



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 146 OF 2015**

EDWARD KIMOTHO MBIA.....PLAINTIFF

VERSUS

BENINA GACIRIKU MBIA.....DEFENDANT

**RULING**

This is in respect to the defendant's application dated 17th March 2016 seeking the following orders:

- 1. Spent.***
- 2. That this Honourable Court be pleased to set aside the ex-parte judgment entered against the defendant.***
- 3. That the defendant be granted leave to file her replying affidavit as per the annexed draft copy.***
- 4. That costs of this application be provided for.***

The application is supported by the defendant's affidavit in which she has deponed, inter alia, that she was never served with the Originating Summons and the documents were only left outside her house and being illiterate, she did not know their import and so did not act on them. Therefore, the ex-parte judgment entered against her on 27th July 1994 (that is clearly an error as the judgment is dated 21st January 2016) was obtained irregularly and she has a good defence on the merit as per the annexed replying affidavit.

In response, the plaintiff filed a replying affidavit in which he pointed out that the defendant's Notice of Motion is wrongly dated 17th March 2016 instead of 17th March 2017 and the defendant having been served duly appointed an advocate who was aware about the interlocutory judgment and therefore there are no grounds of setting aside the said judgment since the defendant's advocate was duly served.

The genesis of this application is that on 17th November 2015, the plaintiff filed an Originating Summons seeking orders that he has become entitled to land parcel No. INOI/KIAGA/356 registered in the defendant's names having been in exclusive and continuous possession thereof for a period of over forty (40) years and the defendant's rights are extinguished. According to the affidavit of service filed by the process server **PETER MURIUKI KABUI**, the defendant was duly served with copies of the Originating Summons on 24th November 2015 at Kiamburi Village at 12 p.m. As no appearance or defence was filed, an interlocutory judgment was entered against the defendant on 21st January 2016 and the case was fixed for formal proof on 3rd May 2016 and on that day, counsel for the defendant appeared and informed the Court that he had just been instructed in the matter.

I have considered the application and the parties' rival affidavits. First, however, the application though dated 17th March 2016 should actually have been dated 17th March 2017. That error is not fatal.

The defendant's main ground in applying to set aside the ex-parte judgment is that she was not properly served with the pleadings in this case. In the same breath, she says she did not comprehend the documents since she is illiterate.

This Court has a wide discretion in setting aside an ex-parte judgment. However, that discretion and power should not be used to assist a party who has deliberately sought (whether by evasion or otherwise), to obstruct or delay the cause of justice – **SHAH VS MBOGO 1967 E.A 166**. And in **PATEL VS E.A CARGO HANDLING SERVICES LTD 1974 E.A 75**, the Court held as follows:

***“There are no limits or restrictions on the Judge’s discretion to set aside or vary an ex-parte judgment except that if he does vary the judgment, he does so on terms as may be just. The main concern of the Court is to do justice to the parties and the Court will not impose conditions on itself to fatter the wide discretion given to it by the rules”***

Where there is no proper service of summons to enter appearance to the suit, the resulting default judgment is an irregular one which the Court must set aside as a matter of right (ex debito justitiae) and in such a case, the judgment is not set aside in the exercise of any discretion but rather, as a matter of judicial duty in order to up-hold the integrity of the judicial process – **REMCO LTD VS MISTRY JADVA PARBAT & CO. LTD 2002 1 E.A 233**. If the ex-parte judgment is however a regular one, the Court still has discretion to set it aside but on terms.

I have perused the affidavit of service filed by **PETER MURIUKI KABUI** on 21st January 2016 as evidence of service upon the defendant. He has deponed in paragraphs 2, 3 and 4 thereof as follows:

**2: “That on 24th November 2015, I received copies of Originating Summons dated 17th November 2015 from the plaintiff herein with instructions to serve the same upon the defendant”.**

**3: “That on the same day, I proceeded to Kiamburi Village Kiamuthambi within Kirinyaga County with a purpose of serving the said Originating Summons”.**

**4: “That at around 12.00 p.m. I met the defendant (old grandmother) at her home who after introducing and explaining to her the purpose of my visit, I served her by tendering the copy thereof and requesting a signature on the original”.** Emphasis added

It is clear from the above that the defendant was only served with the **Originating Summons filed herein on 17th November 2015**. The defendant should also have been served with summons to enter appearance as provided by **Order 5 Rule (II) of the Civil Procedure Rules** which provides as follows:

***“When a suit has been filed, a summons shall issue to the defendant ordering him to appear within the time specified”.*** Emphasis added

**Sub-rules (2) and (3)** goes on to provide as follows:

**(2) “Every summons shall be signed by the Judge or an officer appointed by the Judge and shall be sealed with the seal of the Court without delay, and in any event not more than thirty days from the date of filing”**

**(3) “Every summons shall be accompanied by a copy of the plaint”**

This suit seeks order in adverse possession and is therefore commenced by an Originating Summons as required in law. The Originating Summons is equivalent to a plaint filed in ordinary civil suits. However, apart from serving that Originating Summons, the process server was required to also serve the defendant

with a summons as provided under **Order 5 of the Civil Procedure Rules** duly signed by the Judge or an officer of the Court ordering the defendant to enter appearance within the time specified therein. And **Order 5 Rule 15 of the Civil Procedure Rules** also requires that the process server's affidavit of service shall also have annexed thereto "***the original summons***". That was not done in this case. It is clear from the provisions of **Order 5 Rule 1 (1) of the Civil Procedure Rules** that it is mandatory that summons be served together with any pleadings because that is how a defendant is notified not only about the case he is required to answer but also sets out the procedure that he must take in responding to the plaint. Only then will a defendant be able to instruct counsel or take any other steps in answering to the case against him. That cannot be a mere technicality but is an important prerequisite for a fair trial. As there was no compliance with the mandatory provisions of **Order 5 of the Civil Procedure Rules**, it follows that the ex-parte judgment entered against the defendant on 21st January 2016 is an irregular one which this Court must set aside ex debito justitiae.

The up-shot of the above is that I make the following orders with respect to the defendant's Notice of Motion dated (erroneously) 17th March 2016 and filed herein on 17th March 2017:

- 1. The ex-parte judgment dated 21st January 2016 is hereby set aside.***
- 2. The defendant is granted leave to file a reply to the Originating Summons herein within fifteen (15) days of this ruling.***
- 3. The default was caused by the process server and therefore I direct that each party meet their own costs of the application.***

**B.N. OLAO**

**JUDGE**

**16<sup>TH</sup> JUNE, 2017**

**Ruling delivered, dated and signed in open Court this 16<sup>th</sup> day of June 2017**

Plaintiff present in person

Ms Kiragu for Mr. Karomo for Defendant present.

**B.N. OLAO**

**JUDGE**

**16<sup>TH</sup> JUNE, 2017**