REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC NO. 610 OF 2008

GEORGE O. OCHOLLA (Suing on his behalf and on behalf of 200 others Collectively known as

Gituamba Quarry Micro Investors Self Help Group).....PLAINTIFF

V E R S U S

1. NGINA KENYATTA.....1ST DEFENDANT

2. GITUAMBA STONES LIMITED.....2ND DEFENDANT

R U L I N G

The Plaintiff filed this suit on his behalf and on behalf of 200 other members of Gituamba Quarry Micro Investors Self Help Group claiming, that, pursuant to an oral licence the Defendants had for the last 30 years allowed them to carry out stone quarry business in the suit land, that is LR No. 11494 Nairobi, which belongs to the 1st Defendant. The licence permitted the Plaintiffs to enter into, occupy and exclusively excavate building stones for sale from the suit land at a fee based on the size of the stones excavated. The Plaintiffs were required to surrender to the Defendants all the by-products for sale to third parties. The 2nd Defendant was pleaded to be the management agent of the property for the 1st Defendant and that it had variously indicated to the Plaintiffs that the licence would not be terminated without justifiable cause and reasonable notice. However, that on 6th October 2008 the 2nd Defendant had issued both oral and written notices to the Plaintiffs to vacate the suit land by 31st December 2008 and no reason had been given for the termination of the licence. The suit was filed seeking that the 3 months notice be declared to be oppressive, unjustified, inequitable and incapable of compliance with. They sought an order that such licence could only be terminated by issuing a 5 years notice or such other period that the court may determine. Also sought was an injunctive relief. With the suit was an urgent chamber application for a temporary injunction against the Defendants and an order that the members of the Self

Help Group be notified by public advertisement of the filing of the suit.

On 6th January 2009 Wainaina Ireri & Company advocates entered appearance for the Defendants. On 16th February 2009 the court entered an interlocutory judgment at the request of the Plaintiff, and the same was entered on basis that the Defendants had failed to file a defence within the prescribed time. On 26th March 2009 the Defendants applied under Order 9A rules 10 and 11 of the Civil Procedure Rules and section 3A of the Civil Procedure Act to have the default judgment and any consequential orders set aside and that unconditional leave be granted for them to file a defence to the claim. There was a draft defence annexed to the supporting affidavit in which the Defendants denied knowing the Plaintiffs Group, or dealing with them, or having entered into any oral or written agreement, or having granted them a licence. They pleaded that they entered into agreements with individual applicants and granted them licences with a proviso that a 3 months' notice would be issued to revoke them. The Defendants stated that it had issued licences to 21 individuals, 15 of whom had complied.

The Defendants have alleged that the interlocutory judgment was unprocedurally entered. This is because although the judgment was entered on 16th February 2009 on basis that the Process Server had on 5th January 2009 sworn an affidavit "SKN2" to say he had on 29th December 2008 received summons to enter appearance, copy of plaint, application, etc, and served them on the Defendants, the court record shows that summons to enter appearance were issued on 29th December 2008 ("SKN 3") and collected for the Plaintiffs advocates on 5th January 2009 (as shown by Court's Register "SKN 4"). It follows that when the Process Server Benedict Mutuku Musembi swore that he had the summons on 29th December 2008 he was not telling the truth. The Defendants' advocates sought that the Plaintiffs' advocates avails the Process Server for cross-examination on the affidavit but he was not availed. The Financial Controller of the 2nd Defendant swore an affidavit to say the only documents that were left with their quarry manager one Waithaka were a copy of the plaint and the application, and not the summons. It would appear that the Defendants took precautionary measure by filing a memorandum of appearance as summons had not been issued.

Secondly, and I agree with the Defendants that, the Plaintiffs were not making a liquidated demand in the plaint and therefore the provisions of Order 9A rules 3 to 9 were not available to them as a basis for seeking an interlocutory judgment. The decisions of my learned brothers in **Walter Kimani Ndungu T/a Wakim Quanti consults -Vs- Mount Kenya Roses Ltd & Others HC (Milimani Commercial Courts) CC No. 1440** of **2000** and **Arthur K. Apundu –Vs- M/S Justnice Limited & Others HC (Milimani Commercial Courts) C.C. No. 738 of 2003** support the law that interlocutory judgment can only be entered in default of defence if the claim is liquidated. It follows that the judgment entered herein is unlawful. The court has no discretion in the matter but to set it aside.

In conclusion, the interlocutory judgment entered against the Defendants on 16th February 2009 is set aside. This is together with any consequential orders. The Defendants are allowed to file and serve their defence within 15 days. Costs shall be paid by the Plaintiffs.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MARCH 2011

A. O. MUCHELULE

J U D G E