



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**E.L.C. MISC CASE NO. 130 OF 2014**

**FREDRICK NYAGA M'VINYA** (*Suing as a personal*

*representative of the Estate of*

**MWONGA M'BINYA (Deceased).....PLAINTIFF**

**VERSUS**

**EUNICE RWAMBA NJIRU.....1<sup>ST</sup> DEFENDANT**

**NANCY WANJUKI NJIRU** (*Sued as a personal*

*representative of the estate*

**of EPHRAIM NJIRU M'RIUA (Deceased).....2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a notice of motion dated 3<sup>rd</sup> September 2014, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants sought the following orders:

*a. That this application be certified as urgent.*

*b. That service of this application be dispensed with and this application be heard ex-parte in the first instance.*

*c. That pending the hearing and determination of this application, this honourable court be pleased to grant a stay of the formal proof proceedings in this case.*

*d. That the interlocutory judgement entered on 10<sup>th</sup> June 2014 and all the consequential orders be set aside to allow the applicants enter appearance and file defence out of time.*

*e. That the memorandum of appearance and statement of defence annexed to this application be deemed duly filed upon payment of requisite fees.*

*f. That costs of this application be provided for.*

2. The said application was based on the ground that the Defendants were never served with summons to enter appearance; that they had a good defence to the action; and that they had moved the court without undue delay, among other grounds.

3. It was supported by an affidavit sworn by the 1<sup>st</sup> Defendant who reiterated the grounds set out in the application. She stated in her said affidavit that she only became aware of the suit when a hearing notice for formal proof was served upon her. In her further affidavit dated 25<sup>th</sup> September 2014 and filed on 26<sup>th</sup> September 2014, she stated that she worked and resided in Nairobi at all material times and that it was not possible for her to have been served at Kawanjara village in Embu.

4. The said application was opposed by the Plaintiff who swore a replying affidavit insisting that the 1<sup>st</sup> Defendant was served on 30<sup>th</sup> February 2014 and that interlocutory judgement was properly entered. He attached an affidavit of service of the process server which also indicated that the 1<sup>st</sup> Defendant was served on 30<sup>th</sup> February 2014! One wonders in which calendar the date of 30<sup>th</sup> February 2014 is to be found. However, nothing was said of service upon the 2<sup>nd</sup> Defendant who was not a party to the original plaint before amendment.

5. The main issue in this application is whether the Defendants have made out a case for setting aside of the default judgement entered on 10<sup>th</sup> June 2014.

6. The principles for setting aside a default judgement are fairly well settled in Kenya. A party who has not been served or properly served is entitled to have such default judgement set aside as a matter of right. However, where proper service has been effected, the court may still set it aside if the Defendant can show that he has a good defence on the merits. See *Patel Vs. E.A. Cargo Handling Services [1974] EA 75; Gandhi Brothers Vs. H.K. Njage t/a H.K. Enterprises Nairobi HCCC No 1330 of 2001.*

7. The court has considered both the replying affidavit and the process server's affidavit of service. Both of them claim that the 1<sup>st</sup> Defendant was served on 30<sup>th</sup> February 2014. The court takes judicial notice of the fact that the purported date of service is non-existent and fictional. It could not be a mistake that the two affidavits sworn by two different people and on different dates could fall into similar error. There is simply no evidence of service of summons to enter appearance. In the event, the Defendants are entitled to setting aside as of right.

8. The court has also noted that in both the original and amended plaint, the Plaintiff was only seeking cancellation of the title deed issued to the 1<sup>st</sup> Defendant and another person. There was no liquidated claim sought alongside that relief. Under the provisions of *Order 10 of the Civil Procedure Rules, 2010*, there is no provision for entry of interlocutory judgement where the reliefs sought do not include a claim of liquidated damages. The only option the Plaintiff had was to set down the suit for hearing in accordance with the Rules. On that account again, the interlocutory judgement was irregular.

9. The upshot of the foregoing is that the Defendants notice of motion dated 3<sup>rd</sup> September 2014 has merit and the same is allowed on the following terms:

- a. The interlocutory judgement entered against the Defendants on 10<sup>th</sup> June 2014 is hereby set aside unconditionally together with all consequential orders.
- b. The Defendants shall file and serve their statement of defence within 14 days from the date hereof.
- c. The Plaintiff shall be at liberty to reply to the defence or defences within 7 days of service.
- d. Costs of the application shall be in the cause.

10. Orders accordingly.

**RULING DATED, SIGNED and DELIVERED in open court at EMBU this 28<sup>th</sup> day of SEPTEMBER, 2017**

In the presence of Mr Okwaro holding brief for Mr A.P. Kariithi for the Plaintiff and in the presence of the 1<sup>st</sup> Defendant in person.

Court clerk Njue/Leadys

**Y.M. ANGIMA**

**JUDGE**

**28.09.17**