



**OXIA r 5, 8, 9,10 & 11**

**ss. 128 and 143 of RLA**

- 1. Setting aside of interlocutory judgment**
- 2. Order of inhibition over suit property**

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**HCCA NO. 97 OF 2007**

*LESIT J.*

**ERNEST M. MUGAMBI R. IBURI .....APPELLANT**

**VERSUS**

**JACOB HENRY KIRIMI.....1<sup>ST</sup> DEFENDANT**  
**JACOB KABUTU KANGANGI MWIRITI.....APPLICANT/2<sup>ND</sup> DEFENDANT**

**RULING**

The application is a Notice of Motion dated 23<sup>rd</sup> January 2006 brought under IXA rules 5,8,9,10 and 11 of CPR and sections 128 and 143 of the Registered Land Act. It seeks two substantive prayers:-

1. That the court be pleased to set aside interlocutory judgment entered in the case and the final judgment entered on 28<sup>th</sup> July 2005 together with all consequential orders.
2. That the court do issue an order of inhibition against LR. Nos.NTIMA/IGOKI/6906,6907,6908, 6909,6910,6911,6012,6913, and 6914 The application is premised on grounds on the face of the application as follows:
  - (i) The applicant and the 1<sup>st</sup> defendant were the registered owners of land parcel No. Ntima/Igoki/2504.
  - (ii) The 1<sup>st</sup> defendant passed away on 13/5/1985.
  - (iii) The plaintiff filed the suit herein against the applicant and the deceased in the year 2004 19 years after the death of 1<sup>st</sup> Defendant claiming the above mentioned parcel of land.
  - (iv) The plaintiff purportedly served both the applicant and the deceased after which they purportedly failed to appear or file defence within the stipulated time and hence judgment was entered against them ex-parte and their land given to

the plaintiff.

(v) After the plaintiff was awarded the land he subdivided same into 9 plots being plots Nos. Ntima/Igoki/6906/-6914 and he is in the process of selling all of them.

(vi) The applicant and the estate of deceased lost their land without being served with any summons or being in any way notified of the case and as such it is only fair and just to set aside ex-parte judgment and in the meantime make an order inhibiting all the 9 plots.

This application is opposed. The defendant has filed a replying affidavit dated 8<sup>th</sup> February 2006. Application was argued by Mr. C. Kariuki for the applicant herein. In his submission Mr. C. Kariuki urged the court to set aside the ex-parte judgment. The learned counsel submitted that the land which is the subject matter of this Originating Summons was acquired by the plaintiff through this suit at a time when both defendant owned the properties. Mr. C. Kariuki argument was that the applicant has shown that he was never served with any notice of the suit or hearing notice. He also denied seeing the notice which was posted in the East African Standard as a substituted summon to him on grounds that he never reads the Standard.

Mr. C. Kariuki urged the court to note the averment at paragraph 14 of the supporting affidavit that the 1<sup>st</sup> defendant died 19 years before this suit was instituted and that therefore the plaintiff's allegation that he served both defendants with the summons to enter appearance was false. Mr. Riungu relied on the case of **Kirima v Mutomutiga CA. NO. 202/98**.

Mr. Riungu for the plaintiff/respondent opposed the application. Counsel argued that the argument raised by the applicant was a minor typographical error in the name Kabutu which was misspelt to read Kabuto and that it cannot be an excuse for denying service of the summons. Mr. Riungu urged that the applicant says that he lives in Nairobi but has not given his place of aboard and that was the reason why the respondent was unable to effect personal service on him. Mr. Riungu has urged the court to expunge the death certificate annexed by the applicant in his affidavit in support of this application on grounds that its origin is unknown and that it could be a conspiracy between the applicant and his co-defendant to defeat this case.

I have considered the application before me. I have considered the substituted service effected in respect of the applicant and I am satisfied it was proper service as it appeared in a popular local daily in a conspicuous space. The applicant will not be allowed to deny service. In the circumstances I find judgment herein was a regular judgment.

It is trite that even where a defendant has been properly served and judgment is entered against him in default of defence, the court can still allow an application to set aside such ex parte judgment. The matters the court will consider are:

- (1) If the defendant has an arguable defence on the merits.
- (2) The explanation the applicant offers in his failure to enter appearance and file defence. See **Trust Bank vs Port Way Stores (1993) Ltd & Others Milimani HCCC No. 413 of 1997.**

In this case the applicant has contended that he never saw the advertisement because of error in one of his names and also because he never buys the newspaper in which the advert was posted. I think that it is a reasonable explanation that the applicant does not usually read that newspaper.

In regard to the defence I have looked at the affidavit sworn by the applicant. I find that he raises a legal point that the 1<sup>st</sup> defendant was sued in this case 19 years after his death. His counsel has relied on Court of Appeal decision **KIRIMA V. MUTOMUTIGA C A No. 202/98** in which the court ruled that any proceedings in a case after the death of a defendant are a nullity in absence of any indication on record that a personal legal representative of his estate was substituted.

Mr. Riungu for the Respondent has urged the court to expunge the death certificate. A death certificate is a public document. Since the respondent had notice of it before this application was heard, effort should have been made to verify its authenticity. As far as the application is concerned, the applicant has demonstrated he has a good defence and should be given an opportunity to be heard.

In the circumstances I will allow the application in the following terms:

1. **The interlocutory and final judgment entered against the applicant on 28<sup>th</sup> July 2005 and all the consequential orders be and are hereby set aside.**
2. **An inhibition order be and is hereby issued against land parcels Nos. NTIMA/IGOKI/6906,6907,6908,6909,6910, 6911, 6912, 6913 and 6914 pending the hearing and determination of this suit.**
3. **The applicant should file his defence within 14 days from date herein and serve it within 7 days from date of service or alternatively move the court as appropriate.**

**4. The applicant shall pay thrown away costs to the Respondent for this application.**

Dated Signed and delivered at Meru this 26<sup>th</sup> day of November 2010.

**LESIT, J**  
**JUDGE**

In the presence of the parties  
Kiriimi – Court Clerk.  
Mr. C. Kariuki for appellants  
Mr. Riungu respondents

**LESIT, J**  
**JUDGE**

DATE  
CORAM

Hon. Lady Justice J. Lesiit – Judge

C/Clerk Kiriimi/Mwonjaru  
Mr. C. Kariuki For Appellant  
Mr. Mr. Riungu For Defendant

**ORDER**

Judgment/Ruling delivered in open court.

**J. LESIIT**

**JUDGE.**