



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.117 OF 2012

WILLIAM ORARO

OGANY.....PLAINTIFF

VERSUS

LEONARD OBUNGO

AYIEKODEFENDANT

RULING

1. Leonard Obungo Ayieko, the Defendant, filed the notice of motion dated 23rd March 2015 seeking “to set aside the exparte Judgment and the consequential decree”, for leave to file his defence out of time and defend the suit, the draft defence be deemed as duly filed and served and costs. The application is brought under **Order 10 Rule 4** of Civil Procedure Rules, **Section 1A, 1B and 3A** of the Civil Procedure Act chapter 21 of Laws of Kenya. It is based on the following three grounds:

“(i) That the applicant was not served with the summons to enter appearance and the pleadings.

(ii) That the applicant is almost being rendered homeless and a destitute.

(iii) That the matter be heard on merit”

2. The notice of motion is supported by the affidavit of Leonard Obungo Ayieko, sworn on the 23rd March 2015 in which he among others deponed as follows:

a) That sometimes in February 2015, the Plaintiff left a copy of a decree at his home in Kogony, Kisumu and that his family later sent it to him at his work place in Eldoret.

b) That he stays at Kidiwa estate while his workshop is at the Industrial Area, Eldoret which is about 3 kilometers from the Bus Stop terminus.

c) That every year, he closes his business on 23rd December and reopens it on 3rd January of the following year. That he spends the days between 23rd December and 3rd January of the following year with his family in Kogony.

d) That the claim that he was served with summons and failed to attend court cannot be true as he had faithfully attended the Land Disputes Tribunal proceedings.

e) That he has a good defence to the Plaintiff’s claim to the suit property.

3. The application is opposed by the defendant through the grounds of opposition dated 23rd March 2016 summarized as follows:

- a) That the application is inept, devoid of merit and brought in bad faith.
- b) That the Defendant was served and chose to deliberately disregard the summons.
- c) That the Defendant failed to act without undue delay.
- d) That the application if allowed will prejudice the Plaintiff.
- e) That the application is frivolous, vexatious and an abuse of the court process.

4. The application come up for hearing on 31st July 2016 and counsel for both parties agreed to file written submissions. The Defendant's counsel submission dated 5th September 2016 was filed on the same date while that of the Plaintiff's counsel dated 6th September 2016 was filed on the 7th September 2016.

5. The following are the issues for determination by the court:

- a) Whether the Defendant has come to court without undue delay.
- b) Whether he has a reasonable defence to the Plaintiff's claim.
- c) Who pays the costs of the application.

6. The court has carefully considered the grounds on the notice of motion, the affidavit evidence by the Defendant, the grounds of opposition, written submissions by both counsel, the record of the court and concluded as follows:

- a) That even though the Defendant has disputed in his affidavit to having been at his Eldoret workshop on the date alleged to have been served with the summons on the 29th December 2012, the signature appended at the back of the copy of the summons attached to the affidavit of service of Moses Rombe Ojwang, sworn on 9th January 2013 and the one on the Defendant affidavit sworn on 23rd March 2015 in support of his application appear similar. That the court therefore finds that the Defendant was served with the summons and failed to enter appearance and file defence.
- b) That the documents filed with the plaint dated 22nd October 2012, especially the Land Disputes Tribunal Proceedings shows that the parties herein had litigated over the same suit land before the filing of this suit. That an appeal is reported to have been filed with the Provincial Appeals Committee but the outcome has not been disclosed. That from the foregoing and the draft defence annexed to this application, the court finds that the proposed defence raises triable issues to the Plaintiff's claim and as the Defendant has expressed his desire to be heard, he should be granted an opportunity.
- c) That the Defendant acted without undue delay on getting the copy of the decree, which he deponed was left at his Kisumu home in February 2015 and then forwarded to him ion Eldoret.
- d) That the Defendant having been served with summons and having failed to defend the suit and now coming to court to set aside the judgment entered has caused the court and Plaintiff to waste time. That the Plaintiff is therefore entitled to the costs in this application and some thrown away costs assessed at Kshs.,5,000 (five thousand) payable in 30 days from today.

7. That the notice of motion filed by the Defendant dated 23rd March 2015 has merit and is allowed on

the following terms;

- a) That the exparte judgment dated 7th October 2014 is hereby set aside to allow the Defendant file his defence.
- b) That the Defendant do file and serve his defence, witness statement and list of documents within the next 21 days.
- c) That the Defendant do pay the Plaintiff thrown away costs of Ksh.5,000/= (five thousand) within the next 30 days.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 23RD DAY OF NOVEMBER 2016

In presence of;

Plaintiff	Absent
Defendant	Absent
Counsel	Mr Omondi for Plaintiff

M/s Otieno for Anyul for Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

23/11/2016

23/11/2016

S.M. Kibunja Judge

Oyugi court Assistant

Plaintiff present

Mr Omondi for Plaintiff/Respondent

M/S. Otieno for Anyul for Defendant/Applicant

Court: Ruling dated and delivered in open court in presence of Mr. Omondi for Plaintiff/Respondent and M/S Otieno for Anyul for Defendant/Applicant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

23/11/2016