



**REPUBLIC OF KENYA**

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

**Civil Suit 808 of 2004**

**LESCHESTER SQUARE INVESTMENT LIMITED.....PLAINTIFF**

**VERSUS**

**JACOB OYEKO.....1<sup>ST</sup> DEFENDANT**

**MR. OMIDO ..... 2<sup>ND</sup> DEFENDANT**

**GEOFFREY WACHIRA WANJOYA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

(1) This is an application by Geoffrey Wachira Wanjoya, the Third Defendant, for stay of execution and setting aside the judgment and decree entered against him and the two other Defendants on the 16<sup>th</sup> December 2004. The application is brought under Orders 9A rule 10 and 21 rule 22 of the Civil Procedure Rules. The Third Defendant alleges that the judgment was obtained irregularly because his Advocates currently on record having filed their Notice of Appointment of Advocates on the 4<sup>th</sup> October 2004 ought to have been served with the Summons to Enter Appearance dated the 22<sup>nd</sup> September 2004 whereas such summons was served personally on the Third Defendant on the 7<sup>th</sup> October 2004.

(2) Learned counsel for the Plaintiff maintains that the judgment and decree against the Third Defendant were properly entered and should not be set aside. Counsel submitted that after being served with the summons and plaint in the suit, the Third Defendant should have instructed his Advocates to enter appearance and having failed to do so, he should not be allowed to complain about any alleged irregularity.

(3) The Plaint in this case was filed on the 26<sup>th</sup> July 2004 against Jacob Oyeko and Omido as Defendants. The Plaintiff sought their eviction from a piece of land on Plot L.R. No.209/13959 Nairobi, which, it was alleged, the two Defendants had entered and occupied as trespassers.

(4) On the 15<sup>th</sup> September 2004, the Plaintiff's Advocates filed an Amended Plaint and added Geoffrey Wachira Wanjoya as the Third Defendant. The Advocates then had the Third Defendant personally served with process at his kiosk on the suit property.

(5) When the suit came before me for formal proof on the 16<sup>th</sup> December 2004, Mr. Goi, learned counsel for the Plaintiff informed the court that the Defendants were not present and had not entered any appearance. The hearing proceeded on that basis. It was for that reason that I observed in my judgment dated the 23<sup>rd</sup> December 2004, that the Defendants had been served with summons but failed to enter

appearance or file statements of defence within the time prescribed by law.

(6) Mr. Goi, for the Plaintiff, opposed the application solely on the ground that the Third Defendant was properly served with summons. I do not have to decide that point because the Third Defendant seemed to have had some idea that the Plaintiff had filed a suit against him. What I have to decide is a point taken by the court, whether the Third Defendant was properly joined as a defendant in this suit. As I have already pointed out, he was not one of the original defendants. He was brought on board when the plaint was amended on the 15<sup>th</sup> September 2004. According to Mr. Goi, he did not need leave of the court to amend the Plaint because at that stage, the pleadings had not closed. He relied on Order 6A rule 1(1) of the Civil Procedure Rules, which states ?

**“1(1) A party may, without the leave of the court, amend any pleading of his once at any time before the pleadings are closed.”**

It is to be noted that the exercise of this right to amend is as stated in rule 3(1) of the same order **subject** to Order 1 rules 9 and 10 and Order 23 rules 3, 4, 5 and 7 of the Civil Procedure Rules

(7) The type of amendment undertaken here was to add or join a defendant and therefore fell squarely within the ambit of Order 1 rule 10(2) of the Civil Procedure Rules which provides —

**“10.(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”**

(8) And where, as in this case, the Plaint is amended to add a defendant, it is provided in sub rule (4) as follows ?

**“(4) Where a Defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.”**  
[Emphasis added]

(9) It is plain beyond argument upon a careful reading of these provisions that leave of the court was required before the Plaint could be amended to add the Third Defendant as a defendant in this suit. That was not done and learned counsel for the Plaintiff concedes as much. There can be no doubt therefore that the Third Defendant was improperly joined as a defendant in this suit. It must follow from this that the judgment and decree entered against him was a nullity and must be set aside in the interest of justice. Accordingly, the application succeeds and the judgment and decree dated the 23<sup>rd</sup> December 2004 and any and all consequential orders, in relation to the Third Defendant **only**, be and are hereby set aside. Consequently, the name of Geoffrey Wachira Wanjoya as the Third Defendant in this suit be and is hereby struck out as such defendant.

(10) As I indicated earlier in this ruling, I did not find it necessary to deal with the issues of service upon the Third Defendant. The validity of the service could only be an issue if the Third Defendant had been properly joined as a defendant in the suit. Since I have come to the conclusion that he was improperly joined, it is of no consequence whether or not he was properly served.

(11) As the application has succeeded on a ground raised by the court of its own motion, I will make no order as to costs.

Dated and delivered at Nairobi this Second day of January 2007.

P. Kihara Kariuki

Judge