



REPUBLIC OF KENYA

High Court at Eldoret

Civil Case 37 of 2005

IN THE MATTER OF LAND PARCEL NO. CHERENGANY/KAPCHEROP/190 AND SECTION  
38 OF THE LIMITAION OF ACTIONS ACT

JEMELI KANYEI.....APPLICANT

-VERSUS-

WILLIAM ROTICH KIPSANG.....RESPONDENT

RULING

The Chamber Summons dated 21<sup>st</sup> November, 2006 brought under Order IXB Rule 8 and Order XXI Rule 91 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeks several substantive prayers, to wit;

***2. The ex-parte proceedings of 4<sup>th</sup> October, 2006 and the order contained in the Court's Ruling of 19<sup>th</sup> October, 2006 and/or the Court Order given and issued on 19<sup>th</sup> October, 2006 and 26<sup>th</sup> October, 2006 respectively be and are hereby set aside forthwith in favour of hearing the matter on merits.***

***3. Stay of execution of the Orders given and issued on 19<sup>th</sup> October, 2006 and 26<sup>th</sup> October, 2006 respectively and subsequent orders be and are hereby stayed pending the hearing and determination of this Application.***

***4. The Plaintiff's/Respondent's Chamber Summons Application dated 20<sup>th</sup> April, 2005 be and hereby revived and heard inter-partes on merit.***

The Application is supported by the affidavit of William Rotich Kipsang sworn on 21<sup>st</sup> November, 2006. The decisions the Defendant seeks stayed were issued on 19<sup>th</sup> and 26<sup>th</sup> October, 2006.

The Application is opposed by the Plaintiff/Respondent, who has filed his Replying Affidavit sworn on 13<sup>th</sup> December, 2006.

The Defendant's counsel failed to attend court on 4<sup>th</sup> October, 2006 despite the fact that the hearing date was taken in court by consent of the parties' advocates. The advocate for the defendant failed to attend court on the material day and the Plaintiff proceeded to be heard ex-parte. The Defendant's counsel contended that there was communication breakdown within his chambers resulting in failure to attend court on the day the matter was fixed for hearing.

I have considered the arguments presented before the Court. It is clear that the counsel for the Applicant is responsible for the case proceedings in their absence. I would have made a different decision and condemned the counsel. However, this matter involves land which is a sensitive matter and the Applicant ought to be given the opportunity to defend the claim based on adverse possession. The omission of his counsel ought not to be visited on him. I allow the Application dated 21-11-2006 in terms of prayer 4. The Applicant shall bear the cost of the Application and all thrown-away costs payable before the trial.

Order accordingly.

DATED AND SIGNED AT NAIROBI ON THIS 8TH DAY OF AUGUST 2012

**M. K. IBRAHIM**  
**JUDGE**

DATED AND DELIVERED AT ELDORET ON THIS 17<sup>TH</sup> DAY OF OCTOBER 2012

**F. AZANGALALA**  
**JUDGE**

In the presence of: Mr. Onylwa h/b for Mr. Mitei for Plaintiff