



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

Civil Case 162 of 2004

JEREMIAH OTIENO OKENYE PLAINTIFF

VERSUS

1. PASTOR ENOCK ARITA MOKUA)

2. DECON HEZRON OTISO)DEFENDANTS

**3. RIONCHIRI PENTECOSTAL ASSEMBLIES OF GOD
CHURCH)**

RULING

The third defendant filed an application under Order IXA rule 10 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. The main prayer there is for setting aside of an interlocutory judgment entered against it on 12th June 2006 and all consequential orders made thereunder, particulars those issued on 20th November 2006.

In an affidavit sworn by Hesborn Onchiri, the secretary of the third defendant, he deposed that the third defendant was never served with summons to enter appearance in this matter. He stated that the third defendant had put up its church building on a parcel of land known as **GESIMA SETTLEMENT SCHEME/120** and not on GESIMA SETTLEMENT SCHEME/45 allegedly owned by the plaintiff who claimed that the first and the second defendants, acting at the instance of the third defendant, had erected a church thereon.

Mr. Onchiri pointed out that the affidavit of service showed that summons to enter appearance and plaint were served upon one deacon Hezron Otiso purportedly for and on behalf of the third defendant. The deponent further stated that the third defendant had never had a deacon by the name Hezron Otiso.

The third defendant became aware of the existence of this suit when it was served with an order on 31st December, 2006. The applicant further stated that the first and the second defendants were not its pastor and deacon respectively.

It contended that it had been wrongfully sued. The plaintiff filed a replying affidavit and insisted that the third defendant was served with summons to enter appearance through the second defendant whom he said was a deacon of the said church. He cited the affidavit of service that was filed by one DOMINIC

OKUMU OJILI, a process server. I will refer to the affidavit of service later.

The plaintiff stated that he had no claim whatsoever over GESIMA SETTLEMENT SCHEME/120. He added that the cause of action in his suit involved acts of trespass by the first and second defendants and their followers, whom he accused of having trespassed upon his parcel of land and establishing a church known as Rionchiri Pentecostal Assemblies of God, the third defendant. The plaintiff was aware that Hesborn Onchiri was the secretary of another church built on GESIMA SETTLEMENT SCHEME/120.

The plaintiff stated that the third defendant was guilty of laches, saying that it had been aware of these proceedings since 2004.

Mr. Ombachi and Mr. Oguttu made submissions in support of their respective clients' arguments. I have considered the said submissions.

It is trite law that the court has a wide discretion to set aside default judgments. Where there is no proper or any service of summons to enter appearance, the resulting default judgment is an irregular one which the court must set aside *ex debito justitiae*. Where the default judgment is a regular one, the court still has unfettered discretion to set aside such judgment and any consequential decree or order upon such terms as are just, see REMCO LTD VS MINISTRY JADVA PARBAT & COMPANY LTD & OTHERS [200] 1EA 233.

According to the affidavit of service that was sworn by David Okumu Ojili on 7th June, 2006, he served the summons to enter appearance together with the plaint upon the first and second defendants on their behalf and on behalf of the defendant. The service was effected on 13th November, 2004 though the affidavit of service was sworn and filed on 7th June, 2006.

There was no admission by the first and second defendants that they were officials of the third defendant. Following the aforesaid service of summons, the first defendant filed a replying affidavit and in paragraphs 4, 5 and 6 stated as follows:

“4. That I am a stranger to the entire proceedings

herein and I do not understand why the

applicant is bent in (sic) dragging me into

this matter.

5. That I am a minister of the gospel and Pastor

(of) Ensoko Pentecostal Assemblies of God

Church (P.A.G.(K) while the 2nd Respondent

is the Church elder of my said church.

Annexed and marked “EAM I” is a copy of

letter of transfer by the Pentecostal Assemblies

of God (K).

6. That the said Ensoko Pentecostal Assemblies

of God church is fully independent from

RIONCHIRI PENTECOSTAL ASSEMBLIES of

GOD church, the 3rd Respondent.”

The above quoted depositions were not expressly challenged by the plaintiff. He attempted to do so in paragraph 16 of his replying affidavit where he stated that the first and the second defendants and their followers had illegally encroached into his parcel of land. However, the plaintiff was not clear about the name of the church that had allegedly been erected on his parcel of land.

There is nothing to prove that the first and the second defendants are in any way associated with the third defendant and could thus be served with summons to enter appearance for and on its behalf.

I have also looked at the draft statement of defence by the third defendant and the same cannot be said to be frivolous.

I am satisfied that there was no proper service of summons to enter appearance and plead upon the third defendant and consequently, I set aside the interlocutory judgment that was entered against the third defendant and all the consequential orders thereunder. The third defendant should file its statement of defence within the next fifteen days from the date hereof. The costs of this application shall be in the cause.

DATED, SIGNED and DELIVERED at KISII this 25th day of June, 2008.

D. MUSINGA

JUDGE

Delivered in open court in the presence of:

Mr. Ochwangi for the Plaintiff (Respondent).

Mr. Ombachi for the Defendant (Applicant).

D. MUSINGA

JUDGE