



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 94 OF 2010

KAMAU GIKUNDIPLAINTIFF

VERSUS

TABITHA WAMBUI GICHURADEFENDANT

RULING

BACKGROUND

1. This is a ruling in respect of a Notice of Motion dated 30/4/2016 in which the Applicant Tabitha Wambui Gichura seeks to set aside an ex-parte judgement against her on the ground that she was neither served with summons to enter appearance nor a hearing notice which culminated in the ex-parte hearing. The dispute herein can be traced to the 80's when the current Applicant had a dispute between the Respondent and Turbo Munyaka Co-operative Society Ltd.

2. The dispute was arbitrated by the Commissioner of Co-operative Development and a verdict thereon forwarded to court for adoption. On adoption of the award, there were orders of eviction issued against the Applicant but the eviction proved difficult partly due to non co-operation by those who were to assist in the eviction from the land which was the subject of the dispute and partly due to conflicting orders some of which were said to be forgeries. At some stage the matter was complicated by the disappearance of a court file from the High Court in Nairobi.

3. There had to be reconstruction of the lost file and an application seeking to review Justice Pall's orders was made. The application for review was made before Justice Githinji as then was who dismissed the application for review. In his ruling, he observed that the dispute at hand could only be resolved if a fresh suit was filed for that purpose. It would appear that Justice Githinji's observation is the one which informed the filing of a suit by the respondent against the Applicant and the land Registrar Trans -Nzoia on 4/10/2007.

4. The fresh suit was filed in the High Court in Nairobi but it was later transferred to Kitale. The present Respondent who is the plaintiff in this case set down the case for formal proof on 13/5/2013. The same proceeded on that day to conclusion. A judgement in his favour was delivered on 6/6/2013. The Respondent then embarked on execution of the judgement. Before the process of execution could be completed, the applicant filed the present application.

APPLICANT'S APPLICATION

5. The Applicant contends that she was never served with summons to enter appearance and file defence

or any hearing notice. She contends that the summons to enter appearance were purportedly served upon her son which is not the case. She contends that her son who is alleged to have been served at Cherengani was actually residing at Eldoret and that the son has sworn an affidavit to that effect.

6. The Applicant further contends that her home is not in Cherengani location but Makutano location. That she was not served with notice of entry of Judgement as required and that the first time she became aware of this case was on or about 20/4/2016 when she was served with some documents. She took them to her lawyer who on perusing the court file found that an ex-parte judgement had been entered against her. She contends that she has a defence which raises triable issues and that she should be given an opportunity to be heard.

RESPONDENT'S CONTENTION

7. The Respondent has opposed the Applicant's application through a replying affidavit sworn on 19/5/2016. The Respondent contends that the Applicant was properly served with all the civil processes as required by the law and that she is only out to delay the finalization of this matter. The Respondent prays that the application by the Applicant be dismissed so that the execution process can be completed.

ANALYSIS

8. I have carefully gone through the application by the Applicant and the opposition thereto by the Respondent. There is only one issue for determination in this application and this is whether the Applicant was served with summons to enter appearance and file defence and if she was served with a hearing notice.

9. I have looked at the affidavit of service by **James M. Ng'ang'a** sworn on 10/12/2007 and filed in court on 27/2/2008. The process server states in the affidavit that on 3/12/2007 he was accompanied by the Respondent to the Applicant's home. They found a man who introduced himself as **Kamau Gichora** who told them that the Applicant had gone to Kitale town and that she will be back after two days. He then served the summons upon him and that **Kamau Gichora** promised to pass the same to his mother.

10. As regards service of hearing notice, a process server called **Walter Olando** who works in the firm of M/S Koceyo & Co Advocates states that on 21/3/2013 he received a Hearing Notice from his employer in Nairobi. On the same day, he travelled to the Applicant's home at Cherengani where he served her with a Hearing Notice. That the Applicant accepted service but declined to sign on his copy.

11. Mr Kiarie for the Applicant submitted that the alleged service of summons to enter appearance never took place and that even if it happened, the service was not proper as the process server never made attempts to serve the Applicant in person. He argued that a process server should not serve summons on an adult member on a first attempt. He relied on a decision from the **Court of Appeal in Kisumu Court of Appeal Civil Appeal No. 69 of 1987 between Filimona Afwandi Yalwala -Vs- Indumuli & another.** In this case summons to enter appearance had been served upon the son of the Appellant on a first attempt. The service was held to be proper in both the lower court and the High court. When the Appellant appealed to the Court of Appeal, the Court of Appeal held that process servers should be encouraged to make more than one attempt before service can be effected upon an adult member of the family. The Appellant's appeal was allowed and **Justice Gicheru Ag JA** as he then was had this to say:-

“In the circumstances obtaining to this appeal, no enquiry was carried by the process server to establish that the appellant could not be found. Indeed, the process server made no more than one attempt to effect service on the appellant. Service on the appellant's adult son who was residing with him was therefore not adequate service. It was invalid. Accordingly, I agree that this appeal be allowed with orders made in terms proposed by Nyarangi JA”.

12. Mr Kiarie also argued that it was not possible for a process server to receive summons in Nairobi and proceed to serve the same in Cherengani on the same day at 11.00 am even if one were to travel by flight. I take Judicial notice that the distance between Kitale and Nairobi is about 378 kilometres. The

distance between Kitale town and Cherengani is about 35 kilometres. It is therefore impracticable that a process server could cover 413 kilometres and be able to serve a hearing notice by 11.00 am on the same day. Even if he used a flight which I doubt, he would not have made it.

13. Service of any court process is so central to any meaningful litigation. Where it is shown as in this case that there was no service effected, the court should not hesitate to set aside any proceedings arising from such faulty service or non service. In the circumstances of this case, I find that there was no service of summons to enter appearance or hearing notice which resulted in the ex-parte hearing.

14. The proviso to **Order 22 Rule 6 of the Civil Procedure Rules** provides as follows:-

“ Provided that where judgement in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less than 10 days notice of the entry of judgement has been given to him either at his address for service or served upon him personally and a copy of that notice shall be filed with the first application for execution”.

15. The Respondent has already embarked on execution process without complying with the provisions of **Order 22 Rule 6 of the Civil Procedures Rules**. From the Respondent's own affidavit, he has been engaging the National Land Commission with a view to having the titles in favouring the Applicant cancelled. There is even Gazettment to that effect if his replying affidavit is anything to go by. The Respondent did not issue notice of entry of judgement as required.

16. I have looked at the draft defence by the Applicant. Prima facie it raises issues which ought to be canvassed during a full hearing. I have already found that there was no service of either summons to enter appearance or for the Applicant to attend hearing. I therefore allow the Applicant's application with the result that the ex-parte judgement entered against her on 6/6/2013 together with all consequential orders are hereby set aside. The Applicant is granted unconditional leave to file defence. The Applicant shall have costs of this application.

It is so ordered.

Dated , signed and delivered at Kitale on this 11th day of July 2016.

E. OBAGA

JUDGE

In the presence of M/s Wanyama for Applicant.

Court Assistant – Winnie

E. OBAGA

JUDGE

11/7/16