



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

Civil Case 167 of 2008

STANLEY LUMUMBA BARUNGU THIKANYI PLAINTIFF

VERSUS

CHARLES MWITHALIE DEFENDANT

RULING

The plaintiff sued the defendant seeking an order for eviction and injunction against the defendant in respect of parcel number *NJIA/BURIERI/3297*. The plaintiff claims that the defendant had entered on that land unlawfully. The defendant, by his defence, stated that he entered into an agreement with the plaintiff whereby that land was sub divided in order to create a portion of 0.10 acres which was registered as *NJIA/BURIERI/3802* and that is the portion he occupies. The case came for hearing before me on 13th July 2009. Learned counsel for the defendant, Mr. Akwalu, stated that he wished to cease to act for the defendant who was then present before court. Since it seemed to the court that there was some disagreement between counsel and his client, the court allowed them to have a short adjournment and to go outside the court to discuss their differences. At 12.30pm, when the case was once again called out, both the defendant and his counsel were not outside the court. The case proceeded with the plaintiff adducing evidence. At the end of the plaintiff's evidence in chief, defence counsel walked into court. He informed the court that he still wished to cease to act for the defendant. The court granted him leave to so cease to act. The defendant who had been in court earlier had by then walked out of court and was also not out side the court itself. The plaintiff, on closing his case, the court reserved its judgment. Before the judgment was written, learned counsel, Mr. Akwalu filed a Notice of Appointment to act for the defendant. It was dated and filed on 13th July 2009. The defendant also filed an application of the same date which sought the order that the *ex parte* proceedings of 13th July 2009 be set aside to afford the applicant defendant an opportunity to be heard. That application could not to be heard because the file was with me for the purpose of writing judgment. After judgment was delivered on 25th September 2009, the defendant filed another application by chamber summons dated 16th October 2009. That application sought stay of execution of judgment delivered on 25th September 2009. It also sought the setting aside of that judgment. Both those applications by the defendant were heard together. They are now the subject of this ruling. In support of the application, the defendant deponed that his advocate when the case was first called out, sought to cease acting for him because he had not paid him his fees. I will reproduce here some portion of the defendant affidavit dated 16th October 2009.

That while outside the advocate complained of his unpaid professional fees and told me that unless I deposit at least Kshs. 15,000/= towards his fees he would not continue acting for me.

That I immediately went to the bank where I found a very long queue.

That finally I managed to withdraw the said sum of Kshs. 15,000/= which I paid the same date and was issued with a receipt the copy of which is annexed hereto and marked 'CM1'.

That upon going back to court I was informed by Mr. Akwalu, advocate that the matter had proceeded ex parte.

That I have always been eager to defend this matter and I had put a hood (sic) arguable defence which I wished to prove.

It is on those grounds that the defendant seeks that this court grant him the prayer that he seeks. It is clear that the defendant and his counsel had problems relating to the advocate's representation. The date for hearing, that is, 13th July 2009 was fixed on 24th February 2009 by the representative of the plaintiff's advocates. The defendant's counsel together with the plaintiff's counsel appeared before the Deputy Registrar of this court for purpose of call over. Both counsels informed the court that they were ready for hearing. The case was confirmed for hearing. The record in this file shows that it was Mr. Akwalu who personally attended that call over and he confirmed it for hearing. If counsel for the defendant confirmed this case for hearing, when he appeared before the Deputy Registrar on 16th June 2009, it is then not understood why he had to wait until the morning of the hearing date to resolve his dispute with his client. The defendant as the court records of 13th July 2009 shows was only allowed to step outside the court to resolve his differences with his counsel. However, without informing the court, he left the court precinct. The case was called out for hearing at 12.30pm. If the defendant had heeded the court instructions, he ought to have been either inside the court room or outside. If he had been there, he would then have participated in this case. I am of the view that the defendant and his counsel left the issue of legal fees to the date of hearing at their own peril. The court cannot be involved nor pay heed to the problems between advocates and their clients. I find that there is no basis before court why the orders sought should be granted. The defendant's defence is that he is not occupying the plaintiff's land. If that is so, the judgment passed in favour of the plaintiff will not affect him. Considering the facts of this case, there is one case that comes to mind which I believe is relevant here. This is the case of **JOHN ONGERI MARIARA & OTHERS VS. PAUL MATUNDURA** Civil Application No. 301 of 2003 where the Court of Appeal stated:-

“.....I do not think the applicants have given sufficient explanation to warrant the court's discretion being exercised in their favour. It is true that the court has unfettered discretion but like all judicial discretion, it must be exercised upon reason not capriciously. Even sympathy alone would not assist a party. Justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist indolent.”

The defendant in failing to regulate his relationship with his advocate and by walking out of the court precinct without the court's permission opened himself to having the case proceed in his absence. He then cannot legitimately seek to set aside the judgment obtained by the plaintiff. The defendant applications dated 13th July and 16th October 2009 are dismissed with costs to the plaintiff.

Dated and delivered at Meru this 12th day of March 2010.

MARY KASANGO

JUDGE