



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 164 of 2008

MARGARET WAMBUI NGUGI.....PLAINTIFF/RESPONDENT

-versus-

MUNICIPAL COUNCIL OF LIMURU.....1ST DEFENDANT/APPLICANT

ALLIOW ADEN ALI.....1ST DEFENDANT/APPLICANT

RULING

The two applicants, who are both defendants in this suit are asking this court in their Chamber Summons dated 18th August 2008, that the exparte judgment entered against them herein on 5th June 2008 be set aside so that their defence annexed to the Chamber Summons herein be deemed as duly filed and served upon payment of the court fees thereon.

The said ex-parte judgment was entered following the Respondent Plaintiff's request for judgment dated 26th May 2008 and filed on 27th May 2008 on the grounds that the Defendants had on 5th May 2008 been duly served with summons to enter appearance but had failed to enter appearance within the prescribed period. Request for the exparte judgment was filed together with an affidavit of service dated 20th May 2008 deponed by a process server Julius Nzivu Maingi who stated that he had received summons to enter appearance together with the plaint and verifying affidavit from the Plaintiff on 5th May 2008 and went on to state as follows:

“THAT on the same day I proceeded to the office of Municipal Council Limuru whereby I served the said summons to Enter Appearance together with the plaint and verifying affidavit to the Town Clerk who accepted service at around 3.00 p.m. by signing for Municipal Council Limuru and for the 2nd defendant who is an employee of Municipal Council Limuru.”

The process server claimed the said Town Clerk was known to him.

This Chamber Summons is opposed by the Respondent who has relied on her Replying Affidavit dated 3rd November 2008.

After hearing both sides, two main questions arise. First is whether M/s Mwangangi and Company Advocates are duly representing the Applicants in this matter. The second question is whether the contents of the process server's Affidavit of Service that he served the Town Clerk who as a result signed for the said service is proved.

Concerning the first question, M/s Mwangangi & Company Advocates first name on record in this matter when they filed a Memorandum of Appearance dated 6th June 2008. It was filed late on 10th June 2008 the exparte judgment having been entered already on 5th June 2008. Since there had been no other advocate on record acting for the Respondents, M/s Mwangangi & Company Advocates were not covered by **Order III Rule 9A** of the **Civil Procedure Rules. Rule 1** of **Order III** which the Respondent is relying upon also does not cover them because that rule concerns appearances in court by parties to a suit and has nothing to do with appointment of an advocate by a party in a suit. I therefore find nothing wrong in M/s Mwangangi & Company Advocates acting for the Defendant Applicants in this matter and if the Respondent wants the use of the word “DULY” the said Advocates are “DULY” appointed advocates of the Defendant Applicants in this matter.

Moving to the question of service upon the Town Clerk and her signature, this court has not got the evidence confirming the process server’s statements in his affidavit of service aforesaid. I have not been shown the Town Clerk’s signature, although I have been shown Limuru Municipal Council’s rubber stamp at the back of returned summons to enter appearance. The rubber or date stamp is dated 5th May 2008. The place for signature is empty.

In those circumstances, I do not accept the process server’s claim that he served the Town Clerk and that the Town Clerk signed for the said service.

Although the Respondent is saying something different, I find that the Town Clerk as at 5th May 2008 for the Municipal Council of Limuru was Lucy Njoki Nyaga. She says in her affidavit dated 18th August 2008 that she was never served as claimed by the process server yet under the law governing Local Authorities, she was at the time the Chief Officer of the First Applicant and was therefore the only person upon whom any court process such as summons to enter appearance would be served.

Each Applicant filed a supporting affidavit each to the effect that they learned of the exparte judgment through words going round in Limuru town that an exparte judgment had been obtained by the Respondent against the Applicants. The second Applicant was sent to this court to check and his checking with the Court Registry revealed the existence of this suit. The second Applicant took particulars which enabled the Applicants instruct M/s Mwangangi & Company Advocates who rushed to this court to file a Memorandum of Appearance and obtained a copy of the plaint. Subsequently filing this application having confirmed entry of the exparte judgment.

With the above in mind, the position is clear and I do not have to go into other issues as I do not see them important in determining this Chamber Summons.

Accordingly, I do hereby allow the Chamber Summons dated 18th August 2008 and order the exparte judgment dated 5th June 2008 set aside. The annexed defence of the Applicants attached to this Chamber Summons be deemed as duly filed and served upon payment of the requisite court fees thereon. The Respondent to pay costs of this Chamber Summons to the Applicants.

Dated this 24th day of November 2008.

J. M. KHAMONI

JUDGE