



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

**Civil Case 36 of 2008**

**DAMARIS NJERI (*suing as representative of the estate of***

**PAUL KIMANI NGUGI.....PLAINTIFF**

**VERSUS**

**BLUE SHIELD INSURANCE COMPANY LIMITED.....  
DEFENDANT**

**RULING**

On 13<sup>th</sup> August 2008 I delivered a substantive ruling in the plaintiff's application dated 31<sup>st</sup> March 2008 the upshot of which was to dismiss the defendant's defence dated 28<sup>th</sup> March 2008 and to allow the plaintiff's suit as prayed. On 1<sup>st</sup> September 2008 the defendants filed the present notice of motion seeking, inter alia an order for the setting aside (*sic*) of the ex-parte proceedings of 6<sup>th</sup> May 2008, and all consequential orders made pursuant thereto and to stay the execution of the decree passed against the defendant as a consequence thereof.

The bone of contention is that the ex-parte proceedings of 6<sup>th</sup> March 2008 ought not to have proceeded ex-parte due to the fact that the defendant/applicant's advocate believed that the hearing of the plaintiff's chamber summons of 31<sup>st</sup> March 2008 had been fixed for the 6<sup>th</sup> June 2008. To support that contention the applicants filed a replying affidavit of 46 paragraphs sworn by the advocate for the applicant (*J. Kinyanjui Theuri*) in which he, inter alia casts aspersions and makes serious allegations against third parties who have no interest in the matter at all, including this court's clerk and the court registry.

I am not inclined to delve into matters that are not related to the sole issue arising herein, that of whether or not the proceedings were irregular and I hereby decline to allow this court to be drawn into matters of contention, bordering on contempt.

Submitting for the applicant learned counsel **Mr. Njuguna** submitted that he had not been notified of the hearing date of 6<sup>th</sup> May 2008 despite his own clerk Mr. Tom – advising him that the matter had been fixed for the 6<sup>th</sup> of July 2008. In this regard counsel referred to paragraph 13 of the supporting affidavit in which he depones as follows:

***“13. That on the said date I am informed by the court clerk (Tom Bokea) which information verily believed to the true that the following transpired;***

· ***He was called by a clerk (Wycliffe) from the plaintiff's law firm at 11.00 a.m. on his cell phone to***

**attend the Civil High Court registry found Mr. Karanja Mbugua Advocate personally present for the fixing.**

- **He consulted with the said Karanja Mbugua Advocate and they mutually agreed to take a hearing for 06/06/08 for which he endorsed.**
- **Karanja Mbugua Advocate had requested for an earlier date but he indicated to him that we needed sufficient time to take instructions hence 06/06/08. The said clerk Thomas Bokea has sworn an affidavit to clarify the position (Annexure JKT-3)."**

Having become aware that the matter had been cause listed for the 6<sup>th</sup> of May 2008, counsel submitted as follows:

**"I believe the matter was cause listed on 6/5/2008 but we did not come to court because we had no reason to believe that the same was coming up that day."**

Despite the deposition in paragraph 13 as set out above, the file entry of 11<sup>th</sup> April, 2008 clearly shows that the defendant/applicant's clerk did not endorse any hearing for 6<sup>th</sup> June 2008. It is clear from the said entry that the date given was 6<sup>th</sup> May, 2008. To wriggle out of this lie the said clerk swore an affidavit on 1<sup>st</sup> September 2008 "JK3" of the supporting affidavit in which he make the following obnoxious claims as regards the events of 11<sup>th</sup> April, 2008.

**"5. That on reaching the registry I found Mr. Karanja Mbugua Advocate and I personally suggested the date 06/06/08, although he had wanted an earlier date.**

**6. That Mr. Karanja Mbugua Advocate agreed I was given a paper (Fullscap) to sign against my name to confirm.**

**7. That at that point I was given the paper to sign the date had not been inserted, but after my signature and that of Mr. Karanja Mbugua the paper was passed over and the date must have been inserted.**

**8. That since there was an agreement I sincerely thought that the agreed date of 06/06/08 would be inserted.**

**9. That it's the usual practice to sometime sign the paper for dates even before dates are inserted since agreements for dates are usually not controversial and are agreed before hand.**

**10. That at no one time at all during the fixing did I agree on the date of 06/05/08 which in any event would have been too soon as not to be available.**

**11. That I was surprised when I checked the cause list for 06/06/08 and found out that the matter was not listed, and later found that it had come up on 06/05/08."**

Clearly the applicants herein wish to procure orders favourable clients favour through deceit. The allegations in depositions 6-9 above must be taken to be the deponents own imagination as the sequence of events is most absurd. If at all what he said did happen (*which is highly doubtful in any event*) learned counsel and their clerk know or ought to know that the same is clearly wrong. A person who signs a document without confirming the propriety of what he or she is endorsing does so at his or her own peril and should have himself/herself solely to blame for the consequences.

The circumstances under which the court proceeded ex-parte on 6<sup>th</sup> May 2008 are clearly indicated in the ruling challenged herein. I hold the same view that the hearing date had been fixed by consent. That being the case there was no need for a hearing notice and the proceedings were therefore not irregular. This court is alive to the fact that serious irregularities in procedure and which have a likelihood of

occasioning a miscarriage of justice render the entire proceedings of the court a nullity.

Such was the case in **Kisumu High Court Divorce Cause No. 3 of 2005 H. J. H. (Petitioner) vs. N. L. (Respondent)** where, at the time of writing the judgment a scrutiny of the entries made in the court file disclosed the fact, that despite counsel for the petitioner having submitted that the Petition had been served through a newspaper advertisement the record bore no evidence of such advertisement. Being in doubt as the propriety of the proceedings before me I was quick to find and hold that the proceedings were a nullity, befitting an order for striking out. Based on that finding I proceeded to strike out the same *suo moto*. I hold the same view as I did then but do find that no case has been made out herein to warrant the court proceeding in like manner.

One final question arising, having examined the defence and arriving at a legal finding that the same was a sham and without merit, what other opinion could I possibly hold in this matter even if I was to hear the application afresh and *inter partes*? Could another judge of equal jurisdiction find me wrong? I am, for these two reasons persuaded that the applicant's recourse herein lies not in a striking out or setting aside application but in an appeal. Accordingly I disallow this application and dismiss the same with costs to the respondent.

**Dated, signed and delivered at Nakuru on 28<sup>th</sup> day of May 2009**

**M. G. MUGO**

**JUDGE**