



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC NO. 122 OF 2013**

**CHARLES KHISA NGWENGWE**

**GEOFFREY WEKESA**

**GEOFFREY WANJALA**

**(Suing as the representatives of**

**NDELEMA SELF HELP GROUP) :::::::::::::::::::: PLAINTIFFS**

**VERSUS**

**SIMON WACHIE**

**CALISTUS NYONGESA**

**GLADYS WAFULA**

**BERNARD MUNIALO**

**JANET MUKOPI**

**TOM WANAMBISI :::::::::::::::::::: DEFENDANTS**

**RULING**

1. The applicants filed a notice of motion dated 31/7/2014 in which they seek to set aside ex-parte proceedings herein which culminated in a judgment delivered on 30/7/2014. The applicants contend that they were never served with summons to enter appearance and file defence. The applicants contend that the affidavit of service which was filed in court is false in that they were not served as alleged. The applicants further contend that they have a defence with triable issues and should therefore be granted unconditional leave to defend this suit.
2. The respondents have opposed the application based on replying affidavit sworn on 23/9/2014 and filed in court on the same day. The respondent contend that the judgement sought to be set aside was regulary obtained and that the applicants are merely faulting the service of summons and that in any case, the applicants have not annexed the affidavit of service which they are faulting. The respondents contend that the applicants have no defence with triable issues.
3. I have carefully gone through the applicant's application as well as the opposition to the same by the respondents. The only issue for determination herein is whether there was service of summons

or not. The applicants contend that the affidavit of service by the process server is false. The applicants have gone ahead to demonstrate that indeed the process server's affidavit of service is false. Contrary to the respondents claim that the applicants did not annex the affidavit of service to the supporting affidavit, the said affidavit is the first annexure to the supporting affidavit. In paragraph 3 of the affidavit of service, the process server depones that he received summons from M/S Simiyu Wafula & Co. Advocates for service. The firm of M/S Simiyu Wafula & Co. are not on record in this case. The firm which was initially on record for the respondents was the firm of M/S Lel Bungei & Co. Advocates. The respondents later engaged the service of M/S Kraido & Co. Advocates. The firm of M/S Simiyu Wafula & Co. have never been on record in this matter. The process server was therefore wrong to state that he received summons from M/S Simiyu Wafula & Co. Advocates.

4. The Process Server does not even disclose the person who allegedly identified the applicants to him. The affidavit is scanty in details and cannot be said to be a proper affidavit. Service of summons is so central to any litigation. Without proper service or no service at all, the court is entitled to set the ex-parte judgement ex debito justitiae. For arguments sake even if the court were to assume that service was proper, the draft defence and even the replying affidavit by the respondents show that there are serious contested issues which the applicants ought to be given opportunity to defend. I therefore find that this is a proper case where the ex-parte judgement should be set aside. I allow the applicant's motion with the result that the ex-parte judgement entered herein is hereby set aside. The defendants are granted unconditional leave to defend this suit. Defence to be filed within fourteen days from the date hereof. The applicants shall have costs of this application.

It is so ordered.

Dated, signed and delivered at Kitale on this 2nd day of December, 2014.

**E. OBAGA**

**JUDGE**

In the presence of Mr Ingosi for Mr Okatch for defendant/Applicant. Court Clerk – Isabellah.

**E. OBAGA**

**JUDGE**

**02/12/2014**