



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Miscellaneous Civil Application 186 of 2010

(INTENDED APPEAL FROM THE JUDGMENT/DECREE OF GITHUNGURI RESIDENT MAGISTRATE GITHUNGURI S. NDEGWA IN GITHUNGURI LADN DISPUTES TRIBUNAL CASE NO.3 OF 2006 DATED 18TH JANUARY, 2007)

JOSEPH MURORI MBOCHI..... APPLICANT

-VERSUS-

GEOFFREY GAKINYA KAMAU also known as

GEOFFREY GAKINYA.....RESPONDENT

RULING

The applicant filed an application by way of Notice of Motion under Orders L Rule 1 and XLIX Rule 5 of the Civil Procedure Rules and Sections 3A and 79G of Civil Procedure Act, Cap 21 Laws of Kenya and Section 128 of the Registered Land Act, Cap 300 Laws of Kenya for orders that and ex-parte order of inhibition be issued under Section 128 of the Registered Land Act to inhibit any registration by the Land Registrar, Kiambu in respect of land parcel No.Komothai/Kibichoi/125 or its resultant subdivision portion numbers Komothai/Kibichoi/1497-1503 until further orders of the court.

There was also an order sought that the applicant be granted leave to file an appeal out of time from the decision of the Resident Magistrate at Githunguri in Tribunal Case No.3 of 2006 because the applicant could not have filed an appeal in time, as he became aware of the judgment on 1st March, 2010 because he was not issued with a notice of the judgment delivered on 18th January, 2007. That application was allegedly served upon the respondent but, when the same came up for hearing on 17th May, 2010, the learned counsel for the applicant informed Mwera J. that, the respondent had been served but was absent. The court going by the affidavit of service, allowed the application in terms of the prayers therein.

There is now an application by way of Chamber Summons under Order IXB Rules 3 and 8 of the Civil Procedure Rules brought by the aggrieved party for orders that the order granted on 17th May, 2010 be set aside and the application dated 29th April, 2010 be heard inter-partes. It is supported by affidavits sworn by Geoffrey Gakinya Kamau, Kabi Gakinya, and Ngugi Karuri.

There are three grounds that appear on the face of the application to the effect that;

1. The applicant herein was never served with the application dated 29th April, 2010
2. That the said application was delivered to him by Ngugi Karuri on 25th May, 2010.
3. When he instructed his present counsel on the record he found that the application dated 29th April, 2010 was heard on 17th May, 2010 in his absence on the strength of an affidavit of service sworn by one Peter J. Karugo on 8th May, 2010 and that the said affidavit was false.

At the instance of the learned counsel of the applicant, the Process Server Mr. Peter James Karugo was called to be cross-examined on his affidavit of service. This was to clear the air as to whether or not he indeed served the applicant with the Notice of Motion scheduled to be heard on 17th May, 2010.

The Process Server was questioned at length by the learned counsel for the applicant and tried to justify the service upon the applicant. I watched his demeanor in relation to the issues raised and at the end of the day I formed the view that it was his word against that of the

applicant. I have also considered that the subject matter herein is land and parties should be given an opportunity to address conclusively all the matters raised.

In that regard, I have come to the conclusion that there is some doubt as to service and even if I were to believe the Process Server I would still give the applicant an opportunity to oppose the application on merit.

Accordingly, I allow the application dated 21st June, 2010 by setting aside the order of the court made on 17th May, 2010. The application dated 29th April, 2010 shall now be heard inter-partes on a date to be agreed between both parties. In the meantime, the respondent/applicant shall file an affidavit in reply to the said application within 14 days of this order and serve the respondent who shall have corresponding leave to file a further affidavit, if need be, within 14 days of service. Each party shall bear his own costs of this application. Orders accordingly.

Dated, signed and delivered at Nairobi this 26th day of October, 2010.

A. MBOGHOLI MSAGHA
JUDGE