JACOB NYAKWA

OJWANG.....PLAINTIFF

VERSUS

NATHWALAL NARISHIDAS GHELANI.....1ST
DEFENDANT

JOSHUA OMARI T/A SEDIME AGENCIES.....2ND
DEFENDANT

SAMWEL OGWENO OKECH.....3RD
DEFENDANT

MATHEWS OWINYO ODERA.....4TH
DEFENDANT

JOSHUA ONGWEN WAGUDE.....5TH
DEFENDANT

THE DISTRICT LAND REGISTRAR KISUMU.....6TH
DEFENDANT

RULING

1. By notice of motion dated 20th September 2016, Samuel Ogweno Okech and Mathews Owinyo Odera, the 3rd and 4th Defendants respectively, seeks for seven prayers among them prayers 4 and 5 which are for setting aside the judgment of 18th May 2016 and leave to enter appearance and file defence. The application is based on the 25 grounds on its face and supported by the affidavit of Mathews Owinyo Odera, sworn on 20th September 2016.
2. The application is opposed by the Plaintiff through the replying affidavit sworn on the 21st October 2016.
3. The matter came up for hearing on the 26th October 2016 when Mr. Ogutu and Kimanga, the learned counsel for the 3rd and 4th Defendants and the Plaintiff respectively, presented their rival oral submissions.
4. The following are the issues for the court’s considerations;

- a) Whether proper service of the summons to enter appearance had been done on the 3rd and 4th Defendants.
- b) Whether the interlocutory judgment of 30th January 2014 and the judgment of 18th May 2016 should be set aside to enable the 3rd and 4th Defendants enter appearance and file their defence.
- c) Whether the draft defence by the 3rd and 4th Defendants raises triable issues.
- d) What orders to issue.
- e) Who should pay the costs of this application.

5. The court has carefully considered the grounds on the notice of motion, the affidavit evidence by both sides, the oral submissions by counsel and come to the following determinations;

- a) That the heading of the plaint dated 28th August 2013 had described the 3rd and 4th Defendants as trustees of Afya Cooperative Kisumu.
- b) That the affidavit of service of Henry Odera Osanga, sworn on 10th December 2013, indicated at paragraphs 7 to 10 how the process server served the summons on the receptionist on behalf of the 3rd and 4th Defendants. That the receptionist declined to sign in acknowledgement.
- c) That as the details of the alleged receptionist are not disclosed in the affidavit of service, the court is unable to confirm whether the said receptionist could qualify to be taken as an agent with authority to receive service on behalf of the 3rd and 4th Defendants in terms of **Order 5 rule 8(1)** of the Civil Procedure Rules.
- d) The 3rd and 4th Defendants have disowned being served and in view of the finding in (c) above, the court holds that there was no proper service of summons to enter appearance on the 3rd and 4th Defendants. That for that reason alone, the interlocutory judgment against the 3rd and 4th Defendants entered on 30th January 2014 and the judgment of 18th May 2016 should be set aside.
- e) That the draft defence annexed by the 3rd and 4th Defendants joins issues with the Plaintiff claims. The two Defendants should therefore be accorded an opportunity to be heard.

6. That in view of the foregoing the court finds merit in the notice of motion dated 20th September 2016 and the same is allowed in the following terms;

- a) That the interlocutory judgment entered on 30th January 2014 against the 3rd and 4th Defendants is hereby set aside.
- b) The judgment of the court dated 18th May 2016 is also hereby set aside.
- c) That the 3rd and 4th Defendants are granted leave to enter appearance, file and serve their statement of defence, witness statements and documents in 30 days and in default orders (a) and (b) above to automatically lapse.
- d) The costs of the application be in the cause.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 15TH DAY OF February 2017

In presence of;

Plaintiff Absent

Defendants 3rd & 4th Defendants present

Counsel M/S Asuma for Ogutu Mboya for 3rd and 4th Defendants.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

15/2/2017

15/2/2017

S.M. Kibunja Judge

Oyugi court assistant

3rd & 4th Defendants present

M/s Asuma for Ogutu Mboya for 3rd and 4th Defendants

Court; Ruling dated and delivered in open court in presence of the 3rd and 4th Defendants and M/s Asuma for Ogutu Mboya for 3rd and 4th Defendants.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

15/2/2017