



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 1458 OF 2005**

**VIJAY KUMAR MANDAL .....PLAINTIFF**

**VERSUS**

**RAJINDER KUMAR MANDAL .....DEFENDANT**

**RULING**

1. Before me is a Notice of Motion dated the 9<sup>th</sup> September 2013. It is brought under the Judicature Act Cap 8, High Court (Practice and Procedure Rules) Part 1 Rule 3, Order 12 rule 7, Order 40 rule 1, Order 51 rules 1 and 15 of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act Cap 21.

2. The plaintiff seeks the following orders;

i. That the order of this Honorable Court made by the Honorable Lady Justice Ougo on 31<sup>st</sup> May 2013 and issued on 6<sup>th</sup> June 2013, inter alia, striking out the plaint dated 8<sup>th</sup> April 2005 and filed in Court on 6<sup>th</sup> December 2005 for being time barred by virtue of the operation of Section 4(1) of the Limitation of Actions Act Cap 22 Laws of Kenya be set aside for lack of service of the hearing notice dated 25<sup>th</sup> March 2012 on the plaintiff/applicant.

ii. That the hearing of this suit and in particular of the counterclaim dated 16<sup>th</sup> February 2006 be stayed pending the hearing and determination of this application.

iii. That the plaint dated 8<sup>th</sup> April 2005 and filed in Court on 6<sup>th</sup> December 2005 be reinstated and the plaintiff/applicant's suit against the defendant/respondent as set out in the said plaint be set down for hearing.

iv. That pending the hearing and determination of this application, the defendant/respondent, whether by himself, his servants and/or agents or otherwise howsoever be restrained from interfering howsoever with the plaintiff/applicant's quiet enjoyment, possession and occupation of the suit property.

v. That this Honorable Court do make such other orders as it may deem just and expedient pending the hearing and determination of this application.

vi. That the costs of this application be provided for.

3. The application is based on the grounds stated on the face of the application.

- a) That the plaintiff/applicant was not served with the hearing notice dated 25<sup>th</sup> March 2013 which related to the hearing of the application dated 14<sup>th</sup> August 2006.
- b) That whereas the defendant/respondent purported to serve the hearing notice dated 25<sup>th</sup> March 2013 to the plaintiff/applicant in London by registered post, there was no leave granted by court to allow the defendant/respondent serve any court to allow the defendant/respondent serve any court process out of jurisdiction by registered post.
- c) That the purported service of the hearing notice dated 25<sup>th</sup> March 2013 to London by registered post was irregularly and contrary to the mandatory provisions of Orders 5 and 6 of the Civil Procedure Rules, 2010 on the service of court process outside jurisdiction.
- d) That even the Notice of Motion application dated 17<sup>th</sup> December 2012 in which the defendant/respondent sought leave to serve the plaintiff/applicant by substituted service was withdrawn by the defendant/respondent's advocate on 6<sup>th</sup> February 2013 before it could be heard and/or determined.
- e) That the order made by the Honorable Lady Justice Ougo on 31<sup>st</sup> May 2013 was therefore passed after ex-parte proceedings which were conducted and concluded without the knowledge of the plaintiff/applicant.
- f) That the order made by the Honorable Lady Justice Ougo on 31<sup>st</sup> May 2013 was passed on the wholly erroneous ground that the plaintiff/applicant had been served with the hearing notice for the hearing of the defendant/respondent's application dated 14<sup>th</sup> August 2006 while in fact, no hearing notice was served on the plaintiff/applicant.
- g) That the order made by the Honorable Lady Justice Ougo on 31<sup>st</sup> May 2013 was passed on the wholly erroneous ground that the defendant/respondent's advocate had served the hearing notice for the application dated 14<sup>th</sup> August 2006 on the plaintiff/applicant by registered mail while in fact such service was unlawful and irregular because no leave had been granted by the court to allow for service outside jurisdiction.
- h) That by 30<sup>th</sup> April 2013 when the application dated 14<sup>th</sup> August 2006 was heard, Mr. Satpal Singh Jowhal, advocate, who had the conduct of the matter on behalf of the plaintiff/applicant had been restrained by an order of this Honorable Court made by the Honorable Mr. Justice Odunga on 7<sup>th</sup> November 2012 from acting for the plaintiff/applicant.
- i) That the plaintiff/applicant who was by then acting in person was therefore unduly prejudiced because he was not even informed that his advocate had been restrained from representing him and he was thereby acting in person.
- j) That the main and compelling claim made by the defendant/respondent in the application dated 15<sup>th</sup> August 2006 and taken into consideration by the Honorable Lady Justice Ougo in passing the order dated 31<sup>st</sup> May 2013 is that the plaintiff/applicant's claim against the defendant/respondent had become time barred and the plaintiff/applicant had lost the right to sue for recovery of the suit property due to the lapse of the period of limitation of six (6) years while in fact this was and is not the case.
- k) That the plaintiff/applicant had and still has a good and valid claim against the defendant/respondent because the subject matter of this suit being immovable property and the deed of settlement having been entered into on or about 18<sup>th</sup> April 1996, the applicable period of limitation would only start running upon the expiry of a period of twelve (2) years from the date of breach by the defendant/respondent.

l) That this suit was filed on or about 6<sup>th</sup> December 2005, well before expiry of the period of limitation.

m) That the defendant/respondent misled this Honorable Court into believing that the plaintiff/applicant's claim was time barred while this was not the case.

n) That the suit land Title No. LR 37/303 a prime property situate along Hombe Road in Nairobi and the plaintiff/applicant is justifiably apprehensive that the defendant/respondent will prosecute his counterclaim against the plaintiff/applicant ex parte before this application is heard and determined and thereafter proceed to dispose off or otherwise deal with the suit land in which case the plaintiff/applicant will suffer substantial and irremediable losses due to the uniqueness of the property, its value and sentimental attachment.

o) That since the order dated 31<sup>st</sup> May 2013 was made the defendant/respondent has indeed proceeded to disclaim the plaintiff/applicant's ownership of the suit property. He has written to the plaintiff/applicant's tenant on the suit property threatening them with unspecified dire consequences if they continue to recognize the plaintiff/applicant as their landlord.

p) That upon setting aside of the order dated 31<sup>st</sup> May 2013, the plaintiff/applicant intends to prosecute his claim against the defendant/respondent as set out in the plaint dated 8<sup>th</sup> April 2005.

q) That his application has been made without unreasonable and/or undue delay because the plaintiff/applicant was unaware of the progress and outcome of the said application until he received a letter dated 3<sup>rd</sup> July 2013 from his tenant who sought clarification on the ownership of the suit property. The tenant's letter was in turn prompted by the defendant/respondent's own letter to the said tenant notifying it of the said court order and its consequence on the ownership of the suit property.

r) That in view of the foregoing, there is good and sufficient cause and it is in the interests of justice for the order dated 31<sup>st</sup> May 2013 to be set aside.

4. The grounds as stated explain the applicant's case.

5. The application is also supported by the affidavit of Ms. Vijay Kumar. He explains the background of the suit before the Court.

6. The application was opposed. The defendant/respondent filed a relying affidavit dated the 2<sup>nd</sup> October 2013.

7. I have read and considered the said affidavits. On the 31<sup>st</sup> May 2013 I gave a ruling and dismissed the plaintiff suit for being time barred. I found that the plaintiff suit was filed way beyond the six years. I also noted that there was no respondent to the said application and that the plaintiff had been served by way of registered post as per the affidavit of service dated 4<sup>th</sup> April 2013.

8. The applicant claims that he was not served. As per his affidavit, he purported service of the hearing notice dated 25<sup>th</sup> March 2013 to London by Registered Post was irregular and contrary to the mandatory provisions of Order 5 rule 6 of the Civil Procedure Rules on the service of court process outside the Court's jurisdiction; that the defendant's application dated 17<sup>th</sup> December 2012 which sought leave to serve the applicant by way of substituted service was withdrawn by the defendant on the 6<sup>th</sup> February 2012. I can confirm that from the Court record that the said application was withdrawn.

9. This Court proceeded with the application on the basis of the affidavit of service filed in court on the 4<sup>th</sup> April 2013. The process server states that;

**“That on the 28<sup>th</sup> March 2013 I received hearing notice dated 25<sup>th</sup> March 2013 from M/s H A T Anjarwalla & Company Advocates for service upon Vijay Kumar Nandal, plaintiff herein by substituted service (Registered Post.)**

10. Paragraph 3 of the said affidavit of service states that the said notice was registered on the 28<sup>th</sup> March 2013. The attachment confirms the processer’s action. The application dated 17<sup>th</sup> December 2012 was filed in Court on the 18<sup>th</sup> December 2012. In the said application the defendant sought to serve the plaintiff by Registered Post at the plaintiff’s last known address, P.O. Box 41008 Nairobi Kenya and 121 Walsington Fold London N1LT1R. This application was withdrawn on the 6<sup>th</sup> December 2013. The defendant thereafter proceeded to fix the application dated 14<sup>th</sup> August 2006 for hearing and served the said application by way of registered post without the leave of Court. I agree with the applicant that in the absence of proper service the order I made on the 31<sup>st</sup> March 2023 was passed ex-parte and concluded without the plaintiff’s knowledge. I find that indeed the plaintiff was not properly served and any order made is prejudicial to him. He also had no on record.

11. The applicant has also stated that he has a good claim against the defendant as the claim is based on immovable property and the deed of settlement having been entered into on 18<sup>th</sup> April 1996 and that the applicable period of limitation starts running upon the expiry of 12 years from the date of breach by the defendant/respondent.

12. In opposing the application the respondent claimed that the firm of Kamara is unprocedurally on record and that the replacement by Miss Kiprop Advocate does not cure the issue. On the application Counsel for the respondent argued that the applicant seeks to set aside the Court order issued on the 31<sup>st</sup> May 2013 without indicating if the plaintiff has preferred an appeal or review of the matter and that therefore the application for stay is a blank one. Counsel further argued that the injunctive orders sought do not meet the principles set out in the case of *Giella – Vs – Cassman Brown*. That under Order 5 rule (6) can be served anywhere. Counsel argued that the applicant has come to Court with unclean hands.

13. The applicant’s response was that if the application is granted then it does not require the plaintiff to file an appeal or application for review. On whether the plaintiff will suffer loss Counsel referred to the applicant’s affidavit at paragraphs 21 and 22 where he states that he stands to lose the property and that the defendant has made some specific threats.

14. My findings are as follows: I note that the defendant’s previous counsel M/s Jowhal Advocate was restrained from acting for the plaintiff on the 7<sup>th</sup> November 2012. M/s Kamaara filed a Notice of Appointment on 16<sup>th</sup> June 2013. What they should have filed was a Notice of Change of Advocate. This I find can be cured by the provisions of Articles 159 (2) (d) as it is a procedural technicality. Knowing that M/s Kamaara Advocate was on record from 16<sup>th</sup> July 2013 what M/s Kiprop did on the 25<sup>th</sup> February 2014 is proper and therefore I find that they are properly on record.

15. On the prayers sought, I find that the applicant has demonstrated that at the time the Court proceeded with the application dated 14<sup>th</sup> August 2006, the respondent had no leave to serve by way of substituted service. The applicant was therefore not heard and any orders made are prejudicial to him.

16. The application is brought under Order 12 rule 7 which provides that;

**“where under the order judgment has been entered and the suit has been dismissed the court on application may set aside or vary the judgment on order upon such terms as may be just”.**

Order 12 provides for the hearing and consequence of nonattendance. The suit is fixed for hearing. Order 40 deals with temporary injunctions and interlocutory orders and order 51 deals with applications.

17. Section 3A of the Civil Procedure Act provides that nothing in this Act shall limit or otherwise affect

the inherent power of the Court to make such orders as may be necessary for the ends of justice to prevent an abuse of the process of the Court. With this provision in mind, even though this Court has not been moved under Order 44 for review orders. I find that it is only just and fair and in the interest of justice to grant prayer No. 2 of the application dated the 9<sup>th</sup> September 2013.

18. The applicant has raised issues on the limitation period and deed of settlement. I again find that it is only in order that he be given a chance to be heard and therefore the counter claim will be deal with at the time the plaintiff is heard. I grant prayer No. 4 as sought. On the injunction the applicant has exhibited a note from the defendant to the tenant. I have read it and find that it does not amount to a threat. I therefore decline to grant the injunction sought. Costs shall be in cause.

Dated, signed and delivered this 30<sup>th</sup> Day of *June*, 2014

**R. E. OUGO**

**JUDGE**

In the Presence of:-

..... For the Plaintiff/Applicant

.....For the defendant/respondent

.....Court Clerk