



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.108 OF 2012

MOHAMED KENYI SULEIMAN.....1ST PLAINTIFF

MAIMUNA KENYI SULEIMAN.....2ND PLAINTIFF

TALIB KENYI SULEIMAN.....3RD PLAINTIFF

(SUING AS THE ADMINISTRATORS OF THE ESTATE OF KENYI SULEIMAN KENYI – DECEASED)

VERSUS

JIMBORG OTIENO SIAGA.....DEFENDANT

RULING

1. **Jimborg Otieno Siaga**, the Defendant, vide notice of motion dated 2nd October 2013, prays for the default judgment of 12th June 2013 to be set aside and allow him to file and serve a defence and counterclaim. The application is based on the eight (8) grounds on its face and the supporting affidavit sworn by the said Defendant on the 2nd October 2013.

2. The application is opposed by **Mohamed Kenyi Suleiman, Maimuna Kenyi Suleiman and Talib Kenyi**, the 1st to 3rd Plaintiffs respectively, through the undated replying affidavit sworn and filed by the 1st Plaintiff on 9th December 2013.

3. The court gave directions on filing of written submission on the 18th September 2014. The defendant's counsel filed their submissions dated 16th October 2014 on the 16th October 2014. Thereafter the matter stayed for more than one year without any step being taken to prosecute the suit and on 8th March 2017 a notice order **Order 17 Rule 2 of the Civil Procedure Rules** was issued and served. The counsel for both parties appeared before the court on the 23rd March 2017 and today's ruling date was fixed after counsel for the plaintiffs indicated that they do not intend to file any submissions.

4. The following are the issues for the determination by the court;

- a. Whether there was proper service of summons to enter appearance on the Defendant.
- b. Whether the Defendant has established the existence of a reasonable defence to the Plaintiffs claim.
- c. What orders to issue.

d. Who pays the costs.

5. The court has considered the grounds on the notice of motion, affidavit evidence by both sides, submissions by counsel for the Defendant and concluded as follows:

a. That the suit was commenced through the plaint dated and filed on 23rd November 2012. That the summons to enter appearance dated 4th December 2012 were issued.

b. That the only available affidavit of service of the summons to enter appearance is the one sworn by **Amos Eliud Osango** on the 12th June 2013. The deponent indicates that he was accompanied by one **Abdul**, an agent of the Plaintiff, who was to point out the defendant for service. The process server then depones that the service was effected on a young man who introduced himself as **Melvin Odero**. The age of the said young man is not disclosed and it is not possible to establish whether he was of minor or majority age. The said young man did not sign the original copies as none are attached to the affidavit of service. There is also no confirmation that the young man was a member of the Defendant's family.

c. That in view of the finding in (b) above the court concurs with the submission by the Defendant's counsel that there was no proper service of summons to enter appearance. That it follows that the interlocutory judgment entered on the 12th June 2013 was irregularly entered and should be set aside.

d. That the Defendant acted without delay in filing this application after getting to know that the interlocutory judgment had been entered.

6. That flowing from above, the court finds merit in the notice of motion dated 2nd October 2013 and the same is allowed in the following terms:

a. That the interlocutory judgment entered in favour of the Plaintiffs, on the 12th June 2013 is hereby set aside and the Defendant allowed to file and serve his defence and counterclaim in terms of the copy annexed.

b. That the defence and counterclaim be filed and served in 21 days.

c. That the costs of the application be in the cause.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 31ST DAY OF MAY 2017

In presence of;

Plaintiffs 1ST Present

Defendant Absent

Counsel M/S Adwar for the Plaintiffs

M/s Nabifu for the Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

31/5/2017

31/5/2017

S.M. Kibunja Judge

Oyugi court assistant

1st Plaintiff present

M/S Adwar for the Plaintiff

M/S Nabifu for the Defendant

Court: Ruling dated and delivered in open court in presence of the 1st Plaintiff, M/S Adwar and M/S Nabifu for the Plaintiffs and Defendant respectively.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

31/5/2017