



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL CASE NO. 149 OF 2008**

**PETER IRUNGU WAINAINA.....PLAINTIFF**

**VERSUS**

**CHEGE NJIHIA.....DEFENDANT**

**RULING**

**Chege Njihia**, the Defendant herein, has taken out the Motion dated 16<sup>th</sup> March 2011 in which he sought for the following orders:

- (a) *The orders made on 23.3.2009 directing that this suit be heard ex-parte by way of affidavit evidence and oral submissions be reviewed and set aside;***
- (b) *This suit be heard inter-partes and parties be free to call witnesses and to be subject to the usual examination where necessary;***
- (c) *The costs of this application be provided for.***

The Motion is supported by the affidavit of the Defendant. The Motion is opposed by Peter Irungu Wainaina, the Plaintiff herein, who filed grounds of opposition.

It is the submission of the Defendant that his advocate informed him that on 03.03.2011, his advocate discovered that on 23.03.2009 an order directing the suit to be disposed by affidavit evidence and oral submissions was made. The Defendant avers that his advocate was not previously aware of that order since it was made before he came on record. The Defendant avers that he was not also informed of the existence of the order by his erstwhile advocate. He claimed that if he had knowledge of such orders he would have instructed his current advocate to make an application to set aside the same. He has now beseeched this court to set aside the order on the basis that it was the mistake of his counsel which error should not be visited on him. He has further asked this court to look at his replying affidavit and find that he has a defence which discloses arguable grounds.

The Plaintiff on his part, has urged this court to dismiss the Motion on the ground that the Motion does not meet the requirements necessary in applications for review. It is also argued that the Motion was made after an unexplained inordinate delay of two years. It is further argued by the Plaintiff that if the order is given it will amount to this court sitting on appeal in its own cause. It is also alleged that the firm of Waiganjo Gichuki & co. advocates is improperly on record.

I have considered the rival submissions plus the material placed before me. Let me begin with the preliminary issue as to whether or not the firm of Waiganjo Gichuki & Co. Advocates is properly on record. It is argued that since there has been no complaint nor summons to enter appearance, then the

aforesaid firm could not come on record by filing an appearance. That firm of advocates has urged this court to reject the submission on the basis that there was no law nor rule which bars a litigant from filing an appearance since there was no judgment entered. The substantive suit in this matter is expressed in the originating summons dated 5<sup>th</sup> November 2008 in which the Plaintiff herein sought for judgment against the Defendant in the following terms *inter-alia*:

**(i) *An order for declaration that he has acquired L.R. NO. LOC. 18/Kirere/210 by adverse possession.***”

On the face of the originating summons, the Defendant was given 15 days to enter an appearance. It would appear the Defendant filed a replying affidavit he swore on 17<sup>th</sup> November 2008, before first filing an appearance. The Plaintiff filed the Summons dated 4<sup>th</sup> December 2008 in which he applied for directions to wit inter alia that the suit be heard *ex parte* by way of affidavit evidence and by oral submissions. In the supporting affidavit of Geoffrey Kamonde, the Plaintiff urged this court to strike out the replying affidavit of Chege Njehia on the basis that the same is incompetently on record because it was filed before an appearance was entered. The application came for inter partes hearing on 23.03.2009 and was allowed as prayed since there was nothing filed to oppose. The record shows that one Gachemi held brief for Kamau for the Defendant. Nothing happened in the matter until 6<sup>th</sup> August 2010 when the firm of Waiganjo Gichuki filed an appearance plus a replying affidavit of the same date. The truth of the matter is that the Defendant’s previous advocates i.e. M/S Mwangi Kamau & co. Advocates did not enter appearance. That firm simply filed a replying affidavit which was struck out. The firm of Waiganjo Gichuki & co. Advocates was therefore perfectly right to file an appearance in answer to the invitation on the face of the originating summons. Perhaps what should have happened is that leave to file an appearance out of time should have been sought first before the filing of the appearance itself. I have been urged to find that the firm of Waiganjo Gichuki & co. Advocates is improperly on record because it could not come on record by entering appearance after directions have been given. In my view the issue is a technical one envisaged under *Article 22 (3) (d)* of the Constitution. If I uphold the preliminary issue, then I will have unfairly denied the Defendant a right of hearing. I overrule the preliminary objection and proceed to deem the filing of the memorandum of appearance by the firm of Waiganjo & co. Advocates dated 6<sup>th</sup> August 2010 as filed with leave of court.

Having disposed of the preliminary issue let me now determine the merits of the Motion. Basically, the Defendant is saying that he was thoroughly let down by the firm of M/S Mwangi Kamau & Co. Advocates. There is no dispute that the aforesaid firm of advocates failed to file an appearance before proceeding to file the replying affidavit of the Defendant which was later struck out by this Court. It has now emerged that the mistake was solely that of the Defendant’s erstwhile legal advisers. The same came to the knowledge of the Defendant upon engaging the services of the firm of Waiganjo Gichuki & co. Advocates. In my view that is a sufficient ground in which a court must exercise its discretion of review in favour of the Applicant. Perhaps the only solace I can give the Plaintiff is the order for costs which the Defendant is ready to meet. It is in the best interest of justice that the Motion should be allowed. I allow the Motion as prayed save that the Defendant shall pay the Plaintiff costs of the Motion assessed at Ksh.6,000/= within 21 days from the day hereof.

***Dated and delivered at Nyeri this 23<sup>rd</sup> day of September 2011.***

**J. K. SERGON  
JUDGE**

In open court in the presence of Mr. Karweru holding brief Waiganjo for the Applicant and Mr. Kamonde for the Respondent.