



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO.43 OF 2015
JENIFER AKEYO WALE.....PLAINTIFF
VERSUS
JOSEPH ONDIEK OLWENY.....DEFENDANT

RULING

1. **Joseph Ondiek Olweny**, the Defendant, seeks vide notice of motion dated 1st September 2016, for execution of the decree of 28th April 2016 to be stayed and exparte judgment of the same date set aside. The Defendant list five grounds on the application which is also supported by his affidavit sworn on the 1st September 2016.
2. The application is opposed by **Jenifer Akeyo Wale**, the Plaintiff, through her replying affidavit sworn on the 16th November 2016.
3. The counsel for the defendant and plaintiff filed their written submissions dated 5th May 2017 and 9th May 2017 respectively.
4. The following are the issues for this court's determination;
 - a) Whether the Defendant had been properly served with the summons to enter appearance.
 - b) Whether the Defendant has offered reasonable explanation as to why he failed to enter appearance, file his defence and defend the suit.
 - c) Whether the orders sought should be issued.
5. The court has carefully considered the grounds on the notice of motion, affidavit evidence, written submissions by both counsel and come to the following findings;
 - a) That though the Defendant alleges that summons to enter appearance were not served on him but to his wife who failed to hand them to him, and that he only got to know about this suit during proclamation, there is no affidavit obtained and filed by his wife to confirm that claim.
 - b) That the affidavit of service of summons to enter appearance sworn by David Elvis Ochieng confirms that service was effected on the Defendant who was pointed out by his wife, namely Ms Agneta Achieng. That the same process server effected another service on the Defendant, in the presence of his wife Pamela Achieng, on 30th June 2016 as per the affidavit of service sworn on the same date. That during both occasions the Defendant is indicated to have declined to sign in

acknowledgment of service.

c) That the foregoing notwithstanding, the Defendant's allegation that he is in possession of the suit land has been disputed by the Plaintiff through the replying affidavit. That further, the court has noted the copy of the land certificate for **Kisumu/Konya/797** annexed to the application has the names **Gabriel Adoyo Ondiek and James Okun Olweny** as the registered proprietor under entry No.3 of 23rd March 1999. That the Plaintiff has disputed having transferred the land to the two people and as the land certificate she availed shows she was the first registered proprietor under entry No.1 of 14th March 1991, it is only fair and just that the Defendant be afforded an opportunity to defend this suit on certain conditions.

6. That flowing from the foregoing the Defendant's notices of motion dated 1st September 2016 is allowed on the following terms;

a) That the court's judgment of 28th April 2016 is hereby set aside to allow the Defendant file and serve his defence, statement. and documents in fourteen (14) days.

b) That the Defendant do pay the Plaintiff thrown away costs assessed at Ksh.20,000/= (twenty thousand) within 14 (fourteen days) from today.

c) That should the Defendant fail, neglect or decline to comply with orders (a) and (b) above within the timelines given, the setting aside order will automatically lapse and or taken to have been vacated.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 22ND DAY OF NOVEMBER 2017

In presence of;

Plaintiff Absent

Defendant Absent

Counsel Mr. Orenge for Plaintiff/Respondent

M/S Oketch for Odeny for Defendant/Applicant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

22/11/2017

22/11/2017

S.M. Kibunja Judge

Parties absent

M/S Oketch for Odeny for the Applicant/Defendant

Mr. Orengo for Plaintiff/Respondent

Court: Ruling dated and delivered in open court in presence of M/S Oketch for Odeny for Defendant/Applicant and Mr. Orengo for Plaintiff/Respondent.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

22/11/2017