



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KITALE

LAND CASE NO. 23 OF 2013

LONYANGOLE NGURANYANG..... PLAINTIFF

VERSUS

ABRAHAM LONYANGAT DEFENDANT

RULING

1. The applicant filed a notice of motion dated 26/9/2014 in which he sought the following prayers.

(a) That there be stay of execution of the decree herein pending hearing and determination of the application interpartes.

(b) That the default judgment entered herein and all consequential orders be set aside.

(c) That the defendant be granted leave to file and serve his defence out of time.

d. That costs of the application be provided for.

2. The applicant contends that he was not served with summons to enter appearance and that no notice of entry of judgment was served upon him before execution commenced as provided by law. The defendant/applicant also contends that he has a defence which raises triable issues and that he should be given opportunity to file defence to the plaintiff's claim.

3. The applicant's application is opposed by the plaintiff/respondent through grounds of opposition filed in court on 1/12/2014. The respondent contends that the application by the applicant lacks merits and that the applicant is guilty delay. The respondent also contends that the applicant was properly served and that he opted to sleep on his rights.

4. I have gone through the pleadings herein, the applicant's application as well as the affidavit of service which paved the way for hearing of the ex-parte proceedings. The issues which arise for determination are whether the defendant/applicant was properly served with summons to enter appearance and whether the execution process which was commenced was properly done.

5. As regards the issue of service, I have looked at the affidavit of service by one Raphael Nyongesa Simiyu sworn and filed in court on 29/4/2013. At paragraph 5 of the said affidavit, the process server states that on 1/3/2013 he proceeded to Kakoruron village where he was shown the defendant's house by the plaintiff. He proceeded to the defendant's house where he found his wife

who informed him that the defendant was away and would return in two days time. He thereafter served the defendant's wife who accepted to receive summons but declined to sign a copy of the summons.

6. Order 5 rule 12 of the Civil Procedure Rules provides as follows:-

12 “Where in any suit after a reasonable number of attempts have been made to serve the defendant, and the defendant cannot be found, service may be made on an agent of the defendant empowered to accept service or on any adult member of the family of the defendant who is residing with him.”

This section shows that it is only after a reasonable number of attempts have been made to serve the defendant in vain that service upon an adult member of his family who resides with him can be made. In the present case, the process server made one attempt and served the wife of the defendant. This is despite being told that the defendant was to come back in two days time.

I therefore find that the defendant was not served as by law required.

7. On the issue of notice of entry of judgment, the proviso to Order 22 rule 6 provides as follows:-

“Provided that, where judgment 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 ten days of notice of entry of judgment has been given to him either at his address for service or served on him personally, and a copy of that notice

shall be filed with the first application for execution.”

There was no notice of entry of judgment given as required. The applicant has already been committed to civil jail for failure to pay costs of this suit. I find that the provisions of Order 22 rule 6 were not complied with. The execution which was levied thereof is irregular.

8. A look at the draft defence by the defendant/applicant shows that it has prima facie triable issues. I therefore allow the applicant's application with the result that the ex-parte judgment entered herein is hereby set aside with all consequential orders. The defendant is granted unconditional leave to defend the plaintiff's claim. He should file defence within 14 days from the date hereof. The costs of this application shall be borne by the plaintiff/respondent.

It is so ordered.

[Dated, signed and delivered at Kitale on this 19th day of January, 2015.]

E. OBAGA.

JUDGE.

In the presence of M/s. Arunga for plaintiff/respondent and Mr. Kidiavai for Mr. Katina for defendant/applicant.

Court clerk – Kassachoon.

E. OBAGA.

JUDGE.

19/1/2015.