



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
LAND CASE NO. 221 OF 2013

SWALEH AWESO OMAR.....PLAINTIFF/APPLICANT

=VERSUS=

MOHAMED NASOOR.....DEFENDANT/RESPONDENT

R U L I N G

Introduction:

1. What is before me is the Defendant's Application dated 23rd January, 2014. The Application is seeking for the following orders:
 - a. **That the *ex-parte* Judgment entered herein be set aside unconditionally.**
 - b. **That the Defendant/Applicant be granted leave to file his defence out of time.**
 - c. **That the annexed defence herein be deemed as duly filed and served upon payment of the requisite fees.**
 - d. **That the costs of the Application be provided for.**

The Defendant's/Applicant's case:

2. According to the Applicant's affidavit, he was served with a notice of entry of Judgment by the Plaintiff's advocate and upon perusal of the court file, he realised that he had never been served with the Summons to Enter Appearance or any other court document. It is the deposition of the Applicant that he has a good defence with overwhelming chances of success.

The Plaintiff's/Respondent's case:

3. The Plaintiff's advocate swore a Replying Affidavit and deposed at great length on why he thinks the Defendant owes his client the amount claimed. The advocate annexed on the Replying Affidavit the correspondences exchanged between himself and the Defendant.
4. The Plaintiff's advocate further deposed that the Summons to Enter Appearance were served on the Defendant's shop attendant at the suit premises; that the **ex-parte** judgment was entered in mid January, 2014 and that he accordingly served the Defendant with a notice of entry of Judgment.

Submissions:

5. The Applicant's advocate filed his submissions and reiterated that his client was never served with summons to Enter Appearance. The advocate referred the court to the Defence and submitted that the said Defence raises serious trial issues.
6. The Plaintiff's advocate submitted that the Defendant's shop attendant was served with Summons to Enter Appearance because the Plaintiff was not in the shop at the time of service; that the shop is in the business premises under dispute and it was the proper place to serve the Defendant and that there is no reason why the worker could not be served on behalf of the defendant.

Analysis and findings:

7. The Application before me is for setting aside an ex-parte judgment. I have perused the Request for Judgment which was lodged in court on 24th December 2013. Other than the direction endorsed on the said Request for Judgment for payment of fees, there is no indication that the Deputy Registrar entered judgement. There is therefore no judgment for this court to set aside.
8. Even if the ex-parte judgment was entered, I would still set it aside on the ground that the Plaintiff's advocate has admitted that the Defendant was not personally served with the Summons to Enter Appearance.
9. It is trite law that where a party is not served with summons to Enter Appearance in accordance with the provisions of O.V of the Civil Procedure Rules, any Judgment that is entered thereafter should be set aside by the court *ex debito justitiae*. An employee cannot receive summons to Enter Appearance on behalf of his employer and the purported service of the Summons on the shop attendant is inconsequential.
10. In the circumstances, and for the reasons given above, the Defendant is at liberty to file his Defence within 14 days from today. The Plaintiff shall pay the Defendant the costs of the Application.

Dated and delivered in Malindi this 20th day of June, 2014.

O.A. Angote

Judge