



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**(Coram: Ojwang, J.)**

**CRIMINAL APPEAL NO. 267 OF 1996**

**KENATCO TRANSPORT CO. LTD. (IN  
RECEIVERSHIP).....PLAINTIFF/APPLICANT**

**-VERSUS-**

**PETER M. KIMANI.....DEFENDANT/  
RESPONDENT**

**RULING**

The plaintiff moved the Court twice: by the Chamber Summons of **11<sup>th</sup> May, 2010**; and by the Notice of Motion of **23<sup>rd</sup> August, 2010**. The first is brought under Order VI [Rules 13(a), (b), (d) and 16 of the Civil Procedure Rules in the earlier edition] and s.3A of the Civil Procedure Act (Cap.21, Laws of Kenya). The second application is brought under Orders L [Rules 1 and 2] and IXA [Rule 10] and ss.1A and 3A of the Civil Procedure Act (Cap.21, Laws of Kenya).

The first application carries two main prayers:

***“1. THAT this Court be pleased to order the striking out of the defence and counterclaim filed herein, on the grounds that they disclose no reasonable cause of defence or action, are scandalous, frivolous and vexatious and the same are otherwise an abuse of the process of the Court.***

***“2. THAT this Court be pleased to accordingly order the defence and counterclaim herein to be dismissed with costs.”***

The application rests on the following stated grounds:

***(i) the plaintiff is the registered proprietor of the suit premises herein, namely Subdivision No. 2360 (Orign. No. 2330/27), Section VI,***

***Mainland North, together with the houses erected thereon;***

- (ii) *the defendant who at all material times was an employee of the plaintiff, occupied the suit premises at a token rent of Kshs.800/= per month;*
- (iii) *sometime in 1983 the plaintiff company was placed under receivership, at the behest of its secured creditors;*
- (iv) *notwithstanding the said receivership, the defendant continued occupying the suit premises, with the express permission of the plaintiff, until the commencement of this suit;*
- (v) *on or about 2<sup>nd</sup> September, 1977 the defendant lodged a caveat against the plaintiff's title, alleging purchaser's interest;*
- (vi) *the plaintiff has never made any disposition or conveyance of its vested proprietary rights and interests in respect of the suit premises in favour of the defendant or any third party;*
- (vii) *on or about 8<sup>th</sup> July, 1991 the said caveat was removed, pursuant to the provisions of s.57 of the Registration of Titles Act (Cap. 281, Laws of Kenya);*
- (viii) *as a consequence, the defendant's defence filed on 2<sup>nd</sup> July, 1996 does not disclose any or any reasonable cause of defence against the plaintiff's suit;*
- (ix) *and, for the same reasons, the defendant's counterclaim filed on 24<sup>th</sup> June, 2003 (claiming ownership of the suit premises by dint of adverse possession) does not disclose any or any reasonable cause of action;*
- (x) *the defendant's amended defence and counterclaim was, in any event, incompetent owing to the defendant's equally-incompetent affidavit of 22<sup>nd</sup> May, 2002 accompanying the application for leave to amend the statement of defence;*
- (xi) *in the premises, the defendant's amended defence and counterclaim do not disclose any, or any reasonable cause of defence or cause of action against the plaintiff, and the same are frivolous, vexatious, and otherwise an abuse of the process of the Court;*
- (xii) *and in the premises, the defence and counterclaim be struck out, and dismissed with costs.*

The factual statements in the application are detailed out in the supporting affidavit of **12<sup>th</sup> May, 2010** by **Patrick M. Kamau**, the Receiver/Manager of the plaintiff company who is responsible for the recovery and realization of the plaintiff's assets.

The deponent deposes that he believes to be true his Advocates' advice, that ***“as opposed to being in possession of the suit premises, the defendant was merely in occupation of the same on the basis of being an employee/tenant of the plaintiff.”*** The deponent believes to be true counsel's advice, that the continuous period during which the defendant remained in occupation of the suit premises, was only 7 ½

years – and so he could not claim by adverse possession.

The deponent avers that whereas the defendant, in his defence of **2<sup>nd</sup> July, 1996** had claimed ownership of the suit premises by purchase from the plaintiff, **“no sale agreement or agreement for sale of any sort was entered into by the parties; neither did the plaintiff execute any deed or cause a transfer or conveyance or disposition in respect of the suit premises to be effected in favour of the defendant.”**

The defendant filed, on **15<sup>th</sup> July, 2010**, a notice of preliminary objection, contending that: the plaintiff’s first application is **“incurably defective, incompetent and an abuse of the process of the Court”**; the application is *res judicata*; the applicant lacked *locus standi* to bring the application, as the plaintiff had lodged no defence to the defendant’s counterclaim – this counterclaim having, seven years earlier, resulted in an **interlocutory judgment in favour of the defendant**.

The defendant, furthermore, swore a replying affidavit on **13<sup>th</sup> July, 2010**, deponing as follows: suit by plaintiff was filed against him on **14<sup>th</sup> May, 1996**; defence was filed on **2<sup>nd</sup> July, 1996**; amended defence and counterclaim was filed on **23<sup>rd</sup> June, 2003**; the plaintiff filed no defence to the said counterclaim; interlocutory judgment on the counterclaim was entered on **19<sup>th</sup> September, 2003**; the said interlocutory judgment has remained in force, to-date, for seven years; the defendant filed an application dated **18<sup>th</sup> January, 2007** seeking dismissal of plaintiff’s suit for want of prosecution, and this application was argued *inter partes* before **Sergon, J.** who delivered his Ruling on **5<sup>th</sup> June, 2008** dismissing the plaintiff’s suit – with leave to proceed with a hearing of formal proof, in relation to the interlocutory judgment of **19<sup>th</sup> September, 2003**.

The defendant avers that he believes to be true his Advocate’s advice that, in view of the Ruling of **5<sup>th</sup> June, 2008**, his defence to the plaintiff’s case as stated in the plaint, is spent, and **“there is no defence on record to be struck out”** contrary to the prayer in the plaintiff’s application. The defendant believes to be true the advice of his Advocate, that **“the plaintiff lacks locus to bring any application, in view of the fact that there is no defence filed to [the] counterclaim in respect of which there is interlocutory judgment which has not been set aside for over seven years.”**

The deponent believes to be true the advice of his Advocate, that **“all the issues in the plaintiff’s application are the same issues raised in the plaint filed in this matter which plaint has already been struck out, the suit dismissed, and the application is therefore res judicata.”**

Again accepting the advice of his Advocate, the defendant deposes that **“the Ruling delivered on 5<sup>th</sup> June, 2008 directing that the counterclaim do proceed [to] hearing as formal proof, is in full force and effect, since no application has been made to set it aside”** – and so **“the plaintiff’s application is incompetent [and] an abuse of Court process.”**

Against the foregoing background is to be seen the plaintiff’s second application: since the defendant’s evolving case at this stage is built around the Ruling by **Mr. Justice Sergon** of **5<sup>th</sup> June, 2008** the plaintiff feels called upon to challenge that very ruling – notwithstanding that no appeal to a higher Court was lodged. By the Notice of Motion of **23<sup>rd</sup> August, 2010**, the plaintiff asks this Court to:

- (i) set aside the Ruling dated 5<sup>th</sup> June, 2008;**
- (ii) reinstate the suit which was dismissed with costs by the said Ruling of 5<sup>th</sup> June, 2008;**
- (iii) set aside the interlocutory judgment entered in favour of the defendant on 19<sup>th</sup> September, 2003;**

**(iv) grant leave to defend the defendant's counterclaim which resulted in the interlocutory judgment of 19<sup>th</sup> September, 2003.**

The grounds for the plaintiff's second application are set out as follows:

(a) the plaintiff's suit was dismissed for want of prosecution on **5<sup>th</sup> June, 2008**;

(b) it was by mistake that the Advocates who were then acting for the plaintiff did not set down the suit for hearing;

(c) if the Ruling of **5<sup>th</sup> June, 2008** is set aside, the defendant will not suffer any loss not compensable in costs; whereas the plaintiff stands to suffer irreparable loss and damage – in particular in relation to the suit property – if the orders sought are not granted;

(d) the defendant's counterclaim was irregular and wrongly admitted and **"the defendant has no business purporting to prosecute the same against the plaintiff or at all"**;

(e) the plaintiff has, in any case, **"a good defence to the defendant's alleged counterclaim"** and so **"the interlocutory judgment entered in favour of the defendant on or about 19<sup>th</sup> September, 2003 should be set aside and the plaintiff accordingly granted leave to defend the same"**;

(f) **"this Court is vested with wide discretion...and the plaintiff beseeches the Court to exercise its said discretion to render substantive justice... notwithstanding any procedural or technical shortcomings on the part of the plaintiff"**;

(g) **"grant of the orders sought ....will be in tandem with the overriding objective of the Civil Procedure Act and the subsidiary rules enacted thereunder enunciated in Section 1A of the said Act"**;

**(h)"it is only fair and in the interests of administration of justice that the plaintiff's application hereby be allowed."**

**Patrick M. Kamau**, the Receiver/Manager of the plaintiff, swore a supporting affidavit on **23<sup>rd</sup> August, 2010** blaming the plaintiff's former Advocates for the failure to set down the suit for hearing, occasioning the circumstances which led to dismissal for want of prosecution. The deponent avers that **"the plaintiff is and has always been interested in prosecuting its action against the defendant herein"**; and states that **"the mistake of the previous Advocates [M/s. M.K. Mulei & Co., Advocates] should not be visited upon [the plaintiff], as to do so would amount to gross perpetration of injustice."**

The deponent deposes that **"the plaintiff has a good and plausible defence in respect of the defendant's counterclaim"**; and so, the interlocutory Judgment of **19<sup>th</sup> September, 2003** should be set aside, and the plaintiff accorded leave to defend. He deposes that **"failure to file a defence to the defendant's counterclaim or even to apply for setting aside of the Judgment entered in default of [a] defence was due to the omission or oversight [on the part of] the plaintiff's Advocates then on record."**

The defendant objected to the plaintiff's case in this second application, and filed (on **8<sup>th</sup> September, 2010**) grounds of opposition in the following terms:

(i) that, the application is “***misconceived, incompetent, incurably defective and an abuse of the process of the Court***”;

(ii) that, there is no existing suit upon which the orders sought can be canvassed and/or granted, in view of the Court’s Ruling of ***5<sup>th</sup> June, 2010***;

(iii) that, the plaintiff’s Advocates lack locus to file any application and/or pleadings in these proceedings;

(v) that, the plaintiff is guilty of *laches*, and the application is, therefore, incompetent.

Learned counsel for the plaintiff entered upon his task by laying blame, for the Ruling of ***5<sup>th</sup> June, 2008*** dismissing his client’s suit, squarely on the former Advocates having the conduct of the suit: “***We submit that the mistakes of the plaintiff’s previous Advocates on record should not be visited upon the plaintiff***”; “***the plaintiff’s Advocates then on record did not inform the plaintiff of the goings-on in the said matter and, as such, the dismissal of the plaintiff’s suit was not due to [lack of] interest in the suit***”; and counsel cited authorities to support his client’s stand: ***Julie Migare v. Co-operative Bank of Kenya***, Nairobi HCCC No. 699 of 2005 [***Mutungu, J***], [2009] eKLR – in which it was thus held:

***“The law is that mistakes of an Advocate should not be visited upon the litigant. To fail to reinstate the suit herein would be condemning the applicant for the mistakes of her counsel who left without informing the applicant of what was happening and the status of the case which had been entrusted to her by the plaintiff/applicant.”***

The second case cited was ***Consolata Ndinda Owira & 4 Others v. Banuelbovis Omambia***, Nairobi HCCC No. 2050 of 1993 [***Kubo, J***], [2005] eKLR;

in this case it was held:

***“This is not to say that procedural errors or omissions should always enjoy clemency; far from it, Court procedures are made for a purpose, i.e., to ensure orderly, effective and predictable management of cases. But there will from time to time be cases where substantive justice demands priority over technicalities of procedure. I hold that the present case provides one such instance.”***

To the defendant’s contention that this matter is *res judicata*, counsel urged that “***a matter can only be res judicata if it has been heard and determined on the merits***”, which is not the case herein, in view of relevant authority: ***Bulhan & Another v. Eastern and Southern African Trade and Development Bank*** [2004] 1KLR 147 (***Ibrahim, J.***). That decision held as follows (p.156):

***“It is my view that for the principle of res judicata to apply, the issues alleged to be similar must have been raised in the earlier suit, heard and finally determined or decided by the Court. The application heard by Mr. Justice Hewett was that dated 24<sup>th</sup> September, 1999 for temporary injunction... Justice Hewett made several findings and held that in effect, the plaintiff did not have any prima facie case with a probability of success. A Court’s decision on an application for temporary injunctions under Order [XXXIX] does not decide the issues in question. The Orders...therefore are not final. The suit must still go for trial and, however emphatic and positive the statements or findings of the Judge were, they are not conclusive and final. ...that’s why the Orders are called interim or temporary. The issues and matters raised in the application will be revisited and litigated again in a full trial.”***

Counsel urged that while it is true the defendant had filed a counterclaim and had, on that basis, obtained interlocutory Judgment, it all resulted from “***the lack of effort on the part of the plaintiff’s Advocates then on record***” – and this fact only came to light after a change of Advocates; and by that time interlocutory Judgment had already been secured by the defendant. Counsel urged that the plaintiff be given an opportunity to file a defence to the counterclaim. Counsel submitted that allowing the defendant’s interlocutory Judgment to stand unchallenged would occasion injustice to the plaintiff: “***the***

***[effect] of not allowing the plaintiff to defend this suit will be that the defendant will then be awarded the plaintiff's suit premises....without...the plaintiff [being given] a chance to be heard.*** Counsel submitted that the fact of the suit having been dismissed at the interlocutory stage, ***“does not take away the plaintiff's right to put in a reply to the defence and defence to counterclaim.”***

Learned counsel submitted that the plaintiff, in this first application (the Chamber Summons of ***11<sup>th</sup> May, 2010***) sought the striking out of the defendant's defence and counterclaim: for disclosing no reasonable cause of action, being scandalous, frivolous and vexatious and an abuse of the process of the Court. Counsel submitted that the defendant had no basis for claiming that the suit property had been sold to him, ***“partly by conduct and partly in writing”***; this was not a tenable proposition ***“especially in a matter as sensitive as a house, which can be concluded by conduct, given that the plaintiff is a large company.”*** Without specifying how he purchased the suit property, counsel submitted, the defendant nonetheless ***“asks the Court in his defence and counterclaim to make a declaration that [he] has acquired the suit property by way of quiet possession”***, and seeks ***“a mandatory injunction compelling the plaintiff to transfer the suit premises to [him].”***

Counsel submitted that the plaintiff ***“is and has at all material times been the registered and lawful owner of the suit premises”***; and the defendant was only a tenant for a monthly rent in the said premises. Counsel urged that ***“the defendant has never at any time gone to Court to assert his alleged ownership of the suit property [and] it is the plaintiff who came to Court to have the defendant leave the premises.”***

Counsel submitted that it would be unconscionable for the Court to compel the plaintiff to transfer its property to the defendant ***“when there was no consideration given for the same and no sale agreement was ever entered into by the parties herein.”***

Counsel contested the propriety of the interlocutory Judgment that had been entered in favour of the defendant: such a Judgment, given where there was no liquidated claim, ill-suits the claim for landed property.

Counsel for the defendant submitted that the plaintiff's prayers are not for granting: because ***“the plaintiff has come to Court through the wrong procedure by applying for setting aside of the Ruling of 5<sup>th</sup> June, 2008 dismissing the plaintiff's suit for want of prosecution, instead of applying to the Court for review and/or appeal against the said Ruling....”*** On this ground, counsel urged that the plaintiff's application is an abuse of the process of the Court.

Counsel, secondly, submitted that the plaintiff, after entering appearance in respect of the defence and counterclaim, failed to file a reply to the defendant's amended defence and counterclaim: and this is what led to interlocutory Judgment, as prayed for by the defendant, on ***19<sup>th</sup> September, 2003***; and the interlocutory Judgment was further strengthened by the Ruling of ***5<sup>th</sup> June, 2008*** which directed that formal proof do take place. Counsel, against that background, submits that ***“that interlocutory Judgment...was regular and in line with the provisions of the Civil Procedure Rules.”***

The defendant's third line of challenge was that ***“the plaintiff has not raised any bona fide issue for trial as to why the defendant should not be awarded the suit property.”***

Counsel concedes, however, that the Court has a ***discretion*** to set aside a regular interlocutory Judgment: ***Patel v. E.A. Cargo Handling Services Ltd*** [1974] E.A. 75 (at p.76, *per Duffus, P*):

***“The main concern of the Court is to do justice to the parties, and the Court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here the Court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan, J put it ‘a triable issue’ that is an issue which raises a prima facie defence and which should go to trial for adjudication.”***

Counsel's acknowledgement of the foregoing principle is further shown in yet another authority of the Court of Appeal which he cites: **Muthaiga Road Trust Company Ltd. V. Five Continents Stationers Ltd & 2 Others** [2003] KLR 714. This authority carries certain clear principles which are certainly relevant in this case:

- (i) **“Where a plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons the Court shall on request enter judgment against the defendant for any sum not exceeding the liquidated demand together with interest” (p.714).**
- (ii) **“The court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits” (p.714).**
- (iii) **“A defence on the merits does not mean a defence that must succeed but rather a triable issue that is an issue which raises a prima facie defence and which should go to...trial for adjudication” (p.714).**

Counsel next considered the question of the applicability of *res judicata* to the standing of the main cause herein, and the plaintiff's applications. He cited the High Court's (**Ringera, J**) decision in **Kanorero River Farm Ltd & 3 Others v. National Bank of Kenya Ltd** [2002] 2 KLR 2007, in which the following passage appears (at p.213):

**“As I understand the law, the doctrine of *res judicata* applies to both suits and applications, whether they be final or interlocutory. Indeed section 2 of the Civil Procedure Act defines a suit to mean any civil proceeding commenced in any manner prescribed. And prescribed is defined as prescribed by rules. Applications for temporary injunctions are prescribed by Order [XXXIX] of the Civil Procedure Rules. It follows that the determination of such an application by a court of competent jurisdiction would in appropriate circumstances operate as the plea in bar called *res judicata*.”**

Counsel submitted that the plaintiff had raised the same issues repeatedly in his motions: **“[These] same issues raised in the plaintiff's present application were canvassed by the plaintiff in its replying affidavit in opposition to the defendant's application dated 18<sup>th</sup> January, 2007 seeking dismissal of the plaintiff's suit for want of prosecution and were argued by the parties' Advocates at the hearing of the defendant's said application.”** Counsel submitted that **Sergon, J** had dealt with those same **“repeat issues”** in the Ruling of **5<sup>th</sup> June, 2008** which dismissed the suit for failure to prosecute.

Counsel submitted that the plaintiff is, in this instance, asking this Court to sit on appeal or review over the High Court's Ruling of **5<sup>th</sup> June, 2008** without following proper procedure. To support his proposition, counsel invoked the High Court's (**Maraga, J**) decision in **Anaj Warehousing Ltd. v. National Bank of Kenya & Registrar of Titles**, Mombasa HCCC No. 311 of 2000 [2006] eKLR; however, this authority was essentially concerned with the question of *res judicata*.

The burden of the plaintiff's case is that it is a **corporate body owning property**, on which the defendant had held a tenancy, paying rent on a month-to-month basis; this property is **owned by the plaintiff**, who holds the lawful documents of title therefor; the company, through the firm of **M/s. Nzamba Kitonga, Advocates** had filed suit on **9<sup>th</sup> May, 1996** whereby it claimed from its former tenant-employee (the defendant) vacant possession and *mesne profits*; the defendant filed his statement of defence on **2<sup>nd</sup> July, 1996** while **M/s. Nzamba Kitonga** remained the plaintiff's Advocates; the defendant filed an amended defence and counterclaim on **24<sup>th</sup> June, 2003** and served it on **M/s. Nzamba Kitonga & Co. Advocates**; there was no response and, on **16<sup>th</sup> September, 2003** the defendant made a request for interlocutory Judgment – this not being served upon the plaintiff; the defendant was seeking: (i) a declaration that he had acquired the suit property, L.R. No. 2360/VI/MN against the plaintiff **“by quiet possession,”** and (ii) a

mandatory injunction compelling the plaintiff to transfer the suit property to him; on **17<sup>th</sup> September, 2003** the Deputy Registrar entered interlocutory Judgment in favour of the defendant; on **18<sup>th</sup> January, 2007** the defendant filed an application by Notice of Motion seeking dismissal of the plaintiff's suit for want of prosecution, and formal proof based on the interlocutory Judgment of **17<sup>th</sup> September, 2003**; the application was served upon **M/s. Nzamba Kitonga & Co. Advocates**, but the record shows that, as at **10<sup>th</sup> June, 2009** the plaintiff's Advocates were **M/s. M.K. Mulei & Co. Advocates**, and on **12<sup>th</sup> June, 2009** there was a further change, **M/s. Lumatete Muchai & Co. Advocates** taking over the conduct of the plaintiff's case; the defendant's application was heard before **Sergon, J** who gave his Ruling on **5<sup>th</sup> June, 2008**.

The Ruling of **5<sup>th</sup> June, 2008** is to be considered against the background of the foregoing facts – the main task being to determine whether, in the overall context, justice requires that the interlocutory Judgment be set aside, and an opportunity created for the hearing and determination of the primary dispute between the parties.

The learned Judge found that the suit had been adjourned generally on **9<sup>th</sup> November, 2005**, and, as to the delay in prosecuting, he remarked: **“The reasons given by the plaintiff to explain the delay are not supported by what is apparent from the record.”** The Judge thus held:

**“I find those reasons to be stories concocted to save this suit from [the] jaws of the law.”**

While noting that the plaintiff did, indeed, experience difficulties with counsel-representation over the last several years, the learned Judge dismissed this as of no consequence, and as an insufficient reason for the plaintiff not acting on the counterclaim timeously; in the Judge's words:

**“The confusion which was created between the firm of Nzamba Kitonga & Co. Advocates and that of M.K. Mulei & Co., Advocates is a matter [for] the plaintiff and its Advocates. In fact it manifests sheer negligence and incompetence on the part of the Advocates concerned. That is not the kind of mistake the law envisaged to be used as an excuse. Such mistakes must be visited upon the litigant who in any case has the option of pursuing their Advocate for the available remedies against their legal [advisors] if well advised.”**

The learned Judge then went on to resolve the immediate question as follows:

**“It is obvious from the record that the plaintiff took no steps to have the suit listed for hearing from the date it was stood over generally. By the time of filing the [defendant's] motion, about 13 months had lapsed from the date when the hearing of the suit was adjourned generally. The law allows this Court to dismiss a suit which has not been re-listed for hearing after three months have elapsed from the date when it is adjourned generally. In this case 13 months had lapsed by the time the motion was being filed. I find the delay to be inordinate and inexcusable. It would appear the plaintiff has lost the interest to pursue this suit.”**

Is the question before the Court *res judicata*, on account of the defendant's Notice of Motion of **18<sup>th</sup> January, 2007** and of the Ruling by **Mr. Justice Sergon** on **5<sup>th</sup> June, 2008**?

It is clear that the **real dispute** is lodged in the **primary pleadings**: the plaint of **9<sup>th</sup> May, 1996**; and the amended defence and counterclaim of **23<sup>rd</sup> June, 2003**. Certain **interlocutory steps and decisions**, of course, did exercise themselves upon those primary pleadings: in particular, the Deputy Registrar's **interlocutory Judgment** of **17<sup>th</sup> September, 2003**; and the High Court's **interlocutory Ruling** of **5<sup>th</sup> June, 2008**.

Of the Deputy Registrar's interlocutory Judgment, it is the case that it bore no finality, and was still

subject to formal proof, before evolving into a regular Judgment of the High Court, for enforcement – as is confirmed in *Mr. Justice Sergon's* Ruling in which he directs: “**The defendant is granted leave to proceed with the hearing of the counterclaim as a formal proof in view of the interlocutory judgment already in place.**”

While, therefore, the said interlocutory Judgment *remains inchoate* and awaits the *formal Judgment* of the High Court, what is the status of the learned Judge's Ruling at this stage, in terms of disposing of the matter; in terms of *further exercise of the High Court's jurisdiction*; in terms of possible motions for *review*, or *appeal* to a higher Court?

The defendant's position is that the Ruling of *5<sup>th</sup> June, 2008* could only have been contested in a motion for *review* by the High Court itself, or by way of *appeal* to the Court of Appeal. This raises a *point of law* which must be resolved.

Do the *interlocutory orders* in this case take away the High Court's *jurisdiction to continue exercising a discretion*, and making appropriate orders, *in the run-up to a trial on the merits*? I do not think so. Although the rules of civil procedure set beacons for the disposal of civil matters at all stages, they are essentially *an aid to the Court*, guiding the Court as it considers law and evidence, with the ultimate goal of ensuring *just results*; and the implication is that the Court has an *expansive discretion* as it considers the facts and circumstances of each case; the Civil Procedure Rules enhance the framework for this discretion, and *do not take it away*.

Therefore, the Court's *transitory decisions*, Rulings and Orders in the run-up to the final hearing on the *merits*, are *not intended to bind the Court for all time*; the Court retains the jurisdiction to *keep reviewing* the same, and making such alternative or further orders as expediency may indicate to be appropriate. This is the irreducible, inherent competence of the Judge at the Bench.

It follows that, in the instant case, the High Court's discretion to make any alterations to existing interlocutory orders or directions, is *unencumbered*.

Such a position, I believe, finds support in the Ruling of *Mr. Justice Ibrahim* in *Bulhan & Another v. Eastern and Southern African Trade and Development Bank* [2004] 1 KLR 147. The learned Judge, in that case, thus held (at p.156):

**“A Court's decision on an application for temporary injunctions...does not decide the issues in question. The Orders...therefore are not final. The suit must still go for trial and, however emphatic and positive the statements or findings of the Judge were, they are not conclusive and final.”**

A related point, raised by counsel for the respondent, is *res judicata* in relation to the course of an *application*, and of the *main cause*. Counsel for the respondent, relying on the decision of *Ringera, J* (as he then was) in *Kanorero River Farm Ltd & 3 Others v. National Bank of Kenya Ltd.* [2002] 2007, contended that the plaintiff would have no further case to urge in the main cause, since the issue had been resolved (in favour of the respondent) at the interlocutory stage. I am, however, not in agreement: I understand *Ringera, J* to have limited the relevant principle to the circumstances of the individual case, as may be assessed by the Court.

It does not appear to me that this is a matter in respect of which the plaintiff had to move the Court only by way of seeking a *review* of earlier decisions; nor that the plaintiff's sole recourse was an *appeal* to a higher Court.

Learned counsel for the defendant has rightly acknowledged that, in a proper case, this Court *may set aside a regular interlocutory Judgment*. The interlocutory Judgment of *17<sup>th</sup> September, 2003*, in my opinion, merits being set aside; apart from taking into account the special problems of counsel which *Mr. Justice Sergon* referred to in the Ruling of *5<sup>th</sup> June, 2008* I perceive that this was not a suitable case for interlocutory Judgment. The matter concerned *landed property*, in respect of which the lawful title-holder is the plaintiff; and in a just settlement on the merits, *complex questions of law and fact* awaited determination – something that can only be done in full hearing. The matter in hand was clearly ill-suited to the bare technicality of formal proof; such proof would be an improper mode for transferring title from the plaintiff to the defendant. At this interlocutory stage, during which the Court makes and appropriately adjusts its orders, the earlier trajectory towards formal proof should be changed, in the light of relevant jurisprudential context.

While this case dates back to *1996*, and its several applications were brought in the context of existing rules of civil procedure, recent important changes have come into effect, affecting the entire process of litigation.

Firstly, new sections (1A and 1B) have been included in the Civil Procedure Act (Cap. 21, Laws of Kenya) specifying the broad purpose to guide the Court, in the course of civil litigation. Section 1A (1) of the Act thus provides:

***“The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.”***

If the foregoing provision was already calling for greater emphasis on the *merits* of a case, as opposed to technicality, the principle has gained even larger impetus from the terms of the *Constitution of Kenya, 2010* which was promulgated on *27<sup>th</sup> August, 2010*. The relevant provision is Article 159(2)(d), which thus stipulates:

***“(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles –***

.....

***(d) justice shall be administered without undue regard to procedural technicalities ...”***

In the instant case, as stated in the main pleadings, the justice of the case ultimately requires a determination of the *ownership of landed property* – a subject which, besides, is safeguarded in detail under the Bill of Rights provisions of the Constitution (Chapter 4, notably Article 40).

A peremptory duty is placed on this Court to give fulfilment, in the course of civil litigation, to such matters of rights, and no technicality can be proffered as the excuse for taking property from one person, and vesting the same in another person.

In sustaining the main claims between the parties herein, I have to make further orders, in respect of the plaintiff’s two applications, as follows:

**(1) The plaintiff’s first application, by Chamber Summons of *11<sup>th</sup> May, 2010* is disallowed.**

**(2) In the plaintiff’s second application, by Notice of Motion of *23<sup>rd</sup> August, 2010*, the interlocutory**

**Judgment entered in favour of the defendant on 19<sup>th</sup> September, 2003 is set aside.**

**(3) In the plaintiff's second application, by Notice of Motion of 23<sup>rd</sup> August, 2010, leave is hereby granted to defend the counterclaim of 23<sup>rd</sup> June, 2003 – the said defence to be filed and served within 14 days of the date hereof.**

**(4) This matter shall be listed before a Judge of the High Court for directions bearing on the plaint of 9<sup>th</sup> May, 1996 and the defence and counterclaim of 23<sup>rd</sup> June, 2003.**

**(5) The costs of the two applications shall be borne by the plaintiff/applicant.**

**SIGNED at NAIROBI .....**

**J.B. OJWANG**

**JUDGE**

**DATED and DELIVERED at MOMBASA this 29<sup>th</sup> day of September, 2011.**

**H.M. OKWENGU**

**JUDGE**