



REPUBLIC OF KENYA
HIGH COURT AT NYERI

CIVIL CASE 107B OF 1999

CRISPIN MAGIMA NDORIA.....1ST PLAINTIFF/RESPONDENT
DICKSON MURIUKI NDORIA.....2ND PLAINTIFF/RESPONDENT
NANCY WAMBUGO NYAMU.....3RD PLAINTIFF/RESPONDENT
CHRISTOPHER MWANGI NYAMU.....4TH PLAINTIFF/RESPONDENT

VERSUS

JOSEPH MWANIKI NJAGI.....1ST DEFENDANT/APPLICANT
RAPHAEL KIMARU NJAGI.....2ND DEFENDANT/APPLICANT
BILDAD IHIGA WAHOME.....3RD DEFENDANT/APPLICANT

RULING

The Defendants herein, took out the summons dated 19th June 2003 pursuant to the provisions of **Order 1XB rule 8** of the Civil Procedure Rules in which they applied for the *ex parte* judgment made on 22nd November 2002 to be set aside. The summons is supported by the affidavit of Raphael Kimaru Njagi sworn on 19th June 2003 and a further supporting affidavit of Maina Karingithi sworn on 25th June 2003. When served with the application, the Plaintiffs opposed the same by filing the affidavit of Crispin Magima Ndoria sworn on 22nd October 2003 and another by Felix Kebuka Wachira sworn on the same date.

The background leading to the filing of the aforesaid application appear to be short and straightforward. By a plaint dated 7th July 1999, the Plaintiffs prayed for judgment against the Defendants in the following terms:

- (a) *The defendants to account for all rents allocated from the premises situate in plot 12 at Ihwagi Trading Centre, from the time they excluded the plaintiffs from running the premises until this suit is over and the same be shared among the parties equally.*
- (b) *The suit plot be sub-divided into two equal parts, the defendants to take one part and the plaintiffs the other.*
- (c) *Costs of this suit.*

It would appear that the Defendants were served with the plaint and the summons to enter appearance. The Defendants in turn instructed the firm of Maina Karingithi & Co. Advocate to enter appearance. The aforesaid firm duly entered appearance by filing the Memorandum of Appearance dated 2nd August 1999. The Plaintiffs through the firm of Kebuka Wachira & Co. made a request for the suit to be heard *ex parte* by way of a formal proof when the Defendants failed to file a defence. The suit was finally fixed for hearing on 23rd September 2002 before the Hon. Mr. Justice (Rtd) Mitey. The record shows that the firm of Maina Karingithi & co. Advocates was served with a hearing notice for 23rd September 2002 as evidenced in the affidavit of service of Simon G. Gichuki sworn on 17th September 2002. The record shows that neither defendants nor their advocate turned up for the formal proof. The Honourable Mr. Justice Mitey heard the evidence of one witness before adjourning the hearing of the suit to 28th October 2002 for further hearing. The honourable judge delivered his judgment on 22nd November 2002 in which the Plaintiffs were awarded judgment in the following terms:

1. ***The Defendants jointly and severally be and are hereby ordered to account for all the rents collected from the premises situated on plot number 12 at Ihwagi Trading Centre.***
2. ***The total amount of rent collected from the time the Defendants excluded the plaintiffs from collecting the same until this suit is over be shared among the plaintiffs and the Defendants equally.***
3. ***The suit plot number 12 situated at Ihwagi Trading Centre be sub-divided into two equal parts for the Plaintiffs to take one part and the Defendants the other.***
4. ***The Defendants do pay costs of this suit.***

The Defendants are now before this Court seeking for the aforesaid judgment to be set aside.

It is the submission of Mr. Maina Karingithi, that the Defendants were condemned unheard when the suit was heard *ex parte*. The Defendants aver that they did not write the letter inviting them to attend the hearing of the suit on 23rd September 2002. Through the affidavit of Raphael Kimaru Njagi, the Defendants aver that they only learnt of the entry of judgment when surveyors visited plot No. 12 Ihwagi whereupon they subdivided the same into two equal portions. The Defendants aver that it is then that they rushed to make inquiries from their advocate on the status of that case. In the further affidavit Mr. Maina Karingithi avers that the suit proceeded for hearing irregularly on 28th October 2002 without notice to the Defendants. For the above reasons the learned advocate urged this Court to set aside the *ex parte* judgment. Mr. Mugo, learned advocate for the Plaintiffs urged this Court to dismiss the application for lacking in merits. Mr. Mugo pointed out that having served the hearing notice for 23rd September 2002, he was not obliged to serve another.

I have taken into account the competing arguments. It is not in dispute that the firm of Maina Karingithi & Co. was served with a hearing notice for 23rd September 2002. It is also not in dispute that the Defendants and their advocate failed to turn up in Court for the hearing of the suit. The Defendants have stated that they did not attend Court because they did not receive their advocate's letter inviting them for the hearing. Mr. Maina, learned advocate for the Defendants failed to explain as to why he did not attend Court on 23rd September 2002 despite having been served. I do not believe that Mr. Maina sent the letter dated 7th May 2002 which is attached to the affidavit of Raphael Kimaru Njagi sworn 19th June 2003. If that was true, the learned advocate would have availed himself before the trial judge to explain his predicament. At the time of hearing this application, Mr. Maina did not even bother to file an affidavit to explain why he failed to attend Court on 23rd September 2002. He did not even orally explain himself out when he appeared before me for the interpartes hearing of this application. The only conclusion I can make is that the firm of Maina Karingithi & Co. Advocates intentionally failed to appear in Court. In fact the learned advocate has decided to attack the regularity of the proceedings of 28th October 2002 claiming he was not served with a hearing notice. The learned advocate does not explain as to when he went to Court to peruse the Court file. I find the Defendants' learned advocate to have intentionally failed to inform his client of the hearing date. He purposely also failed to attend Court.

The Defendants have not in any way blamed their advocate for their misfortune whereas it is plainly clear that their advocate failed them. In such cases the client must be left to suffer for the mistakes of their advocate. Having proceeded for hearing on 23rd September 2002 in the absence of the Defendants and their advocates, I am of the considered view that the Plaintiffs were not obliged to serve the Defendants with another hearing notice. Consequently the proceedings of 28th October 2002 were regularly conducted.

In the final analysis, I find no merit in the summons dated 19th June 2003. The same is ordered dismissed with costs to the Plaintiffs.

Dated and delivered this 30th day of September 2009.

J. K. SERGON

JUDGE

In open Court in the presence of Mr. J. Macharia holding brief for Mogo for Respondent and no appearance for Maina Karingithi.