



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC. 257 OF 2012

PETER KIGIA JORAMPLAINTIFF

VERSUS

BORNES CHERONO BARTADEFENDANT

RULING

(Application to set aside ex-parte judgment; defendant claiming that she was never served with summons; ample evidence that she was served with summons and hearing notices; no good ground to allow the application but court in its own discretion allowing the defendant to file defence subject to certain conditions).

1. The application before me is that dated 3 October 2016 filed by the defendant. It is an application which substantially seeks the setting aside of the ex-parte judgment delivered on 3 July 2013 and all consequential orders. The application is founded, principally, on the ground that the applicant was never served with summons to enter appearance and did not know of the case until the plaintiff moved to execute an eviction order.

2. The application is opposed by the plaintiff who has filed a replying affidavit. It is his view that this application is only meant to frustrate him from the fruits of his judgment. He has deposed that the defendant was served with summons to enter appearance on 16 April 2012 by one Hebron Odhiambo Omolo, a process server. He has referred me to the said affidavit of service. He has also deposed that the defendant was served with a hearing notice to the suit and has also pointed me to another affidavit of service sworn by the said Hebron Odhiambo Omolo. He has averred that the applicant was then served by registered post with a notice of entry of judgment. He has asserted that he owns the land in issue and that the applicant has no interest in it.

3. I have gone through the application alongside the submissions of both Ms. Njoroge for the applicant and Mr. Orege for the respondent. I have observed that the plaint was filed on 27 March 2012. The plaintiff pleaded to be the registered owner of the land parcel Nakuru/Sondu River/36. He pleaded that the defendant entered the land in the year 2009 without any colour of right. In the suit, he asked for vacant possession, general damages for trespass, mesne profits and a permanent injunction. I have seen the affidavit of service sworn by Hebron Odhiambo Omolo. He has sworn that on 12 April 2012, he did serve the defendant. The defendant was personally known to him as he had earlier served her with a demand notice. I have also seen another affidavit of service sworn by the same process server, indicating that he served the defendant with a hearing notice of the suit. The affidavits of service are fairly elaborate. I am not persuaded by the allegations of the defendant that she was never served with the summons to enter appearance or the hearing notice. It is my considered opinion that the defendant was served but opted not

to attend court.

4. I have every reason not to allow this application. The defendant was properly served, and it is the duty of every person served, to attend court if they wish to contest the suit. She did not do so and strictly speaking she ought to bear the consequences thereof.

5. However, I do take seriously the right to be heard. I will in exercise of my discretion, undeserving as the defendant may be, allow this application and permit the defendant to defend the suit. It is akin to an act of grace but this will be subject to the following conditions :-

(i) The defendant must pay throw away costs of Kshs. 15,000/= within 14 days from the date hereof.

(ii) Subject to payment of the above costs, the defendant must file and serve her defence, which must be accompanied by the documents she intends to rely on at trial, and the list of witnesses together with their statements, within 14 days of today.

(iii) If the defendant does not comply with the above conditions as stated within the time limit set, the judgment of 5 July 2013 to stand and the plaintiff be at liberty to extract an eviction order for execution.

6. The plaintiff shall have the costs of this application in any event.

Dated, signed and delivered in open court at Nakuru this 30th day of May 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of:

Mr. Kamanga holding brief for Mr. Orege for the plaintiff/respondent

No appearance on the part of Ms. Nancy Njoroge for the defendant/applicant

Court Assistant: Nelima

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU