



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**  
**CIVIL CASE NO. 50 OF 2010**

**ELIAKIM WASHINGTON OLWENI ..... PLAINTIFF**

**VERSUS**

**WILSON KIBOR MUTAI ARAP SANG ..... DEFENDANT**

**RULING**

This suit was initially filed at the Nakuru High Court on the 25<sup>th</sup> March 2010. It is essentially a claim for general damages for trespass and/or a permanent injunction against the defendants restraining them from entering, digging, cultivating, harrowing, planting crops or in any manner trespassing upon or interfering with the suit parcel of land known as **UASIN-GISHU/NGENYILEL SETTLEMENT SCHEME/448**. At the time of filing suit, the plaintiff also filed a Chamber Summons for a temporary injunction order to issue against the defendants. On the 29<sup>th</sup> March 2010, the suit was transferred to this Court from the Nakuru High Court for the main reason that the suit land is situated within the jurisdiction of this Court.

The Chamber Summons dated 25<sup>th</sup> March 2010 came up for hearing inter partes on the 26<sup>th</sup> May 2010 but the defendants failed to appear. The applicant was heard in the absence of the defendants and a ruling was rendered on the 3<sup>rd</sup> June 2010 by **Angawa .J.** A temporary injunction order was thus granted against the defendants pending the hearing and determination of the suit.

About eight (8) months later, the present application was filed on 20<sup>th</sup> January 2011 under S. 3, 3A and 63 (e) of the Civil Procedure Act and Order 51 Rule 1 Order 40 Rule 7 and Order 10 Rule 11 of the Civil Procedure Rules. At this juncture the 1<sup>st</sup> defendant/applicant is seeking orders in terms of prayers (c), (d), (e) and (f) of the Notice of Motion.

The application is made on the basis of the grounds contained in the body of the Notice of Motion as supported by the facts contained in the first defendant's supporting affidavit dated 19<sup>th</sup> January 2011.

The respondent/plaintiff is opposed to the application and has filed grounds of opposition dated 27<sup>th</sup> January 2011.

At the hearing of the application, the applicant was represented by learned Counsel, **MR. BULUMA**, while the respondent was represented by learned Counsel, **MR. OKEKE**.

Mr. Buluma submitted that:-

- When the matter came up in Court on 26<sup>th</sup> May 2010, proper service had not been effected upon the first defendant who was allegedly identified by the second defendant by name Arap Sang.
- The said Arap Sang is a person not related to the first defendant and could be anybody as he is yet to participate in these proceedings.
- The contents of the affidavit of service by the Process Server are full of contradictions and inconsistencies such that they should not be believed.
- Paragraphs 10, 11 and 12 of the plaint shows that the maize was planted by the first defendant during the 2009 and 2010 planting season. Therefore an order of injunction would disrupt the status quo.
- There would be no prejudice to the respondent if the application were allowed.
- If the injunction orders remain the way they are, they would be in vain and incapable of enforcement as the suit land has since been sub-divided and titles issued accordingly.

The submission by Mr. Okeke, were that:-

- The Court in its ruling of the 3<sup>rd</sup> June 2010 made a specific finding that the first defendant had been properly served and since the said finding has not been challenged or set aside, it cannot be challenged at this stage. Therefore what the first defendant is now doing is frivolous and vexatious.
- The procedural anchor herein is Order 50 Rule 1 of the Civil Procedure Rules but there is neither a Notice of Motion nor a Chamber Summons before this Court. What is before the Court is a “mongrel” of the two as the title describes a Notice of Motion but the application describes a Chamber Summons.
- Order 51 Rule 10 (2) of the Civil Procedure does not apply herein as there is no proper application which should therefore be struck out for being incompetent.
- On the merits, it is not open for the first defendant to challenge service at this juncture. Notwithstanding that the Process Server was in Court ready to be cross-examined, the first defendant elected not to cross-examine him thereby implying that he (applicant) is not serious in this matter.
- The alleged sub-division of the suit land is not supported by the pleadings. There is no document from the Land Registrar to confirm the sub-division.
- Paragraph 15 of the applicant’s affidavit shows that the applicant has declared the suit land to be his property measuring 10.6 hectares while Annexure “WKM.1” shows that the suit land measures 1.26 hectares meaning that the parcels of land cannot be the same.
- Annexures “WKM.2 a-e” are misleading and in different names. Annexure “WKM.2(e)” is not even mentioned in the supporting affidavit and is therefore improperly annexed.
- The application is an abuse of the Court process. It is based on facts already decided by the Court. A defence to the suit has not even been filed yet the first defendant seeks orders made and founded on the suit, set aside.

This court has given due consideration to the application, its supporting grounds as well as the submissions made for and against by the learned Counsels.

On competence, the submission by the respondent that the application should be struck out for want of competence as it is neither a Notice of Motion nor a Chamber Summons and therefore improper before

the Court is clearly defeated by the provisions of Order 51 Rule 10 (2) of the Civil Procedure Rules 2010 which makes it clear that no application shall be defeated on a technicality or for want of form that does not affect the substance of the application. The defect attributed to the present application is on form rather than the substance. It is thus an irregularly capable of being cured.

Procedural defects would ordinarily not render an application incurably defective unless they relate to the Court's jurisdiction.

On the merits of the application, it is apparent that the proceedings, conducted by the Court on the 26<sup>th</sup> May 2010 were so conducted in the absence of the two defendants including the applicant. What was then due for hearing was the respondent's application for a temporary injunction dated 25<sup>th</sup> March 2010.

Prior to the hearing of the application, the learned Judge observed that the two defendants had not entered appearance despite being served as expressed in the affidavit on record.

The said affidavit is that dated 27<sup>th</sup> April 2010 and filed herein on 26<sup>th</sup> May 2010. It is deponed by a Process Server **HEBRON ODHIAMBO OMOLO** and is so detailed that it must have left no doubt in the mind of the learned Judge that indeed the two defendants were personally served with a hearing notice for the inter parties hearing of the material application. This Court too, is left with no doubt that indeed the applicant was properly and lawfully served but he failed to personally or through his advocate appear for the hearing of the application.

In the premises, the applicant cannot now be heard to complain about non-service. He was given an opportunity to be heard in opposition to the material application but failed to utilize the opportunity. His present application may therefore be construed as a gross abuse of the Court process. He has not provided any legal justification for the grant of the orders sought. There is no valid ground for the setting aside of the ex parte proceedings conducted on 26<sup>th</sup> May 2010. There is also no valid ground for the discharge, variation and/or setting aside the orders of injunction granted by the Court on 3<sup>rd</sup> June 2010.

The parcel of land subject of this suit is Uasin Gishu/Ngenyilel Settlement Scheme/448. The validity or otherwise of the titles annexed to the applicant's supporting affidavit to confirm the alleged sub-division of the suit land may be determined only after a full hearing of the suit.

In sum, the present application is devoid of merit and must be dismissed. It is accordingly ordered. Costs to the respondent.

**J. R. KARANJA**  
**JUDGE**

**[Read and signed this 9<sup>th</sup> day of February 2011]**  
**[In the presence of Mr. Buluma and Mr. Okeke]**