



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 181 OF 2009

KENYA CHURCH OF CHRIST REGISTERED TRUSTEESPLAINTIFF

VERSUS

WILMOSE KIPLAGAT & 2 OTHERS DEFENDANTS

RULING

Before me for hearing is an application by way of Chamber Summons dated 8th May, 2009 filed by the Applicants/Defendants. The same is brought under the provisions of Order XXXIX Rule 1(a) 1, 2, Rule 4(4) of the Civil Procedure Rules. The same is supported by the affidavit of *Wilmore Kiplagat* the first Defendant herein.

The application seeks to set aside Exparte injunction orders issued in favour of the applicant as against the Defendants on the 5th of May, 2009, and injunctive orders restraining the Plaintiff from trespassing into or taking over, or dealing with the Defendants' quite possession of L. R. No. 37/723 (I. R. No.408/70) Birongo square, Nairobi West.

The Plaintiff/Respondent has objected to the application by filing grounds of opposition dated 11th May, 2009. During submissions the Plaintiff/Respondent's counsel Dr. J. Khaminwa relied on the affidavit in support of the Plaintiff/Respondent's application dated 1st April, 2009.

On the 5th of May, 2009 Dr. J. Khaminwa counsel for the Plaintiff/Respondent appeared before me. There was no representation from the Defendants. There was an affidavit of service filed on the same day by one *Mr. Albert Mulindi* a process server.

In paragraph 2 & 3 of the said affidavit of service the process server deponed

“2. That one the 23rd day of April, 2009 I received a plaint, summons to enter appearance and Chamber Summons from M/S Khaminwa & Khaminwa advocates with instructions to have the same served upon the Defendants.”

3. That on the same day I proceeded to Nairobi West where the Defendants are members of the same church and operate business, under the name, The New Life Christian Church, I personally effected service upon *Wilmore Kiplagat, Samuel Kipruto and Caleb Muhando Jairo* with copies of the said documents who acknowledged service by sighing on my copies”

The assumption by the court then was that the Chamber summons served bore the hearing date.

The 1st Defendant *Wilmore Kiplagat* in his affidavit sworn on the 8th May, 2009, in paragraph 5, 6 & 7 depones as follows:-

“4. That I and the other Defendants instructed the firm of Lumumba & Lumumba Advocates on the 30th of April and a memorandum of appearance was filed on the same day

5. That we were served with a Chamber Summons application dated 1st April, 2009 and which was not endorsed with a hearing date on the face of it, but nevertheless the Defendants filed a Replying Affidavit on 6th May, 2009.

6. That the Plaintiff/Applicants fixed the application for hearing and failed to notify us on our advocates on record inspite of having notice”

The above averment especially 5 & 6 of the said affidavit have not been controverted by the Plaintiff/Applicant. I therefore find as a matter of fact that the Defendants/Applicants were not aware that the Plaintiff/Respondent’s application dated 1st April, 2009 had been fixed for hearing for the 5th of April, 2009.

I now wish to turn to the prayers sought in the applicant’s application, the application has been brought under order XXXIX Rule 1(a) 2 & 4(4) none of the Rules deal with review and/or setting aside of ex parte orders. It is however clear from the submissions by counsel and the affidavit in support that the Defendants/Applicants are seeking for review of the court orders. In my considered view, the prayer seeking for the review and discharge of the order ought not be defeated due to technicalities. This is one of the instances where the court ought to apply substantive justice without undue regard to technicalities I wish to be guided by **Prafula Enterprises Ltd vs. Norlake Investment Limited and Another**, H.C.C.C No. 336 of 1999 where Mwera J sort to apply substantive justice and overlooked procedural defects of the application before him.

I accordingly set aside the ex-parte orders I issued on the 5th of May, 2009 and order that application to be canvassed inter parties on a date to be agreed upon by the parties.

Dated and delivered at Nairobi this 14th July, 2009.

ALI- ARONI

JUDGE