



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**Civil Suit 269 of 2010**

**JOHN SIMON NJENGA**

**NGIGI.....PLAINTIFF**

**-VERSUS-**

**TABITHA NYAWIRA**

**WAMATHAI.....DEFENDANT**

**RULING**

The Application herein by the Defendant dated 9<sup>th</sup> July 2010 is seeking stay of execution of the orders made on 28<sup>th</sup> day of June 2010, and that the said orders be set aside and the Defendant be allowed to defend the suit. The main grounds for the application are that the service of pleadings was irregular and that the Counsel appointed to represent the Defendant failed to take any action in the matter.

The Defendant in her supporting affidavit states that she was served with a photocopy of a plaint in this suit sometimes in June 2010, and that on 4<sup>th</sup> June 2010 she received a telephone call from one Humprey Okuku informing her that he had a court document he wished to give to her. The Defendant further states she told the said Humprey Okuku to take the court document to her advocate at the time, Mr. Mburu Machua, and that she telephoned the said Advocate and told him to accept the document and to inform her of its contents. The Defendant avers that when she eventually managed to meet with the said Advocate on 19<sup>th</sup> June, 2010 he assured her that he had sent a memorandum of appearance and was taking care of her case. She also avers that the said Advocate has never shown her the pleadings in this case nor has he asked her to write any affidavit, and that she engaged her current Advocate who managed to get photocopies of the pleadings and found that an *ex parte* order has been issued against her .

The Defendant's Counsel in written submissions dated 1<sup>st</sup> October 2010 put forward the argument that there was also misrepresentation on the part of the Advocate representing the Defendant at the time of the hearing of the application, since it had been discovered that the said Advocate had not taken out a practicing certificate for the year 2010 and could therefore not have filed any pleadings. The Defendant further submitted that her interests as a owner of the suit property will be irreparably affected unless the orders made on 28<sup>th</sup> June, 2010 are set aside and the application dated 2<sup>nd</sup> June 2010 be heard *inter parties*. The evidence produced by the Defendant produced were copies of the court ruling and orders sought to be stayed and set aside.

The Plaintiff is opposing the application and has filed a Replying Affidavit sworn on 15<sup>th</sup> July 2010. The Plaintiff states that the Defendant does not deny having been served with copies of the pleadings herein, and that has indeed admitted service, having admitted to talking to the process server Humprey Okuku,

and to instructing and directing the said process server to serve her Advocate, one Mburu Machua. The Plaintiff further states that the said Advocates accepted the documents from the process server as instructed and duly stamped, signed and dated them 14<sup>th</sup> June, 2010.

The Plaintiff also avers that the Defendant knew that the matter was to be heard on 22<sup>nd</sup> June, 2010 and even if her Advocate had no practicing certificate this did not stop the Defendant from attending court on her own behalf. The Plaintiff further avers that if it was the mistake of her Advocate not to be in Court, then the Defendant's recourse lay elsewhere and not in this suit. The final averment made by the Plaintiff is that no proper reason has been given to warrant stay of execution of the orders granted on 28<sup>th</sup> June, 2010 or the setting aside of the same, and that since he is the registered proprietor of the suit property, no damage is being suffered by the Defendant.

The Plaintiff's Counsel filed written submissions dated 25<sup>th</sup> October 2010 and has submitted that the service was regular under Order V Rule 9(1) and Order V Rule 9(2) of the revoked Civil Procedure Rules in terms of service on an agent or Advocate. Further that the Defendant and her Advocate met on 19<sup>th</sup> June, 2010 before the application giving rise to the said court orders was heard, and hence they had sufficient time to prepare and file a replying affidavit which they never did. The Plaintiff's counsel has also submitted that the Defendant's application is brought under Order IXB Rule 8 of the Revoked Civil Procedure Rules, which are wrong and inapplicable provisions of the law as no judgement has been entered in this suit. Counsel submitted that the applicable provisions were Order XXI Rule 22 of the revoked Civil Procedure Rules that address stay of execution. The Plaintiff's Counsel in addition submitted that since the orders sought to be set aside were interlocutory orders, the Defendant still has the right to defend the suit.

I have read and carefully considered the pleadings, evidence, and written submissions by the respective parties to this application. I will first deal with the preliminary issue of the applicable provisions of the law. As submitted by the Plaintiff's Counsel the application is brought under Order IXB Rule 8 of the revoked Civil Procedure Rules which provided as follows:

"Where under this Order judgment has been entered or the suit has been dismissed, the Court, on application by summons, may set aside or vary the judgment or order upon such term as just."

Similar provisions are now provided for in Order 10 Rule 11 of the Civil Procedure Rules of 2010.

In **Kamunyi v Macharia & Anor (1990) KLR 470**, a case with similar facts, Bosire J (as he then was) held that Order IXB of the revoked Civil Procedure Rules did not deal with setting aside of orders made *ex parte* in applications of an interlocutory nature. It was held that the applicable Order in such cases should be Order XXXIX Rule 4 of the revoked Civil Procedure Rules, which provisions are now found in Order 40 Rule 7 of the Civil Procedure Rules of 2010. I am however not inclined to find that this procedural technicality is fatal to the Defendant's application. In addition, this Court is mandated to apply any other applicable provisions of the law under Article 159 (2) of the Constitution and sections 1A, 1B and 3A of the Civil Procedure Act in the interests of justice.

On the substantive orders sought, I however have difficulty in proceeding with consideration of the two orders in the manner sought, as they are mutually exclusive and have not been sought in the alternative. In addition I find that no provision for stay of interlocutory judgements is provided for under the applicable Order, which is Order XXXIX of the revoked Procedure Rules. Further, the provisions cited by the Plaintiff's counsel on stay of execution namely Order XXI Rule 22 of the revoked Procedure Rules, which are also found in Order 22 Rule 22 of the Civil Procedure Rules of 2010, must be read in the context of that Order and only apply when there is an application for execution of a decree filed under the said Order, which is not the case in the present application. I am in this respect guided by the Court of Appeal's decision in **Industrial & Commercial Development Corporation v Onyango (1983) KLR 418** where it was held that even though there may be circumstances in which the court may exercise its discretion to stay execution where there is no appeal pending, grounds had to be established to invoke the provisions of Order XXI rule 25 of the revoked Civil Procedure Rules, which dealt with stay of execution

when there is a suit pending in any court between a decree holder and judgement debtor.

I will therefore only address the prayer of setting aside of the orders made on 28<sup>th</sup> day of June 2010. The exercise of the court's power in this respect under Order 40 Rule 7 is discretionary and should be exercised for the ends of justice. The Defendant's main grounds are that the service of the pleadings was irregular and that her Advocate was to blame for failing to appear at the hearing in which the said orders were given. The Defendant also pleads that she is being negatively affected by the *ex parte* orders given on 28<sup>th</sup> June 2010.

There is an affidavit of service on record sworn by Humphrey W. Okuku on 21<sup>st</sup> June 2010 attesting to the service of the pleadings in this suit, including the application dated 2<sup>nd</sup> June 2010 that gave rise to the order of this Court made on 28<sup>th</sup> June 2010. It is stated in the said affidavit of service that the pleadings were served on an Advocate, Mr Mburu Machua upon instructions by the Defendant. The Defendant has admitted to having given such instructions in paragraph 5 of her supporting affidavit to the present application sworn on 8<sup>th</sup> July 2011. In addition there is on record a copy of the application filed herein by the Plaintiff dated 2<sup>nd</sup> June 2010 duly endorsed by the said Advocate acknowledging receipt on behalf of the Defendant on 14<sup>th</sup> June 2010.

Despite this finding, upon examination of the said affidavit of service sworn on 21<sup>st</sup> June 2010 I note that the said affidavit does not attest to service of the notice of the hearing of the application dated 2<sup>nd</sup> June 2010, that had been set for 14<sup>th</sup> June 2010. Indeed, upon perusal of the Court record, Counsel for the Plaintiff submitted at the said hearing on 14<sup>th</sup> June 2010 that they had not been able to serve the Defendant, upon the which another hearing date was set for 22<sup>nd</sup> June 2010 with directions that the Defendant be served. There is no evidence of any service of that hearing date on the Defendant, and the Court proceeded to hear the application *ex parte* on 22<sup>nd</sup> June 2010, reserving the ruling for 28<sup>th</sup> June, 2010. It is my finding that the Defendant had no notice of the hearing date of the said application, and therefore has a good cause for not attending the said hearing.

On the ground of prejudice being caused to the Defendant by the *ex parte* orders, the Defendant states that the said orders are negatively affecting her interests as owner of the suit property, but has not produced any evidence of such ownership. I nevertheless do find that there is enough ground already established for the court to exercise its discretion in her favour.

For the reasons given in the foregoing prayer 3 of the Defendant's application dated 9<sup>th</sup> July 2010 is allowed in terms of setting aside of the orders made by this Court of 28<sup>th</sup> June 2010. The costs of the application shall be in the cause. The parties shall proceed to set a hearing date for the *inter partes* hearing of the Plaintiff's application dated 2<sup>nd</sup> June 2010

Dated, signed and delivered in open court at Nairobi this 16th day of January, 2012.

**P. NYAMWEYA**

**JUDGE**