



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**ELC CIVIL CASE NO.32 OF 2010**

**GEORGE TSUMA KANUNDU.....PLAINTIFF**

**=VERSUS=**

**BENSON SAFARI MWATETE.....DEFENDANT**

**R U L I N G**

**Introduction:**

1. On 28<sup>th</sup> May, 2013, this court delivered a Judgment in which it allowed the Plaintiff's claim.
2. The Defendant has now filed an Application dated 18<sup>th</sup> December 2014 in which he is seeking for an order to set aside the Judgment of the Court.
3. The Application is premised on the grounds that the Defendant was condemned unheard.

**The Defendant's/Applicant's case:**

4. In his Supporting Affidavit, the Defendant has deponed that Morris Ngunyo is not a reliable process server; that the nature of this case is very sensitive as it involves land and that the orders that were granted by the court are adverse to him.

**The Plaintiff's/Respondent's case:**

5. In his Affidavit, the Respondent deponed that it is not true that the Defendant was not served with court documents as alleged; that summons were served on the Defendant on 17<sup>th</sup> April 2010 and that the Defendant was served with hearing notices on 22<sup>nd</sup> February 2012, 24<sup>th</sup> September 2013 and 11<sup>th</sup> February 2012.

**Cross examination of the process-server**

6. The Defendant's advocate cross-examined Morris Ngunyo, the process-server, who maintained that he served the Defendant with hearing notices.
7. The process-server described the Defendant's homestead and stated that on the first occasion, he was taken to the Defendant's homestead by the Plaintiff.

8. Mr. Morris Ngonyo denied that he is the one who served the Summons to Enter Appearance.
9. The Defendant's/Applicant's advocate did not file submissions. The Plaintiff's/Respondent's filed his submissions and reiterated the averments in the Plaintiff's Affidavit.

**Analysis and findings:**

10. The issue for determination in this matter is whether the Defendant was served with Summons to Enter Appearance and the Plaintiff, and if so, if the Defendant can be given leave to defend the suit.
11. According to the Affidavit of Thomas Konde which was filed on 7<sup>th</sup> May 2010, the Defendant was served with the Summons to Enter Appearance and the Plaintiff on 17<sup>th</sup> April 2010 at his home in Gede/Magangani village.
12. The Affidavit of Service states that the Defendant acknowledged service of the Summons to Enter Appearance by signing on the copy of the Summons.
13. The process-server returned the copy of the signed Summons to court on 7<sup>th</sup> May, 2010.
14. I have perused the signed Summons that was returned by the process-server on 7<sup>th</sup> May 2010.
15. The signature on the reverse side of the Summons is similar to the signature appearing on the Defendant's Supporting Affidavit.
16. Considering that the Plaintiff and the Defendant are neighbours, and in view of the fact that it is the Plaintiff who pointed the Defendant to the process server who served him with Summons which he accepted by signing, I am convinced that the Defendant was served with Summons to Enter Appearance on 17<sup>th</sup> April 2010 but failed to file a Defence. The Defendant has not stated how the two signatures could be similar despite the difference of five years since the two documents were signed and filed.
17. Indeed, the Defendant's advocate did not call Mr. Thomas Konde, the process server who served the Summons to Enter Appearance for cross-examination.
18. Having found that the Defendant was served with Summons to Enter Appearance which he duly acknowledged by signing, I will not consider if it is true that he was subsequently served with hearing notices before the matter proceeded for formal proof.
19. Where a party does not enter appearance or file a Defence, the Plaintiff will not be under any legal obligation to serve him with hearing notices every time a matter is set down for hearing.
20. The Defendant has not disclosed the nature of the Defence he intends to file. In the absence of a draft Defence, this court cannot exercise its discretion to grant to the Defendant an opportunity to defend the suit.
21. The Defendant has not given any good reason as to why the Judgment of this court, which is a regular Judgment, should be set aside.
22. From the foregoing reasons, I dismiss the Defendant's Application dated 18<sup>th</sup> December 2014 with costs.

**Dated and delivered in Malindi this 3<sup>rd</sup> day of July 2015.**

**O. A. Angote**

**Judge**