



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 971 OF 2000

HARRISON BISMARCK NDORIA GICHER.....PLAINTIFF

VERSUS

FRANCIS GITAU NGURE.....1ST DEFENDANT

AGRICULTURAL FINANCE CORPORATION.....2ND DEFENDANT

RULING

1. On 9th February 2012 Mutava J ordered that this case be marked as settled.
2. The plaintiff now asks this court to set aside the said orders, so that the suit may be reinstated.
3. The plaintiff also asked the court to grant a Prohibitory Order, prohibiting the defendants from interfering with the plaintiff's quiet possession of the suit property, and also prohibiting the defendants from advertising for sale; advertising for auction; selling; auctioning; entering; transferring, leasing or dealing adversely in any other way whatsoever with the suit property **L.R. No. LIMURU/RIRONI/57**.
4. A perusal of the records of the proceedings reveals that there was a Notice to Show Cause dated 20th January 2012. The Notice was addressed to the 1st Defendant, **FRANCIS GITAU NGURE**, and to the Law Firm of **KHAMINWA & KHAMINWA ADVOCATES**.
5. Whilst the plaint was filed through messrs Khaminwa & Khaminwa Advocates, the records show that from as early as 13th April 2005, those lawyers were no longer acting for the plaintiff. They had been replaced by the Law Firm of **LUMUMBA, MUMMA & KALUMA ADVOCATES**.
6. Consequently, if the Notice To Show Cause was served upon Khaminwa & Khaminwa Advocates, that did not constitute service upon the plaintiff.
7. In **FRAN INVESTMENTS LTD Vs G4s SECURITY SERVICES LTD Hccc No. 467 of 2009** Gikonyo J. held as follows;

“Order 17 Rule 2 (1) of the Civil Procedure Rules does not require service of notice; it uses the word ‘give notice??. The court may give notice of dismissal through its official website or through the cause-list?.

8. As my learned brother noted, Order 17 Rule 2 (1) does not expressly stipulate that the plaintiff or the

parties should be served with the Notice To Show Cause why the suit should not be dismissed for want of prosecution.

9. However, in this case, there was a Notice which is dated 20th January 2012, which was addressed to advocates who were no longer representing the plaintiff.

10. By addressing the Notice to the wrong person, it may be presumed that that was the person who was required to show cause.

11. Secondly, there is nothing to show that the case was either placed in the Judiciary website or on the cause list.

12. Thirdly, whilst the hard copy of the Notice which is on the court file indicates that the Notice to Show Cause was scheduled for 1st February 2012, the matter was not dealt with on that date. Therefore, even if the Notice was issued, it has the wrong date, as the learned Judge dealt with the case on 9th February 2012.

13. Finally, the pronouncement made by the court was not in accordance with the Notice. The court marked the case as settled, whereas there was no basis in law, or in fact, for arriving at such a conclusion.

14. In the result, I find that the court arrived at an erroneous conclusion. That is reason enough to warrant the setting aside of the order made on 9th February 2012.

15. Accordingly, I do now order that the order made on 9th February 2012 be and is hereby set aside.

16. I also find that it was the order dated 9th February 2012 which served to remove the orders which had been in force until that order was made. Had not that order been made by the court, the orders that were already in force would have continued subsisting.

17. Therefore, upon the reinstatement of the case, I also direct that such order as was in force upto 9th February 2012 be reinstated forthwith.

18. However, because the plaintiff took a considerable amount of time before bringing his application to court, that is a demonstration of a lack of the requisite sense of urgency, in the prosecution of his case. Therefore, although the application dated 28th February 2014 is successful, the plaintiff will meet the costs thereof. I so direct because the defendant cannot be condemned to bear the costs which arose from an action which the defendant was not party to.

DATED, SIGNED and DELIVERED at NAIROBI this 14th day of October 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Marunga for the Plaintiff

Miss Waweru for the 1st Defendant

No appearance the 2nd Defendant

Collins Odhiambo – Court clerk.