

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 5060 of 1987

JULIUS KURIA KIERU PLAINTIFF

V E R S U S

1. GILBERT GICHAGUA GITACHU

2. D.W KIIRUDEFENDANTS

R U L I N G

The suit herein is very old; it was filed in 1987. Interlocutory judgment was entered against the Defendants for want of appearance and defence. Final judgement was entered against them, apparently on 6th August, 1992. An application to set aside that judgement was made by chamber summons dated and filed on 15th September, 1995. That application has, nearly thirteen (13) years later, not been disposed of. In the meantime, one of the Defendants has died.

On 15th June, 2000 the court (Aluoch, J, as she then was) ordered in effect that the process-server who served the Defendants with summons to enter appearance and copy of the plaint be produced at the hearing of the application for purposes of cross-examination, the dispute in the application being whether or not there was such service.

The Plaintiff has now applied by notice of motion dated 19th October, 2007 for an order to vacate the aforesaid order of 15th June, 2000 upon the ground that the process-server cannot be found. The application is opposed by the surviving Defendant.

I have read the supporting and replying affidavits. I have also given due consideration to the submissions of the learned counsels appearing. In my view the present application is unnecessary. What ought to be done is to fix for hearing the application by chamber summons dated 15th September, 1995. If the process server cannot be produced at the hearing, the Judge then seized of the matter will be so informed and reasons for failure to produce given. It will then be upon that Judge to determine and direct how to proceed. I hazard the opinion that failure to produce the process-server, for whatever reason, should not be allowed to hold the application to set aside judgment in abeyance indefinitely. But it will be entirely upon the Judge seized of the matter when the application comes up for hearing.

I therefore hold that the application by notice of motion dated 19th October, 2007 is misconceived. It is hereby struck out with no order as to costs. I further direct that that application by chamber summons dated 15th September, 1995 be fixed for hearing on priority basis. Those will be the orders of the court.

DATED AT NAIROBI THISDAY OF JUNE 2008.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 6TH DAY OF JUNE 2008.

