



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**ENVIRONMENT & LAND COURT**  
**CIVIL CASE NO.99 OF 2010**

**HILARY KABUGU MUGUKU.....PLAINTIFF**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....DEFENDANT**

**R U L I N G**

Hilary Kabugu Muguku (*hereinafter referred to as the plaintiff*) commenced this suit by way of plaint against the Hon. Attorney General (*hereinafter referred to as the defendant*) on the 15/5/2008 in the High Court of Kenya at Nairobi based on a claim that he is the registered owner of plot **No.Nyeri Municipality Block 1/1072** measuring 0.1297 Hectares under certificate of lease issued on 26th September 2000 and has at all materials times been in quiet possession of the suit property and has been complying with all the legal requirements over the property including payment of land rent to the Ministry of Lands of the Republic of Kenya. On or about June 2007, the District Land Surveyor Nyeri, an officer under the control and/or direction of the permanent secretary, Ministry of Lands and Housing entered onto the suit property and erected a fence around it thereby interfering with the plaintiff's rights and quiet possession over the suit property.

The plaintiff avers that the action of the District Land Surveyor, Nyeri was unlawful, unjustified and amounts to trespass and accordingly the defendant should be held liable for the action of its officer. The plaintiff's claim against the defendant is for damages for trespass and that the defendant be ordered to remove the fences erected by the District Land Surveyor. Despite demand and notice of intention to sue having been duly given to the defendant and its aforesaid officers, they have ignored and/or declined to make good the plaintiff's claim thereby putting him to loss and prejudice.

The plaintiff ultimately prayed for a declaration that Nyeri District Land Surveyor's action of fencing the plaintiff's Land No.Nyeri/Municipality Block 1/1072 is unlawful and amounts to trespass and that the defendant do remove this fence within 30 days of service of the decree in default of which the plaintiff to remove it at the defendant's cost. The plaintiff further prays for general damages for trespass and loss of use of the suit land, costs of the suit, Interest at court rates and any other or further relief that this Honourable Court may deem fit and just to grant.

The Attorney General through **Allan Messo, Litigation Counsel as he then was** filed a statement of defence at the High Court of Kenya central registry civil side at Nairobi on 16/7/2008 whilst the defendant filed a reply to defence at the the same registry on 16/7/2008. Thereafter pleadings were closed and a notice to admit documents was issued by the plaintiff dated 28/8/2008. The plaintiff's list of

documents was filed on the 29/8/2008 together with a notice to produce dated 28/8/2008. A list of agreed issues was filed on the 8/9/2008 however the same was signed by the firm of **Mbigi Njuguna & Company Advocates** but not the **Attorney General**.

By letter dated 6/1/2009 addressed to the Attorney General the firm of Mbigi Njuguna & Co. Advocates invited the Attorney General to attend registry on the 19/1/2009 to fix a hearing date. The said letter was filed in court on 29/1/2009.

It appears that the Attorney General failed to attend court hence the matter was fixed for hearing on 6/7/2009 in his absence.

On the scheduled date, the matter did not proceed due to the fact that the state counsel handling the same was not ready as he had not perused the plaintiff's documents and that he was unable to procure attendance of his witness who was based in Nyeri hence he applied for adjournment. The plaintiff did not strenuously oppose the application hence the same was allowed by consent and fixed for hearing on 14/10/2009 for one day. The plaintiff was to supply the bundle of documents to the defendant within one day.

On the 14/10/2009 Miss Mwambiri held brief for Mbigi Njuguna In court however nobody appeared for the Attorney General. She informed the court that Mr. Mbigi Njuguna was ready to proceed. The matter was placed aside until 12.00 pm, however, the matter could not be reached due to the fact that the court was proceeding with High Court Civil Case Nos.4869 of 1992 and 261 of 2005 and therefore the matter was to be given a fresh hearing date in the registry.

On the 4/3/2010 when the matter was to proceed for hearing, again the same could not be reached and was therefore adjourned to 3/6/2010 on which date hon Justice Muchelule transferred the matter to the High Court of Kenya at Nyeri for hearing and disposal. This order was made in the presence of M/s Mwambiri for plaintiff and Mr. Bosire for Cherogony for defendant.

On the 23/8/2010 the Deputy Registrar Nyeri signed a letter addressed to the Deputy Registrar High Court of Kenya at Nairobi acknowledging receipt of the file No. NBI HCCC NO.230 OF 2008 for hearing and determination. The letter indicated the new file number as Nyeri HCCC No.99 of 2010. The same was copied to both the plaintiff and defendant. It is important to note at this point that there is no evidence that the letter was served upon both the plaintiff's and the defendant's advocates.

On the 1/9/2010 the Deputy Registrar received a letter dated 20/8/2010 from Mbigi Njuguna & Co. Advocates requesting for the particulars of the new case number but the same appears not to have been copied to the Attorney General.

The Deputy Registrar promptly responded on 3/9/2010 by giving the details of the new case number but did not copy the letter to the Attorney General and did not inform the said firm that he had already communicated to the parties on the new case number.

The firm of Mbigi Njuguna & Co. Advocates invited the Attorney General on the 28/11/2011 to Nyeri to take a date for hearing in the matter and cited the new number thus **Nyeri HCCC No.99 of 2010**. it appears that nobody attended court registry to take a hearing date on behalf of the Attorney General but nonetheless the matter was fixed for hearing on 6/3/2012 at 9.00 am. The hearing notice was duly dispatched to the Attorney General's chambers on 21/2/2012 and was received by one **Patrick** at the Civil litigation registry. On the hearing date, the plaintiff filed an affidavit of service of the hearing notice and the matter proceeded for hearing upon proof of service before Hon. Justice Wakiaga and was to be mentioned on 7/5/2012 to fix a judgment date. There is no indication as to what happened on the 7/5/2012 however there is evidence that the matter was later fixed for mention on 28/6/2012.

On the scheduled date, **Mbigi Njuguna** did not appear for plaintiff but M/s Gathagu appeared for the Attorney General and requested to be given time to set aside the proceedings of 6th March 2012. the matter was stood over generally to enable the Attorney General make the intended formal application.

On the 25/7/2012 the Attorney General filed an application dated 23/7/2012 to set aside the proceedings of 6/3/2012 and any other proceedings grounded on the facts that the defendant was kept in the dark after the suit was transferred from Nairobi to Nyeri and that the plaintiff did not serve the defendant's office in Nyeri with the hearing notice of 3rd March, 2012 hence the case proceeded *ex parte*. In the defendant's view he has a good defence to the suit which raises triable issues and has not deliberately refused and/or neglected to file or attend court. The Attorney General believes that if the orders sought herein are not granted, the defendant stands to be highly prejudiced and will suffer irreparable harm. He also believes that the plaintiff/respondent will not be prejudiced if the orders sought are granted and therefore It is in the interest of justice that the orders sought be granted.

In the affidavit of Teresia W. Gathagu, it is deponed that this suit was initially filed in Nairobi as case **No. H.C.C.ELC 230 of 2008** and that the Honourable Attorney General had entered appearance and filed defence. The court record shows that a state counsel had severally attended court in Nairobi on behalf of the defendant. On 3rd June, 2010 the High Court at Nairobi made an order that the suit be transferred to Nyeri for disposal. Thereafter, it appears from the court record that the Attorney General was not informed of the progress in the case. On 28th June, 2012, she attended court before **Hon. Justice Honourable Wakiaga** upon seeing the matter on the day's cause list. It was in court where she learnt that the case had proceeded *ex parte*, and on that day, it was being mentioned so that a judgment date could be given.

That upon perusal of court file, she established that there had been previous communication between the plaintiff's advocate and the court, and the Attorney General had not been involved. Through this communication the case had been given a new number. There are letters dated 20th August, 2010 and 3rd September, 2010 to that effect. She also noted from the court file that the plaintiff's advocate had been serving hearing notices upon the head office in Nairobi yet the Attorney General has a regional office in Nyeri. An invitation to fix hearing date was sent to Nairobi quoting the Attorney General's reference as AG/MLS/45/08 and indicating the new number. A hearing notice was also sent quoting the Attorney General's reference as G/MLS/US/08 copies are in the court file. She believes that the Attorney General's office which handles more than two thousand cases on behalf of the Government could not properly place these two communications since the office had not been informed of the new case number. It is because of this confusion that the Attorney General did not attend court when the matter came up for hearing on 6th March, 2012. The plaintiff ought to have served the Attorney General's office in Nyeri with the hearing notice of 6th March, 2012 but deliberately failed to do so. That this court should set aside the proceedings of that day and any subsequent and order the case proceedings to start afresh so that the defendant is given an opportunity to be heard.

The plaintiff on his part filed a replying affidavit whose gist is that he attended hearing of this case on 6th March 2012 and the matter proceeded in absence of the defendant. That he was informed by his advocates and verily believe it to be true that the defendant was duly served but did not attend. The States Law Offices in Nyeri has never been on record in this matter and the allegation that they were kept in the dark cannot be sincere. The Attorney General's office in Nairobi had liberty to instruct its Nyeri office and communicate the same to its lawyers but he was told by his lawyers that there was no such communication hence the said Nyeri office remains a stranger to this matter. He verily believes that after waiting for several years, he should not be made to suffer further at the behest of a state counsel who claims to have seen a case in the cause list while she has not shown clear instructions in the matter.

When the matter came up for hearing, Mr. Muthuri submitted that the defendant has a good defence raising triable issues and has been attending court and wholly relied on the affidavit of Teresia Gathagu. He submitted that the defendant has a right to be heard under **Article 159 of the Constitution** and that the court should not unduly rely on procedural technicalities.

Miss Munga on her part argued that the applicant did not move the court appropriately by coming under Section 3 and 3A of the Civil Procedure Act. She argued that the main prayer is setting aside proceedings that took place when the defendant was absent.

I agree with Mr. Muthuri for the Attorney General that Miss Munga's argument on the section

under which the application is brought is based on technicalities hence upholding the same will be going contrary to the spirit of **Article 159 of the Constitution** that provides that the court should not unduly regard procedural technicalities. Though **Order 12 of the Civil Procedure Rules** is not cited in the body of the Notice of Motion, failure to do so is not fatal as the court is obliged to look into the merits of the case.

This court observes that the issue before it can be summarized as whether the Attorney General was properly informed by the court on the new case number and therefore whether he was able to appreciate the letter by the Deputy Registrar dated 23/8/2010 that is if the same was served upon his office. This court finds no evidence on record that the said letter was sent to the Attorney General as there is not evidence of postage or service. Secondly, the court finds that the letter by the Deputy Registrar dated 3/9/2010 was addressed to Mbigi Njuguna but not copied to the Attorney General. The Court finds that there were procedural irregularities in the registry that caused the Attorney General to be denied an opportunity to be heard. There is a likelihood that the Attorney General's chambers in Nairobi were unable to comprehend Nyeri HCC No.99 of 2010 as they had not been properly notified of the new case number. Though the Attorney General was present when the order transferring the suit to Nyeri was made, he had a right to be informed of the new case number.

However, this court is not moved by the modalities in the Attorney General's office as the Civil Procedure Rules are very clear that service upon the A.G is effected by leaving the document within the the prescribed hours at the office of the A.G ,or of any agent whom he he has nominated for the purpose ,but in either case with a person belonging to the office where the document is left or by posting it to in a prepaid registered envelope addressed to the Attorney General or any such agent aforesaid and agrees with the plaintiffs counsel that it is upon the Attorney General to organize his office. I uphold Miss Munga's submission that since the Attorney General's office in Nairobi was on record and there was no communication that his office in Nyeri had taken over the matter it was only proper that the office in Nairobi be served and therefore the allegations that the Attorney General's office in Nyeri had been kept in the dark cannot be sustained. However, the court finds that failure to inform the Attorney General of the new case number by the Deputy Registrar High Court of Kenya at Nyeri might have caused some hardship to the office to comprehend that Nyeri HCCC No.99 of 2010 was indeed the new number for Nairobi H.C.C.C (ELC) No.230 of 2008.

The principles of setting aside *ex parte* judgment applies to the setting aside of *ex parte* proceedings, though there is no provision for setting aside *ex parte* proceedings. There are legal minds within the school of thought that parties have to wait until judgment is delivered to apply the provision of order 10 rule 11 to set aside the same whilst other legal minds are of the opinion that the court can apply its inherent powers to set aside proceedings tainted with procedural impropriety. This court has unfettered discretion to vary or set aside its decision to proceed with the trial in the absence of the Attorney General but must exercise the discretion judiciously. The main concern is for the court to do justice to the parties and to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. In applying this principle this court finds that the mistakes error or inadvertence herein in failing to notify the Attorney General with the new case number cannot be visited on the defendant but the same can be visited on the Deputy Registrar High Court.

The rules of natural justice and fair administration of justice dictate to this court that a party must be given a fair hearing and an opportunity to be heard. Failure to disclose the new number to the Attorney General was an affront to the cardinal rules of natural justice and therefore denied the Attorney General an opportunity to be heard. The upshot of the above is that the application is found merited and allowed with no orders as to costs as the mistakes were not occasioned by the plaintiff. Orders accordingly.

***Dated, signed and delivered at Nyeri this 16th day of May 2014***

**A. OMBWAYO**

**JUDGE**