



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

**AT EMBU**

**CIVIL CASE NO 15 of 2010**

LILIAN RWAMBA ..... PLAINTIFF  
 VERSUS  
 ARCHANGED K. IRERI T/A  
 MEGABYTE AUCTIONEER .....1<sup>ST</sup> DEFENDANT  
 KENYA COMMERCIAL BANK ..... 2<sup>ND</sup> DEFENDANT  
 ONESMUS MACHARIA T/A  
 WATTS AUCTIONEERS .....3<sup>RD</sup> DEFENDANT

**RULING**

On 3<sup>rd</sup> February 2010 the Plaintiff’s chamber application under Order 39 rules 1, 2, 2A and 3 of the Civil Procedure Rules and sections 3A and 63(e) of the Civil Procedure Act was granted on *ex-parte* basis in terms of prayer (3). The prayer sought an injunction restraining the 2<sup>nd</sup> Defendant or his agent the 3<sup>rd</sup> Defendant from dealing with, interfering with, alienating or disposing land parcel KYENI/KIGUMO/1305 pending the *inter-parte* hearing and determination of the application. The application was filed under a certificate of urgency. It is common ground that since then the application has not been heard *inter-partes*.

On 23<sup>rd</sup> March 2011, the 2<sup>nd</sup> Defendant filed this motion under Order 40 rule 4 and Order 51 rule 1 of the Civil Procedure Rules and sections 3A and 63(e) of the Civil Procedure Act to have the *ex-parte* order set aside and/or discharged. The application was based on various grounds, one of which was that the Plaintiff, having obtained an *ex-parte* order in an urgent application, has deliberately failed to fix the application for *inter-parte* hearing and this was meant to frustrate the 2<sup>nd</sup> Defendant. The other ground was that the *ex-parte* order was obtained without the court having the benefit of material facts pertaining to the dispute.

There is no dispute on that 25<sup>th</sup> February 2010 the Plaintiff filed an application to amend the chamber application of 3<sup>rd</sup> February 2010. The application to amend came for hearing on 26<sup>th</sup> May 2010 but the file was not placed before the Judge. Since then, the application to amend has not been fixed for hearing.

The Plaintiff swore a replying affidavit to say, among other things, that she has not fixed the injunction application for *inter-parte* hearing because she has not been able to trace and serve the 1<sup>st</sup> Defendant. It is evident that there has been no application for substituted service. The Plaintiff’s excuse is therefore not reasonable.

Without going into the nature of the dispute between the parties, it is clear from the order of 3<sup>rd</sup>

February 2010 that the Plaintiff was directed to fix a hearing date at the registry for the application within 14 days. It is apparent she did not fix a date within 14 days, or at all. A party who comes to court under a certificate of urgency and obtains an *ex-parte* order and does not fix the application for *inter-parte* hearing for a period of 12 months is certainly abusing the process of the court. The order obtained cannot be allowed to continue to be in operation.

I also consider that under Order 40 rule 4 all applications for injunction are to be heard expeditiously and in any event within 60 days from the date of filing. An *ex-parte* order of injunction may be granted only once for not more than 14 days and shall not be extended thereafter except once by consent of the parties or by the order of court for a period not exceeding 14 days. In short, the *ex-parte* order of injunction issued on 3<sup>rd</sup> February 2010 is hereby discharged. The Plaintiff shall pay the cost of this application.

DATED, SIGNED AND DELIVERED AT EMBU THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2011.

**A.O. MUCHELULE**  
**JUDGE**