



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
CIVIL CASE NO. 614 OF 2006

JAMES MASILA MUTUA.....APPLICANT

VERSUS

JOHN MUTIO MUTUA.....1ST RESPONDENT

FLORENCE NDINDA MUTUA.....2ND RESPONDENT

RULING

Background

1. Land & Environmental Law Division
2. Civil Practice & Procedure
3. Subject of Main Suit: Originating Summons
 - a) Orders seeking an injunction against Defendant/Respondent 1 & 2 from sub – dividing suit land.
 - b) Fraud – sub-division be declared null and void.
4. Main Suit.
 - i). 1st Defendant entered appearance.
 - ii). 2nd Defendant – no appearance
 - iii) On 16.11.2006 hearing Orders given by Aluoch J. as prayed in the Originating Summons.
 - iv) Plaintiff in process of executing
5. Application by 1 & 2 Defendant/Applicant of 17 May 2007

- i) Application for stay of execution of the Judgment
- ii) Reasons: Mistake by advocate who failed to enter appearance and file reply affidavit for 1st Defendant/Applicant.

iii) No directions had been given prior to the Judgment.

6. Held: i) Stay of execution granted

ii) Orders of judgment granted

7. Case Law

a) Willie v Muchuki & 2 others 2004 2 KLR 357.

8. Advocates

T.M. Kuria for T.M. Kuria & Co. Advocates - for the Plaintiff/respondent – Present

A. Wandabwa for Langat & Wandabwa Co. Advocates - for the Defendant/applicant – Present1.
Background to Application of 17.5.2007

1. The Originating Summons in this main suit concerns orders sort for an injunction against the 1st and 2nd Defendants restraining them from sub dividing the suit land. The prayers for fraud was also pleaded and thereby the whole sub-division be declared null and void.

2. On being served with the Originating Summons, the advocate for the 1st defendant entered appearance but did not do so for the 2nd Defendant. The Originating Summons was amended. No reply affidavit was thereafter filed.

3. On the day the matter came for hearing judgment was entered by way of an order in favour of the plaintiff. The plaintiff intended to execute their orders.

II. Application of 17.5.2007

4. The advocate for defendant 1 and 2 by way of a certificate of urgency filed an application for stay of execution of the judgment. The reasons given is that it was due to a mistake and ERROR on the part of the advocate to fail to file such appearance and replying affidavit. Further there had been no directions taken by the court before the trial was set down for hearing.

5. In relying also on the case law of Willie & v. Muchiki & 2 others (2004) 1KLR 357 the suit may be res judicata on grounds that there are other cases filed in succession matters touching on this matter. That in effect there is substance of this application.

III. In reply

6. The Respondent/plaintiff stated in reply that the land reference are different and therefore the issue of res judicata does not arise. The application does not lie in law.

IV Findings

7. The advocate has made a mistake. This is something the court frowns on very often. The mistakes require to be rectified. The advocate reliance on the famous case law that states mistake should not be visited upon a litigant, seems to be misused. There will be soon a time when advocate

may end up with issues of professional negligence.

8. This suit was heard by Aluoch J. She was not available to hear this matter. Under Order 17 r 10 civil procedure rules I have heard it and find that in the interest of justice and noting the 'genuine' mistake by the advocate, that this application be granted with costs to the plaintiff respondent.

10. All the said matter and orders made are duly set aside and the replying affidavit be filed within 14 days.

Dated this 22nd day of May, 2007 at Nairobi.

M.A. Ang'awa

JUDGE

24.5.2007

Advocates:

T.M. Kuria (for T.M. Kuria & Co. Advocates - for the Plaintiff – Present

A. Wandabwa (for Langat & Wandabwa Co. Advocates - for the Defendant – Present