



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 271 of 2006**

**PAUL MWANGI MWIRIGI.....PLAINTIFF**

**VERSUS**

**FRANCIS NYOIKE KARANJA.....DEFENDANT**

**RULING**

The Plaintiff herein filed suit against the Defendant averring in paragraph 3 of the plaint that at all material times he has been the registered proprietor of all that property situated in Maragua District known as land reference Number Loc.4/Gakui/520 Muranga situated in Kandara location Maragua District of Central Province which he purchased in vacant possession and free from encumbrances from Joseph Njuguna Ngugi. That the plaintiff has resided in the said property since the period of 1992. That the defendant's entry and encroachment upon the said Title Number Loc.4/Gikui/520 Maragua is a trespass and in blatant violation of the Plaintiffs property rights, without any colour of right and that by the said wrongful entry and trespass the defendant has wrongfully denied the plaintiff his right to develop the said property as planned by him. By reason of the matters aforesaid the plaintiff has suffered loss and damage in consequence of which the plaintiff seeks an order that the defendant be evicted from the suit land, damages for loss of use, costs of the suit together with interest on (c) and (d) above and any other relief that this court may deem fit to grant.

Paragraph 7 of the plaint contained an averment that there was no other suit between the plaintiff and the defendant relating to the same subject matter of this suit. The verifying affidavit verified the correctness of the contents of the plaint.

Summons were taken out and according to the return of service sworn on 23.5.2006 and filed on 24.5.2006 the defendant is alleged to have been served on 30.5.2006 at 11.00 a.m. having been pointed out by plaintiff. Request for judgment was filed on 30.5.2006. Judgment was entered by the Deputy Registrar on 12.6.2006.

Formal proof done on 13.10.2006 and judgment dated 15.3.2007 but was read on 29.3.2007. A decree was issued on 12.4.2007.

The defendant applicant has come to this Court by way of Chamber Summons under Section 3A Civil Procedure Act, Order 22(1) (2) and (3), order 1XA rule 10 and 11 of the Civil procedure Rules seeking stay pending hearing of the application inter-parties and setting aside of the exparte judgment entered herein on 29.3.2007. The main grounds in support are that the applicant defendant was not served with summons to enter appearance herein and secondly that the Plaintiff/Respondent failed to disclose to the Court that there is a court case pending before this court civil, case No. 555 of 2005 between the plaintiff

and the defendant herein. Thirdly that the defendant has a good defence to the plaintiffs claim herein.

In response the plaintiff /respondent has opposed the application on the following grounds:-

- (1) He accompanied the process server to serve the defendant but the defendant declined to accept service.
- (2) He agrees that there is a case No.555 of 2005 which the defendant filed after withdrawing case No.5112/92 but he refused to prosecute it.
- (3) That he filed this case to seek eviction because the Defendant was dragging his feet in 555/2005.

On the basis of the foregoing the plaintiff urged the court to dismiss the application so that he proceeds with the eviction.

On the courts assessment of the facts herein it is clear that the applicant has raised major complaints namely lack of service and existence of another suit. On lack of service the Return of Service filed herein indicated in this ruling depones that the process server was accompanied by the plaintiff when he went to effect the service. The plaintiff has deponed so and submitted so in court. This court finds nothing to show that the plaintiff is cheating on the issue of service.

As for the second complaint that another proceeding exist, the Respondent has exhibited proceedings in case number 5112/2005(OS) which was withdrawn. The applicant has exhibited another set of documents in NAIROBI HCCC NO.555/2005 (OS) which is pending. The proceedings have not been exhibited to show the stage of the proceedings. The defendant applicant has not exhibited the proceedings to show what is holding it. The Respondent says the applicant refused to prosecute it forcing him to file this case. As a requirement of law the plaintiff should have disclosed this fact in his pleading in the current case. Leaving the judgment herein to stand will embarrass, the proceedings in HCCC 555/2005. The best way to resolve this is to reopen this matter so that the defendant can file his defence and thereafter parties will decide whether to stay one suit and finalize the offer or convert HCCC.555/2005 (OS) into a suit consolidate it with this one and then have one trial.

If the plaintiff herein had problems getting the plaintiff in HCCC 555/2005 prosecute his case, he should have fixed it for hearing himself or move the court to have it dismissed for want of prosecution.

For the reasons given this court is inclined to allow prayer (c) of the application dated 17.4.2007 and filed on 18.4.2007.

- (2) The plaintiff will have costs of the application since the court is satisfied the defendant was served.
- (3) The defendant has 21 days from the date of this ruling to file a defence.
- (4) The plaintiff will have 14 days from the date of service upon him of the defence to file a reply to defence.
- (5) Thereafter the parties to proceed according to law.

DATED, READ AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF MAY 2007.

R.NAMBUYE

JUDGE