

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 62 OF 2014

EPUYO LOWOTON ::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

NATIPO LOCHAMPA ::::::::::::::::::::::::::::::: DEFENDANT

RULING

1. The Defendant/applicant filed a notice of motion dated 5/2/2015 in which he seeks to set aside an ex-parte judgement entered herein and that he be allowed to file defence. The applicant contends that he was not served with summons to enter appearance and that he has a good defence to the applicant's claim.
2. The application is opposed by the Plaintiff/Respondent who contends that the defendant was duly served with summons to enter appearance and file defence but that he did not do so. The respondent further contends that the defendant has no defence on merits and that he is merely intent on denying the plaintiff from enjoying the fruits of his judgement.
3. I have gone through the applicant's application together with the supporting affidavit as well as the further affidavit. I have also gone through the respondent's replying affidavit as well as the further affidavit. The issues which emerge for determination are firstly whether the defendant was served with summons to enter appearance and secondly whether the defendant has a defence on merits.
4. In an application for setting a side an ex-parte judgement, the issue of service is central to the whole application. In the present case, I have looked at the affidavit of service by the process server. The process server has described on how he went to the home of the defendant but did not find him. His (defendant's) daughter offered to take the process server to a nearby market where her father had gone to. They found the defendant on the way. The defendant agreed to sign the summons. In the further affidavit filed by the defendant, he seems to agree that he was served with all documents except the summons. I do not find any merit in this argument. The respondent has filed a further affidavit in which the defendant has signed at the back of the same. The defendant is also trying to deny his signature. I do not find any merit in this. The applicant is even trying to fault the contents of the affidavit of service on such grounds that the process server has not stated the county in which he was found. I find his arguments unmeritorious. The affidavit of service by the process server is adequate in the salient areas. I find that the defendant was actually served.
5. Even though the defendant was served, the court has to consider whether there is a defence on the merits. In the present case, the agreement between the plaintiff and defendant did not contain the plot which was being sold. The acreage of the plot was also not indicated. The defendant contends that after he sold the plot in issue, there was a problem in that his family was against the sale. This prompted him to try to refund the purchase price to the plaintiff who rejected the same. He then contends that he started negotiations with the plaintiff in which it was agreed that the plaintiff takes a 50 x 100 plot. If this be the case, then this an issue which cannot be locked out. The defendant should be allowed to raise it as a defence.
6. The sale is said to have been effected in 2004. The plaintiff has a letter of allotment dated 20/6/2004 in which it is said that he was allocated the plot on 24/9/1992. It is not clear on what

basis the plaintiff was given an allotment which was backdated. It is important that these issues are addressed once and for all. This can only be done if the defendant is given an opportunity to defend this suit. I therefore allow the application to the extent that the ex-parte judgement entered herein on 4/12/2014 is hereby set aside. The defendant is granted unconditional leave to file his defence within 14 days from the date hereof. Costs shall be in the cause.

It is so ordered.

Dated, signed and delivered at Kitale on this 20th day of April, 2015.

E. OBAGA

JUDGE

In the presence of Mr Bororio for plaintiff and Mr Wanyama for Mr Kimondo for defendant.
Court Clerk – Kassachoon.

E. OBAGA

JUDGE

20/4/2015