



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 38 of 2009

JOSEPHAT MWAURA THUO.....PLAINTIFF
VERSUS
LOISE WAMBUI KAHENYA.....DEFENDANT

JUDGMENT

The plaintiff instituted this suit against the defendant, his daughter, seeking a cancellation of two title deeds in respect of **L.R. No.NAKURU/BAHATI/329** and **NAKURU/BAHATI/217**, both registered in the name of the defendant. He also seeks that both titles be reverted to his name.

On 17th September, 2009, the plaintiff obtained interlocutory judgment in default of appearance and proceeded to adduce evidence in support of his claim by way of formal proof. His advocate has also filed written submissions.

It is always incumbent upon a party alleging the existence of certain facts to prove them, whether or not the matter is defended. The law on entry of interlocutory judgment is clear. **Order 9A** of the **Civil Procedure Rules** provides that interlocutory judgment in default of appearance can be entered in respect only of a liquidated demand or in a claim for detention of goods.

Order 9A rule 8 of the **Civil Procedure Rules** provides that:

“8. Subject to rule 3, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing under Order 1XB rule 1”

The plaintiff instead of obtaining interlocutory judgment ought to have satisfied the court that the defendant has been duly served but failed to appear. Thereafter, the suit would be set down for hearing.

The procedure was explained in the case of **Mint Holdings Ltd. & Samson N. Keengu Vs. Trust Bank**, Civil Appeal No.249 of 1999

In that case, the court stated that:

“As pointed out, there was no liquidated demand. Judgment could only have been entered upon a formal proof. The entry of such interlocutory judgment was irregular as Order IXA of the Civil Procedure Rules does not cater for entering of an interlocutory judgment when the nature of reliefs sought requires formal proof.”

The entry of interlocutory judgment in this matter was irregular. Secondly, the pleadings fail to disclose a fundamental fact; that the defendant lives in the United States of America. This fact only came out during the hearing. It was incumbent upon the plaintiff to demonstrate that the defendant was duly served.

The plaint at paragraph 2 states:

“ 2. The defendant is a female adult individual of sound mind residing within Nakuru.....”

In an application dated 27th March, 2009, the plaintiff sought leave to serve the defendant by way of substituted means. In the affidavit in support of the application, the plaintiff averred as follows:

“5. THAT after looking for her in vain, I send (sic) somebody to apply for official search for me at Nakuru lands office.

6. THAT after receiving the official search I discovered that she has transferred all my two (sic) parcels of land indicated herein and vanished to unknown destination.”

But in his testimony, the plaintiff and his witnesses, another daughter, Dorothy Nyokabi Kimani confirmed that the defendant has all along lived in the United States of America and only returned to Kenya in May, 2008 when the transfer of one property was effected. It is therefore clear that the plaintiff deliberately misled the court in order to enter an interlocutory judgment and service was itself irregular.

Pursuant to **Order IXA rule 10** of the **Civil Procedure Rules**, the interlocutory judgment and subsequent proceedings are set aside. The plaintiff to properly effect service on the defendant.

Orders accordingly.

Dated, Signed and Delivered at Nakuru this 30th day of April, 2010.

W. OUKO

JUDGE