



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Misc Civil Suit 366 of 2008 (OS**

**IN THE MATTER OF: LAND PARCEL NO KWALE UKUNDA 965**

**AND**

**IN THE MATTER OF: REGISTERED LAND ACT CAP 300 (LAWS OF KENYA) SECTION  
143**

**AND**

**IN THE MATTER OF: THE RECTIFICATION OF THE REGISTER AT THE KWALE  
DISTRICT LANDS REGISTRY**

**BETWEEN**

**MWANAJUMA MOHAMED MWAJINGA ..... APPLICANT**

**V E R S U S**

**ATHMANI SAID GUO ..... RESPONDENT**

**R U L I N G**

This matter was heard on 17<sup>th</sup> October, 2008, and judgment reserved for delivery today. The court now finds itself in the unfortunate position in which it has to deliver a ruling instead of a judgment.

The reason for this change of events is that this matter was heard ex parte. Owing to an oversight on the part of the court, the court did not notice that the hearing date was taken ex parte and that there was no affidavit of service on record. If the respondent had been duly served, it is imperative that such an affidavit ought to have been filed.

Secondly, the date for the hearing of the application by Originating Summons dated 9<sup>th</sup> July, 2008, was taken on 14<sup>th</sup> October, 2008. And the application was fixed for hearing 3 days later, to wit, on 17<sup>th</sup> October, 2008.

Quite apart from the fact that there was no evidence of service upon the respondent, it is not certain that any such notice would have complied with O.IXB rule 3(c) of the Civil Procedure Rules which requires that hearing notice be served in sufficient time for the defendant to attend.

In these circumstances, I find that this matter should not have proceeded ex parte, and that if judgment is entered in such circumstances, the respondent would be entitled to set it aside ex debito justitiae. In exercise of the court's inherent jurisdiction under Section 3A of the Civil Procedure Act, I accordingly direct –

1. *That judgment in this matter be and is hereby arrested and that the matter be heard afresh.*
2. *That the applicant do invite the respondent or his representative to attend at the Registry for the taking of a fresh hearing date which is mutually convenient to both parties.*
3. *That in the event that the Respondent or his representative does not attend at the Registry, then an ex parte hearing date be taken and an appropriate notice thereof do issue to the respondent in sufficient time for him to attend.*
4. *That the costs for the attendance on 17<sup>th</sup> October, 2008 and those for today be borne by the Applicant.*

It is so ordered.

Dated and delivered at Mombasa this 31<sup>st</sup> day of October 2008.

**L. NJAGI**

**JUDGE**