

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 349 OF 2014

AZINA CHEPKEMBOI SAID.....PLAINTIFF

VERSUS

NOAH MARITIM TOO.....1ST DEFENDANT

CHRISTOPHER KIPCHOGE BITOK.....2ND DEFENDANT

KIBUTUK ARAP TOO.....3RD DEFENDANT

RULING

Noah Maritim Too, Christopher Kipchoge Bitok and Kibutuk Arap Too (*hereinafter referred to as the defendants*) have come to court against **Azina Chepkemboi Said (*hereinafter referred to as the plaintiff*)** by way of application dated 30.12.2015 seeking orders that the judgment dated 20.11.2015 and all consequential orders be set aside and that the defendants be granted leave to file their statement of defence be deemed as duly filed subject to payment of the requisite fees.

The application is based on grounds that the applicants/defendants were not served with summons, plaint and all the pleadings in respect of this suit. The plaintiff conveniently failed to disclose the existence or subsistence of another suit to wit Eldoret High Court Civil Case No. 56 of 2010 (OS) now Environment and Land Court No. 613 of 2012 which touches and concerns ownership and possession of L. R. No. Nandi/Kamobo/2267. The plaintiff's title to L. R. No. Nandi/Kamobo/2267 was obtained fraudulently for reasons that the registration was done after the death of the former title holder. The defendants have been in open, quiet and peaceful possession and occupation of one third (1/3) of L. R. No. Nandi/Kamobo/2267 and have cultivated and developed it for a period exceeding twelve (12) years. The plaintiff in execution of the court decree has particularly destroyed some of the defendants' homes and now intends to proceed to other houses and fence off the entire parcel. That it is the interest of justice and fairness that the applicants be heard in their defence before being condemned. That L. R. No. Nandi/Kamobo/2267 is the defendants' only home and they stand to be rendered homeless and destitute without being given an opportunity of being heard in their case.

The application is supported by the affidavit of Kibutuk Arap Too who states that they live at Kamobo sub-location, Kamobo location within Kapsabet town in Nandi County. That the applicants were surprised when on 23.12.2015 police officers from Kapsabet Police Station in company of the respondent invaded their home at dawn and started evicting them. That they have been residents on L. R. No. Nandi/Kamobo/2267 for a period exceeding 12 years uninterrupted. That they were not served with summons to enter appearance and the affidavits of service sworn by Enos M. Lubutsi on 26th November, 2014 and 20th April, 2015 are false. That on 21st April 2010, he instituted Eldoret High Court Civil Case No. 56 of 2010 (OS) against one Salim Kibet Said who was then the registered proprietor of L. R. No. Nandi/Kamobo/2267. That Civil Case No. 56 of 2010 was later registered as ELC No. 613 of 2012 on establishment of the Land Court and Registry.

The applicants state that the originating summons have not been heard and determined by the court and the plaintiff herein misled the court by stating that no proceedings are pending in court in respect of L. R. No. Nandi/Kamobo/2267. That they have been condemned unheard in these proceedings and they crave for an opportunity of having their day in court. That Civil Case No. 56 of 2010 now ELC No. 613 of 2012 stalled because Salim Kibet Said passed on 10.10.2014. That on the death of Salim Kibet Said, the

plaintiff herein fraudulently caused herself to be registered as the proprietor of L. R. No. Nandi/Kamobo/2267 on 4.11.2014. That the title deed exhibited in court belonging to the plaintiff is a forgery because it is not possible to conduct succession proceedings in less than a month.

The plaintiff herein ought to have substituted herself in ELC No. 613 of 2012 instead of instituting these proceedings and that even then, the certificate of death was issued on 17th June, 2015 as per the annexure marked KAT 4 above. That the decree and order issued by the court has been partially executed and they are praying for stay of further execution because they are still resident on the land. That they would like the judgment and decree and all consequential orders set aside. They pray for leave to file defence out of time and the annexed and marked KAT 8 draft statement of defence be deemed duly filed subject to the payment of the requisite fees. They shall seek leave of the Honourable Court to cross-examine the court process server on Enos M. Lubutsi on his affidavits of service.

Azina Chepkemboi Said filed a replying affidavit whose gist is that the applicants were aware of this case as they were duly served and they just ignored or refused to appear in court. The plaintiff admits that the defendants filed a case No. 56 of 2010 and now ELC No. 613 of 2010 but she was not aware of the suit but adds that the same has never been prosecuted for 5 years. According to the plaintiff, the defendant invaded her land in the suit property and her late brother went to Kapsabet Police Station and they were arrested and charged with forcible detainer They were tried and found guilty and sentenced each to serve 9 months' imprisonment. The plaintiff was given the land as a birthday present by her brother. He transferred the property to the plaintiff before his death. According to the plaintiff, case No. 56 of 2010 was abated as the respondent died and that no substitution has been done. The defendant submits that the summons to enter appearance were not served and that the affidavit of service sworn by one Enos M. Lubutsi is full of falsehoods. Moreover, that the plaintiff fraudulently obtained title to the land.

The plaintiff submits that the judgment was legally obtained as the defendants were served but they ignored court summons and that the defendants have not approached the court with clean hands due to fact that they have not disclosed the abated suit and that the judgment delivered was in vain and therefore, can only be imposed vide review or appeal.

I have considered the application before court, the same is brought under the provisions of Order 10, Rule (11), Orders 22, Rule (22) and Articles 40, 159 of the Constitution. The application revolves on the right to be heard as envisioned in Article 40 of the Constitution and the power of this court to ensure that justice is done. When the matter came for hearing, the defendants were not present. It is not in doubt that the defendants were served with the summons to enter appearance, but they failed to enter appearance and file defense. It is also clear that the defendants were served with a hearing notice dated 1st April, 2015 indicating that the suit was to be heard on 24.6.2015 but failed to attend court for hearing. I do agree with the plaintiff that the defendants were duly served but failed to file defence in time and also neglected to come to court for hearing. It is my view that court processes should not be taken lightly as they have consequences as provided by the law. The defendants did not apply to cross-examine the process server; hence it is proved on a balance of probabilities that they were served. I do not think that I should exercise my discretion to set aside judgment entered after hearing a party and following due process unless the person seeking for the discretion of the court gives good reasons. The defendants were given an opportunity to defend themselves but they chose not to. Article 159 of the Constitution should only be applied where good reasons are given and where the defendants demonstrate that they did not file defence due to some hardship. In this case, I do find that the defendants ignored court summons and a hearing notice duly served by a process server.

On whether the defendants have an arguable defence, I do find that the defendants' claim in Environment & Land Court No. 613 of 2010 having abated, the defendants have no claim against the plaintiff. The application is otherwise dismissed with costs. Judgment issued on the 20th day of November, 2015 to be enforced after the lapse of 30 days and with notice to the applicant.

DATED AND DELIVERED AT ELDORET THIS 28TH DAY OF JUNE, 2017.

A. OMBWAYO

JUDGE