



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

**Civil Case 350 of 2008**

DAVID NJUNU MBIYU.....1<sup>ST</sup> PLAINTIFF  
MARGARET NJERI MBIYU.....2<sup>ND</sup> PLAINTIFF  
EDDAH WANJIRU MBIYU.....3<sup>RD</sup> PLAINTIFF

*(All suing as administrators of the estate of the Late Mbiyu Koinange)*

**VERSUS**

WHEAT & BARLEY FIELDS LIMITED.....1<sup>ST</sup> DEFENDANT  
LENNAH WANJIKU KOINANGE.....2<sup>ND</sup> DEFENDANT

**RULING**

This ruling relates to the defendant/applicants' chamber summons dated 2<sup>nd</sup> January, 2009 but filed on 2<sup>nd</sup> January, 2009 in which they seek orders, inter alia, as follows:

- 1. That there be a stay of further proceedings in this matter pending the hearing and determination of the application.**
- 2. That the interlocutory judgement said to have been entered herein against the defendants/applicants order IXA rules 3, 4, 5 and 6 of the Civil Procedure Rules be set aside.**
- 3. That the defendants/applicants be granted unconditional leave to defend the suit.**

The application is premised on the grounds that:

- a) The judgment is defective**
- b) Failure by the defendants to file a defence was due to inadvertence**
- c) The defendants have a good defence**
- d) It is just and fair that the application be allowed as prayed.**

The application is supported by the 2<sup>nd</sup> applicants' affidavit sworn on 2<sup>nd</sup> January, 2009 in which she

explains her inadvertence stating that an attempt was made to serve her with the summons to enter appearance while she was attending court in another suit on 24<sup>th</sup> November, 2008. She advised the process server to serve her advocate who accepted service on her behalf but declined to take up the present brief. Owing to pressure put on the 2<sup>nd</sup> respondent by the ongoing suit, and believing she had ample time to instruct a fresh counsel, having noted from the summons that the attendant chamber summons was scheduled for hearing on 24<sup>th</sup> February, 2009 and not finding the summons within the 80 folios served, she did not realise that she needed to enter appearance within 15 days from the date of service. By the time she instructed her present advocate, judgement had been entered. She depones further that according to the advise from her present advocate, the judgment ought not to have been entered on the basis that it does not lie. She claims she and the 1<sup>st</sup> defendant have a good defence as is disclosed in the statement of defence exhibited as annexure "LKD" of the supporting affidavit.

The application is opposed on the strength of a Replying Affidavit sworn on the 5<sup>th</sup> February, 2009 by the 3<sup>rd</sup> plaintiff/respondent in which she depones inter alia, that the judgment sought to be set aside is regular and that the applicants have no defence to warrant a setting aside of the interlocutory judgment. She bases her deposition on a ruling in H.C.C.C. No. 263 of 2006 in which the applicants' purported lease over the suit property namely L.R. No. 8669/3 Mau Narok was declared invalid null and void with the effect that the applicants would have no valid claim to the suit land. She further depones that the averments in paragraph 5 of the draft defence, wherein the defendant/applicants deny allegations of fraud are false, whilst stating that the question of the applicant's possession of the suit land is res-judicata, by virtue of the dismissal of the applicants' suit (H.C.C.C. No. 263 of 2006). The 3<sup>rd</sup> respondent depones that the present suit was filed with the intention of "*bringing to a halt the defendants' blatant and criminal intermeddling with this particular asset in the estate*" of the late Mbiyu Koinange.

Counsel for the opposing sides made oral submissions and cited several authorities in support of their respective positions. Although their submissions and authorities touched on several aspects, I am of the view that the most pertinent questions arising herein are firstly, whether the judgment sought to be set aside is regular and secondly, whether the applicants have a good defence.

The reliefs sought in the Plaint dated 17<sup>th</sup> November, 2008 are as follows:

- a) A declaration that the defendants are trespassers in Land Parcel Ref. No. 8669/3 Mau Narok otherwise known as Muchera Farm.***
- b) An order that the defendants do vacate the suit land and in default eviction orders be issued by this honourable court.***
- c) An injunction restraining the defendants whether by themselves, their servants and/or agents from entering into, dealing with disposing of, wasting, alienating or in any other way interfering with the plaintiff's quiet possession of L.R.No.8669/3 and discharging their duties as administrators.***
- d) An order that the defendants do account to the plaintiffs of all earnings, derived by them from Muchera Farm during the duration of the times (SIC) they have been in illegal occupation.***
- e) An order that the defendants do pay to the estate of the late Mbiyu Koinange for the loss of mesne profits and/or of use of the suit property from 1<sup>st</sup> May, 2005 to the date of vacation or eviction.***
- f) Costs of the suit.***
- g) Any further or better relief the court may deem fit to grant.***

The suit is based primarily on fraud, alleged against the two defendants and a third party as stated in paragraphs 11 and 12 of the plaint and particularized in paragraph 13. The 2<sup>nd</sup> defendant/applicant claims a beneficiaries' interest to the suit land which claim is recognised under paragraph 8 of the plaint. In her

draft defence, she denies the allegations of fraud against her and raises several issues in paragraph 5 of the defence, in order to explain how she and the 1<sup>st</sup> defendant came to be in possession of the suit land. The plaintiff/respondents say that those averments are false.

The reliefs sought herein, not being in the nature of a liquidated demand (*either wholly or in part*) and the suit not being one for pecuniary damages, clearly the provisions of **Order IXA** Rules 3, 4, 5 and 6 do not apply. The applicable provision and which the Respondents should have invoked is **Rule 8 of Order IXA** which states that;

***“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 IXB rule 1”***

Order IXB rule 1 provides as follows:

***“1(1) At any time after the close of pleadings the plaintiff may, upon giving reasonable notice to every defendant who has appeared, set down the suit for hearing:***

***(2) At any time after the entry of interlocutory judgment the Plaintiff may, upon giving not less than 14 days to every defendant who has appeared, set down the suit for assessment of damages or of the value of goods and damages as the case may be.”***

In my view rule 1 (1) applies to all cases where interlocutory judgment is not available whereas sub rule (2) applies to cases where judgment has been entered in accordance with rule 5 of Order IXA. From the wording of both sub-rules (1) and (2) of Order IXB rule 1 it appears that the plaintiff, must set down the suit for hearing but need not serve any hearing notice upon a defendant who has not appeared.

The Replying Affidavit filed herein creates uncertainty as to who is actual possession of the disputed land. The same confusion arises from prayer No.(c) of the plaint. As to who between the applicants herein and the Respondents are entitled to possession and use can only be determined once the issue of the alleged fraud is strictly proved as required by law. Paragraph 5 of the plaint does, in my opinion raise triable issues touching on the crux of the dispute herein and constitute in my considered view, a valid defence to the action.

Having found, therefore, that the interlocutory judgment entered herein ought not to have been entered, the same is hereby struck out as being irregular. By a consent entered herein on 11<sup>th</sup> March, 2009 the parties agreed that the plaintiffs injunction application of 17<sup>th</sup> November 2008, which I had earlier dismissed be reinstated for hearing interpartes. That alone demonstrates that the Respondents themselves do not believe in the effectiveness of the interlocutory judgment they seek to protect.

Considering the above, and given what is deponed in paragraph 11 of the Replying Affidavit to wit; that

***“.....the plaintiffs are currently in possession and control of the suit property and carrying out their mandate as per the Grant of Letters of Administration dated 22<sup>nd</sup> March, 1993”***

which appears to go against the pleadings, I hereby grant the defendants unconditional leave to defend the suit and direct that they do file and serve their defence within the next 14 days. The respondents shall file and serve a reply to the defence, if they so wish, within 14 days of service. Costs of this application are awarded to the plaintiff/respondents in any event.

Orders accordingly.

**Dated signed and delivered at Nakuru this 25<sup>th</sup> day of September 2009**

**M. G. MUGO**

**JUDGE**