



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL CASE NO. 50 OF 2005

**ROBERT JAMES IMBAYA }
DOLOROSA A. IMBAYA }..... PLAINTIFFS**

-VERSUS-

PHILIP JUMA AKOTHDEFENDANT

RULING

The application before court is by way of Chamber Summons dated 7th October, 2010 brought pursuant to Order III Rule 6 & 12, Order IXB Rule 8 of the Old Civil Procedure Rules and Section 1A & b of the Civil Procedure Act. The application is supported by the affidavit of the defendant **PHILIP JUMA AKOTH** dated 7th October, 2010 and on the grounds on the face of the application.

It seeks for orders that the court do set aside the proceedings of 20th May, 2009 and all other consequential orders so that the suit is heard **de novo** and on merit in furtherance of the overriding objects of the suit.

The grounds upon which the application is based are that unknown to the defendant his previous counsel **Mr. Wasilwa** was struck off the role of advocates, that there is no indication on record that the amended plaint was ever served; pre-trial requirements had not been met; the plaintiff will not suffer any prejudice if the order is granted; and that the defendant will suffer substantial loss, damage and prejudice should the matter proceed without his participation.

The plaintiffs objected to the application through the replying affidavit dated 9th November, 2010 and a further affidavit dated 3rd December, 2010 both sworn by the 1st plaintiff **ROBERT JAMES IMBAYA**. The plaintiffs contended that the hearing notice and pre-trial documents, i.e plaintiffs list of documents and issues for determination including the Amended Plaint were duly served. Further that since proceedings have now been typed therefore would be is no need to start the matter a fresh.

The issue for determination by the court is whether the defendant is likely to suffer loss and damage if the matter proceeds from where it has reached and if so whether the matter should start **de novo**.

Only one witness has testified in this matter and the proceedings have now been typed. Although the defendant did not participate at the time the said witness testified he had not denied service of the hearing notice and other pleadings.

The proceedings are now typed, I see no need to have the 1st witness **PW1** give his evidence afresh, however in the interest of fair play as the defendant has a new counsel on record he should be given an opportunity to cross - examine the said witness. In this regard I order as follows:-

1. The parties herein do comply with provisions of order II Rule 2 within 10 days and Order 11 Rule 3 within 30 days.

2. A case conference date be fixed for hearing.

3. The defence counsel do cross – examine PW1 at the next hearing of the case.

4. Costs of the application do abide the out-come of the case.

DATED AND DELIVERED IN KISUMU ON 11.02.2011.

ALI-ARONI

JUDGE

In the presence of:

..... for the plaintiff/applicant(s)

..... for the defendant/respondent(s)