



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT BUSIA

CIVIL CASE NO.1 OF 2009

ALICE IKOLOMI THURANIRA.....PLAINTIFF

=VERSUS=

**JAMES WACHIRA GITHAIGA
BENARD NGUGI MWANGI.....DEFENDANTS**

R U L I N G

This is a ruling on an application dated 12th May 2010 seeking for setting aside of Interlocutory Judgment and all consequential orders. It also seeks for leave to be granted to the 3rd defendant to defend the suit and for lifting of the warrants of attachment. Finally, the 3rd defendant/Applicant seeks for an order that the plaintiff/respondent be ordered to meet the auctioneer's charges.

Mr. Ocharo argued the application for the 3rd defendant/applicant submitting that the applicant has a good defence which raises triable issues. It is also argued that the decree was not drawn and served on the applicant as required by the law and that the mistake of the counsel should not be revisited on the defendant.

The date of the hearing of the application was taken by consent of the parties on 27.09.11. However, the respondent and his Counsel Ipapu Jackah & Co. failed to attend court for hearing.

In the supporting affidavit the Counsel for the applicant Mr. Ocharo Kebira depones that he was given instructions by the defendants in this case to enter appearance and file defence. The memo of appearance was filed on 20.01.2010. However, the defence for the applicant was later prepared and not filed due to an oversight by the advocate's clerk. It was not until 12th May 2010 that the Counsel came to know that the defence had not been filed. Mr. Ocharo in his affidavit undertakes to personally pay the costs of this application.

The Respondent filed grounds of opposition dated 18th October 2010 in which he states that the application is an abuse of the due process of the court and that it has no legal basis. It also states that the application is against the spirit of equity. The said grounds would have made sense if they were argued in court or explained in way of a replying affidavit. As they are now, the court may not be able to know or understand the reasoning in the said grounds. However I have looked at the application before me in view of the abstract issues raised in the grounds. The interlocutory judgement was entered on 19th February 2010. This application was filed on 12.05.10. I note that the court stamp gives the erroneous date of 12.03.10 which is not consistent with the proceedings in the court file.

The 3rd defendant gave instructions to his advocate to file the defence. It was the mistake of the advocates office that the defence was not filed. The delay to file the application has been explained in the supporting affidavit that the Counsel took long time to know that the defence had not been filed though prepared.

The same Counsel filed the defence of the 1st defendant on 25.02.09 which explains that the mistake of leaving behind the defence of the 3rd defendant was inadvertent.

I have looked at the draft defence of the applicant and I am satisfied that it raises triable issues. The applicant is innocent and should not be shut out from justice due to a mistake which is not of his own making.

After interlocutory judgement was entered, the case ought to have been formally proved before execution was carried out. The applicant states that the decree was not drawn and served on them as required by the law. This allegation was not denied.

It is in the interests of justice that all parties are accorded hearing before courts of law. The applicant has satisfied this court that he has a good defence and that failure to file defence was not his mistake.

All considered, I allow the 3rd defendants application to set aside interlocutory judgement and to lift the warrants of attachment issued in this case. As for costs of the auctioneer, the court is not possessed of sufficient information to enable it to give a ruling on the matter. I hereby direct that the plaintiff/Respondent and the applicant herein do file written submissions on the matter within 30 days. The cost of this application will be met by the firm of Ocharo Kebira & Co-advocates.

F.N. MUCHEMI
JUDGE.

ORDER: Mention of the case on.....to confirm filing of written submissions and take a date for ruling.

F.N.MUCHEMI
JUDGE.

Ruling delivered on the **6th December, 2011** in the presence of Mr. Juma for Ocharo for the Defendant/applicant.

F.N. MUCHEMI
JUDGE.