



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

LAND AND ENVIRONMENTAL LAW DIVISION

CIVIL SUIT (ELC) NO.145 OF 2009

JAMES JORAM NYAGAH.....1ST PLAINTIFF
ABIJA JAMES NYAGA.....2ND PLAINTIFF

VERSUS

THE HON. THE ATTORNEY GENERAL.....1ST DEFENDANT
THE LAND REGISTRAR THIKA.....2ND DEFENDANT
KAHAWA SUKARI LTD.....3RD DEFENDANT

RULING

1. By a chamber summons dated 13th April, 2010, Kahawa Sukari Ltd came to this court seeking several orders as follows:

- (i) That this application be heard *ex-parte* in the first instance and be certified as urgent.
- (ii) That Kahawa Sukari Limited be added as the 3rd defendant in this suit.
- (iii) That the interlocutory judgment entered against the defendant (sic) on 26th November, 2009 be set aside upon such terms as are just.
- (iv) That the applicant be granted leave to file a defence and, if need be, a counterclaim.
- (v) That the applicant be at liberty to pray for such further or other orders as this honourable court may deem fit and just to grant.
- (vi) That the costs of this application be provided for.

2. The application was certified urgent and fixed for *interparte* hearing on 4th May, 2010. On 29th April, 2010 the 1st defendant filed a replying affidavit. However when the matter came up on 4th May, 2010, neither the plaintiffs nor the defendants attended court. The court granted the prayer joining Kahawa Sukari Ltd as a 3rd defendant to this suit, and ordered that the plaintiffs and 1st and 2nd defendants be served again with a hearing notice for hearing of prayers (3) & (4) of the chamber summons dated 13th April, 2010. It was not until 5th April, 2011 when the applicant's counsel and the plaintiffs' counsel

appeared before me and argued the application dated 13th April, 2010 in regard to prayers (3) & (4).

3. Surprisingly, there was no representation for 1st defendant, even though the prayers specifically sought to have the *ex-parte* judgment entered against 1st defendant set aside. Nonetheless, the applicant has urged the court to set aside the interlocutory judgment entered against 1st defendant pointing out that the judgment entered against the 1st defendant was irregular. The applicant has further endeavoured to demonstrate that it is the beneficial owner of the suit property, and that being a necessary party it should be granted leave to file a defence to the plaintiff's claim.

4. For the plaintiffs it was argued that the interlocutory judgment having been entered against the Attorney General, it is only the Attorney General who can move the court to set aside the judgment. It was further argued that the application was misconceived.

5. I have given due consideration to this application. The issue of the applicant being joined as a party to this suit was settled on 4th May, 2010 when the court granted prayer 2 of the application and added the applicant as a 3rd defendant in the suit. That order has not been set aside and the court cannot revisit the issue.

6. As regards prayer (3) for the setting aside of the interlocutory judgment which was entered against the 1st defendant on 26th November, 2009, my perusal of the court record reveals that there is an error apparent on the face of the record. This is because the judgment entered on 26th November, 2009 was entered when there was a defence on record dated 26th June, 2009 filed by the Attorney General on 30th June 2009. Therefore, interlocutory judgment ought not to have been entered. It is true that the application for setting aside the interlocutory judgment ought to have been made by the Attorney General. Nonetheless, the applicant has demonstrated that the orders sought by the plaintiffs will completely compromise the applicant's claim to the suit property unless the applicant is given an opportunity to defend the plaintiff's suit.

7. For the above reasons, I find it fair and just that prayers (3) & (4) of the application dated 13th April, 2010 be granted and that the applicant be given 15 days within which to file its defence and counterclaim to the plaintiffs' suit. Orders accordingly.

Dated and delivered this 27th day of May, 2011

H. M. OKWENGU
JUDGE

In the presence of: -
P.N. Mugu for the plaintiff
Ndengeri H/B for Kipkoge for the Attorney General
B. Kosgei - Court clerk