



**REPUBLIC OF KENYA**

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

**E & L CASE NO. 424 OF 2012**

**RUSY JESEREM KIRUI.....PLAINTIFF**

**VERSUS**

**FRANCIS CHEPSIROR KIPCHIRCHIR.....DEFENDANT**

**RULING**

The application dated 14.4.2015 seeks orders that the Honourable court be pleased to review and/or to set aside the orders issued on the 20th of June, 2013 and reinstate the status quo pertaining on the suit land prior to the filing of the suit and the said orders to operate pending hearing and determination of the suit and that the defendant/applicant be allowed to file his defence and other connected documents out of the prescribed time. Thereafter, the draft defence of the defendant/applicant be deemed filed on payment of requisite fees.

The application is based on the following grounds namely:-

- (a) That the plaintiff filed suit on the 12.5.2009 for the eviction of the defendant from a piece of land known as LR No. Moi's Bridge/Sirikwa Block 2 (Ziwa) 540 measuring 2.49 ha, where as the defendant/applicant resides on LR No. Moi's Bridge Sirikwa Block 2(Ziwa) 399 measuring 1.88 acres which lies adjacent to each other.***
- (b) That the matter proceeded undefended hence entry of judgment and its consequential orders.***
- (c) That the service of summons and court process is disputed.***
- (d) That around the period of the suit and to-date, the defendant/applicant has been critically ill and was thus unable to respond to the suit papers and attend court, and admitted on and off in hospital thus unable to accept service as alleged or to be in a place so to accept.***
- (e) That in the said situation of the defendant, he was so ill so as to respond to any service or court process.***
- (f) That the matter before court was a boundaries dispute which was before the chief at time of filing suit.***
- (g) That the foregoing ground was compounded by the fact of illiteracy and lack of understanding of the English language and thus could not comprehend the consequences of the***

*court's decisions and processes.*

***(h) That in the mind of the defendant/applicant, the matter had been resolved since the local administration had resolved the boundary dispute existing as between the plaintiff and the defendant.***

***(i) That there was a gross misapprehension of fact by the Honourable Court largely due to the misguiding testimony of the plaintiff, the facts suit that the defendant holds title to land where he resides and not on the land represented by the title held by the plaintiff and on this ground alone the application should succeed.***

***(j) That the defendant was evicted from his own land LR No. Moi's Bridge Sirikwa Block 2 (Ziwa) 399 measuring 1.88 acres not the piece of land known as LR No. Moi's Bridge/Sirikwa Block 2(Ziwa) 540 measuring 2.49 ha.***

***(k) That it now a trite constitutional and statutory principle that justice shall be administered without undue regard to procedural technicalities as such the greatest regard should lie with the substantive issues.***

***(l) That the instant applicant and his family have been rendered homeless and loss that cannot be compensated by way of costs if the orders sought in this application are not granted.***

***(m) That the defendant/applicant shall continue to suffer irreparable damage and loss that cannot be compensated by way of costs if the orders sought in this application are not granted.***

***(n) That the balance of convenience favours the applicants.***

***(o) That the defendant/applicant's case has merit and raises triable issues.***

The application is supported by the affidavit of Francis Chepsiror Kipchirchir who states that on the 20th of June 2013, this Honourable court entered judgment against him and decreed that forthwith he vacates the land parcel Moi's Bridge/Sirikwa Block 2(Ziwa) 540. That the plaintiff later moved the court for eviction orders and on the 31st of July, 2014, this Honourable court ordered inter alia that he be evicted from LR Moi's Bridge/Sirikwa Block 2 (Ziwa) 540. That as a consequence of the order for eviction, armed youths and police raided his home of three decades and brought down his house rendering his family and himself homeless. That on the advice of his counsels on record which advice, he believes to be sound and true the matter had proceeded undefended and hence the entry of judgment.

The defendant claims that around the period when the suit was filed and the hearing set, he had been critically ill always bed ridden and admitted at Moi Teaching and Referral Hospital for long periods and was thus unable both physically and mentally and even financially to respond to the suit papers or attend court.

That within the said period, he had been admitted at the said hospital on several occasions and unable to accept service of court process as he was in hospital. That any claim of being before the chief on 27th May 2008, is untenable and laced with malice and he prays that the process service Mr. Daliti Munyasi be cross examined on his affidavit. He states that though he is lame and illiterate he knows that the dispute between the plaintiff and him was a boundaries' dispute as the plaintiff's land lies adjacent to his.

That he is the sole and registered proprietor of the piece of land more specifically known as LR Moi's Bridge/Sirikwa Block 2 (Ziwa)/339 which he has occupied since the year 1981, during which occupation the surveyors came surveyed the land in 1994 he was issued with the title deed to the land in 1995.

That as a consequence of the foregoing statement, he has never invaded the plaintiff's land, his occupation limited to LR Moi's Bridge/Sirikwa/Block 2(Ziwa)/339) where he is registered proprietor, paying the rates and in uninterrupted occupation since 1981 as such the plaintiff/respondent's claim is unfounded and

a gross misrepresentation of facts. To the best of his knowledge, the nature of dispute between the plaintiff and himself concerns the boundary between their two parcels of land, the matter before court was a boundaries dispute which was before the chief at time of filing suit which dispute had been resolved by the local administration given that he has been in occupation of the land since 1981 prior even to the emigration of the plaintiff to the area and her land which lies adjacent to his.

That he has occupied the parcel of land from the 6.3.1981 when he bought the same from a vendor by the name Fredrick Arap Biego they did an agreement which was witnessed accordingly. That the title he holds was issued in 1995 after purchasing the land and after services of survey and mapping That he is advised by his advocates on record, which advice he verily believes to be true and correct that on the basis of these facts that are patently erroneous and as such he is entitled to move this court for review. That he does have a credible defence and should be granted an opportunity to file the same and the case heard on this merits.

The plaintiff/respondent filed a replying affidavit whose import is that she is the registered owner of all parcel of land known as Moi's Bridge/Sirikwa Block 2 (Ziwa)/540 measuring 2.49 Ha. The defendant/applicant was duly served with the plaint and summons to enter appearance as per copies of the affidavit of service sworn by E. M. Taliti Munyasi on 27.5.2008. That at the time of service, the defendant/applicant was not ill as alleged in his affidavit as per his medical chit he was ill in the year 2011 and not 2008. That it was not only the summons and the plaint served, the defendant was also severally served with hearing notices by one of the officers of this Honourable Court named Mr. Timothy Kamau Njoroge. The allegation by the defendant being illiterate does not stop this Honourable Court from making its decision at the time of service of summons or hearing notices he could have appointed an advocate. Further to this that ignorance of the law is not a defence to anything.

The plaintiff indeed encroached into her parcel of land known as Moi's Bridge/Sirikwa Block 2 (Ziwa)/540 and she sued him and the matter was heard and determined hence the only remedy remaining is the plaintiff to appeal over the said judgment and not review. That it is admitted that indeed there was a boundary dispute between the parties herein. That a review is not the remedy available as the judgment dealt with the boundary dispute and there is no new evidence to show that a new matter has come up.

**Mr. Awi learned counsel for the defendant/applicant** submits that the defendant/applicant was not served. He submits that at the time of the alleged service, the defendant was gravely ill. Moreover, that the defendant was illiterate and did not understand English language. There was an existing boundary dispute between the plaintiff and the defendant being handled by the District Land Registrar. He argues that there was a gross misapproach of the law by the court.

**M/s Matoke learned counsel for the respondent** argues that the application lacks merit. A demand notice was sent to the defendant. The notice lapsed and the plaintiff filed suit. Summons were issued and served, the defendant did not respond. The plaintiff owns Moi's Bridge Sirikwa Block 2 (Ziwa)/540 measuring 2.49 Ha. The defendant owns adjacent land known as M/B/S/Block 2(Ziwa)/399. The matter was heard and the court ordered that the defendant be evicted. The only remedy available is appeal.

I have considered the application, supporting affidavit and the replying affidavit and do find that the suit herein was filed on 12.5.2009. The summons were issued on 13.5.2009. The important issue in the matter is whether the summons to enter appearance and file defence were served.

Mr. E. M. Daliti Munyasi states in the affidavit of service that he is an independent private process server attached to the High Court, Eldoret. That he received instructions from the firm of M/s Chebii & Company Advocates of Eldoret to effect service of summons to enter appearance in duplicate dated 13th May, 2008 with a request to serve the same upon Francis Chepsiror Kipchirchir at Ziwa Machine in Uasin Gishu District.

That on 27th May 2008, he travelled to the house of the said defendant where he found him away to the Ziwa Sirikwa Market. That from here, he went to the office of the Chief, Mr. Ng'eno who pointed out the defendant to him and when serving, he tendered one copy of the summons to him and he accepted the

required service and declined to sign on the other copy which he now returns the same duly served at 2.00 O'clock. That the said defendant became known to him **after serving him.**

The affidavit of service of E. M. Daliti Munyasi is not logical at paragraphs 3 and 4. He states that he found the defendant away to the Ziwa Sirikwa Market .It is not clear whether he was on his way to Ziwa market or away at ziwa market. If he was on his way, the process server should have served him then. If he was away at Ziwa market then there is no connection between the Ziwa market and the chief's office. where Mr. Ng'eno the chief pointed out the defendant to him. In Paragraph 5, he states that the defendant became known to him after service and yet it should be the other way round thus the defendant should have been identified before service. The defendant should be identified to the process server before service.

I do find that the defendant was not properly served. The judgment entered on 17.6.2008 is therefore set aside. All subsequent orders and proceedings are set aside. I will not belabor on service in the subsequent proceedings as I have already found that the affidavit of service of the summons to enter appearance is not satisfactory. The upshot of above is the application is allowed costs in the cause.

**DATED AND DELIVERED AT ELDORET THIS 29TH DAY OF JULY, 2016.**

**ANTONY OMBWAYO**

**JUDGE**