



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 268 OF 2017**

**SYOMBUA MANG'ETHWA MUMU.....PLAINTIFF**

**VERSUS**

**BONFACE MASILA.....1<sup>ST</sup> DEFENDANT**

**MUSANGI MBULU MUMU.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. What is before the court is the Defendant's Application dated 29<sup>th</sup> September, 2015 seeking for the following orders:

***a. That this court be pleased to set aside the interlocutory Judgment entered against the Defendants on 21<sup>st</sup> July, 2014 with any consequential orders thereof and the Defendants be granted leave to defend this matter.***

***b. That costs of this Application be provided for.***

2. The Application is premised on the grounds that there was no service or proper service of the pleadings herein and that the Defendants' Affidavits raise triable issues which are likely to succeed.

3. In the Supporting Affidavit, the 2<sup>nd</sup> Defendant has deponed that he became aware of this matter on 10<sup>th</sup> September, 2015 when a stranger dropped the Application for substitution in his compound and that when his advocate perused the court file, he discovered that interlocutory judgment had been entered against them on 21<sup>st</sup> July, 2014.

4. According to the 2<sup>nd</sup> Defendant, the allegation that he was served with the Summons on 15<sup>th</sup> May, 2014 is blatant falsehood because he has never met the process-server.

5. The 2<sup>nd</sup> Defendant further deponed that he is the registered proprietor of land known as Kyangwithya/Mulutu/720 while the 1<sup>st</sup> Defendant is the owner of plot 609.

6. According to the 2<sup>nd</sup> Defendant, the decision to curve plot number 720 out of plot number 609 was arrived at by the Minister and that the Minister's decision was lawfully executed.

7. In response, the Plaintiff deponed that the Defendants were indeed served with court papers; that in any event, the Defendants have not attached a draft Defence on their Application and that the Judgment herein should be set aside.

8. In the Further Affidavit, the Defendants have deponed that the Plaintiff should not speak on behalf of the process-server, and that the Application should be allowed. The Defendants annexed a draft Defence on the Further Affidavit.
9. The advocates for both parties filed their respective submissions and authorities which I have considered.
10. In the Plaintiff filed on 6<sup>th</sup> May, 2014, the Plaintiff alleged the Defendants caused parcels of land known as Kyangwithya/ Mulu/609 and 702 fraudulently registered in their names.
11. In the said Plaintiff, the Plaintiff, who has alleged that the two suit properties are a sub-division of plot number 217 belonging to the deceased, is seeking for a declaration that the two title documents issued to the Defendants should be cancelled.
12. The Affidavit of Service of Charles Mutua Mwangi shows that he served the 1<sup>st</sup> and 2<sup>nd</sup> Defendants with the Plaintiff and the Summons to Enter Appearance on 15<sup>th</sup> May, 2014, a fact which the Defendants have dispute.
13. The Affidavit of Service further shows that the process-server served the 1<sup>st</sup> Defendant with the Summons to Enter Appearance in Mulu town while he was shopping.
14. It is the Plaintiff's sister-in-law who pointed to him the 1<sup>st</sup> Defendant whereafter he served him with the court process.
15. The process-server further deponed that on the same day, he was shown the home of the 2<sup>nd</sup> Defendant by the Plaintiff's sister-in-law, and in the presence of his son, served him with the pleadings.
16. The Defendants did not seek the leave of the court to cross-examine the said process-server.
17. Having failed to call the process-server for cross-examination, I am satisfied that with the help of the Plaintiff's sister-in-law, the two Defendants herein were served with Summons to Enter Appearance and the Plaintiff.
18. It is trite that notwithstanding the regularity of an ex-parte Judgment, like in this case, the court may set aside the Judgment if the Defendant has a Defence which raises triable issues.
19. I have looked at the Defendants' Affidavits and the draft Defence.
20. The Defendants have annexed on their Affidavit the proceedings before the Minister in respect to the suit land.
21. According to the proceedings in Land Appeal No. 541 of 1986, the Plaintiff's father, the late Mangethwa Mulu, sued the 1<sup>st</sup> Defendant for the recovery of parcel No. 609.
22. After hearing the dispute, the Minister directed that the boundary between parcel No. 217 and 609 should be adjusted in accordance with the decision of the elders and that parcel number 609 should be retained by the 1<sup>st</sup> Defendant and that part of plot 609 should be annexed to parcel number 217.
23. This decision was never appealed against. Indeed, the letter of the District Surveyor dated 25<sup>th</sup> February, 2013 shows that the decision of the Minister was implemented whereby two parcels of land being number 609 and 720 were created.
24. Considering that the Defendants' titles are based on the decision of the Minister, their Defence to the Plaintiff's claim cannot be said to be frivolous.

25. For those reasons, I shall grant to the Defendants an opportunity to defend the suit.

26. Consequently, I allow the Application dated 29<sup>th</sup> September, 2015 with no order as to costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 2<sup>ND</sup> DAY OF NOVEMBER, 2017.**

**O.A. ANGOTE**

**JUDGE**