



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI

Civil Suit 429 of 2004

LIZZIE MUTHONI WANYOIKEPLAINTIFF

VERSUS

OCHIENG OWINO1ST DEFENDANT

ANDREW OWINO MIYAGA2ND DEFENDANT

RULING

The application dated and filed herein on 1st March 2007 seeks two (2) orders, namely the extension of time to file an amended application as ordered by this Court on 17th October 2006 and the issuance of a temporary stay of execution of a judgment and decree and all consequential orders of the Court made on 4th July 2006.

The application is based on the grounds stated on the face thereof and the averments on the supporting affidavit.

The grounds on the face of the application are that the Honourable Court ordered the amended application to be filed within 14 days; that the applicant was dissatisfied with this order and filed a Notice of Appeal; which had now been withdrawn.

That there was imminent danger of execution and the Defendant stands to suffer irreparable loss and damage if the exparte orders were to be enforced; that the Defendant has a meritorious defence to the Plaintiff's claim and should be allowed to argue the amended Chamber Summons and that the Court has a discretion to enlarge time.

The averments in the supporting affidavit were that the Defendant filed a Chamber Summons application dated 27th July 2006 which came up for hearing on 17th October 2006 when **Honourable Judge Aluoch** of her own motion ordered that the Defendant do file an amended application within 14 days from the date thereof; that the deponent to the affidavit, an Advocate of the High Court of Kenya was of the firm view that the application dated 27th July 2006 was properly before the Court and needed no amendment.

That the Defendant was dissatisfied with that ruling and filed a Notice of Appeal, which had since been withdrawn.

That the learned Judge made it clear to the deponent and **Mr. Mundla**, another counsel on 13th November 2006 that she took exception to the use of the word *irregular* in the Chamber Summons of 27th July 2006

and confirmed that she would hear the application once the amendment was made.

That as a consequence the amended application dated 13th November 2006 was filed out of time and was withdrawn on 1st March 2007.

According to the deponent, it is the desire of the Defendant to prosecute the application to set aside the *ex parte* judgment entered on 4th July 2006. That the extension of time sought herein will not prejudice the Plaintiff in any way whatsoever; that the filing of the amended application was delayed by the intended appeal which had now been withdrawn and that since there was a danger of execution a prayer for conservatory orders is opportune.

A replying affidavit was deposed to by the Plaintiff and filed in Court on 5th March 2007 in opposition to this application.

According to an advice she received from her advocate and which she accepted, the application was fatally defective and an abuse of the Court process and that the Court lacks jurisdiction to hear and determine the application or to issue any orders thereon.

According to the deponent the application is scandalous, frivolous and vexetious and is intended to prejudice and delay the fair trial and determination of this suit.

That the deponent to the supporting affidavit is not a party to the suit and has not been candid and forthright in his averments made and contained in this application.

In paragraph 7 of the replying affidavit the Plaintiff denied sending thugs to the suit property to evict the Defendant and to demolish the suit property or that the said thugs demolished the fence and gate of the suit property as alleged by the deponent to the supporting affidavit.

That on 17th October 2006 the Court heard and made orders in relation to a Chamber Summons application dated 27th July 2006 by the 2nd Defendant herein.

That the orders were that the Chamber Summons application were not brought to Court under the correct procedure and that the applicant had fourteen (14) days to amend the Chamber Summons application, that the applicant did not amend the Chamber Summons application and instead he filed a Notice of Appeal against the said order.

That on advice from her advocate, the Plaintiff believes that there is no evidence that the Notice of Appeal has been withdrawn or struck out as required by the Court of Appeal Rules and that the applicant did not amend the pleadings as ordered.

That the applicant filed an amended Chamber Summons application dated 13th November 2006 which the deponent says she vehemently opposed when the same came up for hearing on 1st March 2007 before **Honourable Lady Justice Rawal**. That then the applicant decided to withdraw the Chamber Summons application.

According to the deponent Counsel has had ample time to comply with the order of this Court dated 17th October 2006 but has blatantly refused/failed to meet the said orders; that the applicant has not given justifiable reason and grounds as to why he had refused and/or failed to comply with those orders.

The deponent avers further that on advice from her advocate, she believes the learned Judge did not say on 13th November 2006 that she took great exception to use of the word *irregular* in the Chamber Summons dated 27th July 2006; and that the correct position in relation to the Chamber Summons application dated 27th July 2006 was that the same were filed under wrong provisions of the law and the honourable Judge after submissions by the Plaintiff's advocate on record agreed and made an order to that

effect.

According to the deponent the application by Chamber Summons filed herein does not comply with the order of 17th October 2007 and that the application filed is intended to continue denying the deponent her rights as quoted by the Court in the decree of 4th July 2006.

That as per the decree of 4th July 2006, the 2nd Defendant was supposed to vacate **Land No. 13330/259** and to demolish the structures constructed therein but he has so far refused to vacate and/or demolish those structures and that he is in contempt of Court and continues to disobey those Court orders.

That this application and the orders sought by the applicant have prejudiced and will continue prejudicing the Respondent unless this application is refused and the orders sought denied.

Counsel for the parties appeared before me on 23rd April 2007 to argue the application. Counsel for the applicant referred the Court to the application, the grounds and the supporting affidavit. The application seeks enlargement of time to file an amended application as per the Honourable **Judge Aluoch's** order of 17th October 2006 which granted the applicant fourteen (14) days to do so from that date.

That the Judge did not make clear what aspect of the application was to be amended but she did so on what she thought was inappropriate on 13th November 2006.

That it was when the Judge made it clear of what she wanted removed from the application and/or added that the counsel moved fast to apply for extension of time to file the amended application.

That in fact counsel filed the main application but the other side objected that there was no Court's leave to file it out of the period of 14 days the Court had granted to do so – hence the present application.

According to counsel, the amended application is to set aside *ex parte* judgment entered by this Court on 4th July 2006 where the Respondent got full and final judgment over the suit property without her proving her entitlement to it.

That due to this, the applicant had been denied the right to be heard on the matter requiring him to vacate the suit premises over which he holds a valid certificate of title and if the Court refuses to extend the time as sought the applicant will have been condemned unheard.

Counsel for the Respondent opposed the application on the basis of the replying affidavit and the annexures. He stated that the application is an abuse of the Court process, scandalous and vexatious.

According to counsel, after **Judge Aluoch** made the order of 17th October 2006, the applicant was dissatisfied and he filed a Notice of Appeal. That so long as this notice is still on record, this present application cannot be entertained unless it is only intended to assist the applicant by condoning his mischief; thus playing a mischievous game with judicial process.

That if the application herein was for review, then the Court would allow it to proceed.

Counsel stated that the application previously made did not relate to what had happened and this is why the Judge said it had not been filed in accordance with correct procedure.

That it arose out of a defence which had been struck out for non attendance though the applicant had been served and the amendment did not comply with the Court order, hence application cannot stand.

Counsel stated that the application was not filed within 14 days as granted by the Judge which started running from 18th October 2006 but the applicant did not comply with the limitation period but waited till

1st March 2007 to seek extension of time.

That the applicant was not ready to pay due regard to the Court orders and was clearly in contempt of Court.

That principles of justice and fairness should not be extended to him.

That it was the Plaintiff who cannot enjoy the fruits of the judgment made in her favour on 4th July 2006 because the applicant continues to occupying the suit plot. He urged the Court to dismiss this application so that the applicant can vacate the suit land.

I have heard and recorded the submission of both parties herein.

This problem started with an application dated and filed in Court on 21st October 2005. It was for striking out a defence by 2nd Defendant dated 19th November 2004 and the entry of Judgment as prayed in the amended Plaint dated 12th May 2005.

This application was fixed for hearing on 4th July 2006; but on this day, though counsel for the Plaintiff appeared before **Judge Aluoch**, that for the Defendant did not show-up though he had been served.

Counsel who appeared presented his case by praying that the defence be struck out and judgment be entered as prayed because the 2nd Defendant was a trespasser on the suit land. The learned Judge then recorded:

“BY COURT: The 2nd Defendant was served with today’s date. He has not appeared in Court. In the circumstances I grant prayers 1, 2 and 3 in the Chamber Summons dated 21st October 2005.”

Then on 27th July 2006, the applicant in the present application filed an application under **Order IXA Rules 5, 8 and 10, Order IXB Rules 1 and 8 and Order XX Rule 7** of the Civil Procedure Rules and prayed for various orders including setting aside an irregular ex parte Judgment dated 4th July 2006.

This is the application which came before **Lady Justice Aluoch** on 17th October 2006.

On that day, the matter did not proceed but the learned Judge is recorded as having said:

“By Court:

I am not satisfied that the application has been brought under the correct procedure. However in order to be fair to both parties I grant 14 days to enable the 2nd Defendant to file an amended application. The Plaintiff will have costs for today in any event and the 2nd Defendant to pay today’s Court adjournment fees of Kshs .400/= before next hearing”.

It would appear counsel for the applicant was not sure about the amendment to be made as ordered by **Honourable Justice Aluoch** and on 18th October 2006 he was before **Honourable Justice Kariuki Kihara** with an application under Certificate of Urgency for an order that the application dated 27th July 2006 be certified as urgent and that there be an order of stay of execution of the Orders and Judgment issued by the Court on 4th July 2006 pending inter-partes hearing of the application dated 27th July 2006.

One of the reasons given for this application was that contrary to the Judge's order that the application dated 27th July 2006 needed amendment, counsel said that application had been filed under correct procedure and that the same ought to be heard and determined on its merits.

Judge Kariuki Kihara granted a temporary stay until 26th October 2006 when **Judge Aluoch** would hear the application but on that day **Lady Judge Aluoch** did not hear the application. She instead said her order of 17th October 2006 had not been complied with and in the circumstances she was unable to hear the application. She marked it as **S.O.G.**

The applicant then filed an amended application on 13th November 2006 which was placed before **Judge Aluoch** on 15th November 2006 for the purpose of fixing a hearing date but that there was to be a mention thereof before duty Judge on 16th November 2006.

The matter was before the duty Judge on 16th October 2006 when an application by the Respondent dated 9th November 2006 and filed in Court on 10th November 2006 for review or setting aside of **Judge Kariuki Kihara's** order of 18th October 2006 was heard.

In his ruling dated 23rd November 2006 the Judge in effect dismissed the Respondents application and ordered the "**status quo**" to be maintained as had been ordered by **Judge Aluoch** – but a hearing date of the application dated 13th November 2006; to be fixed at the Registry.

The matter came up for hearing before **Lady Justice Rawal** when counsel for the Respondent raised a preliminary objection on 5th March 2007 as to the jurisdiction of the Court to entertain the application when there was still a pending Notice of Appeal in the Court of Appeal over the ruling of **Lady Justice Aluoch** of 17th October 2006.

That issue was however; exhaustively dealt with by **Lady Justice Rawal** and I need not concern myself much with it.

I have heard, read through and evaluated the submissions made by counsel for the parties. I note there have been many applications and counter-applications by counsel for both parties which have contributed to the delay in the hearing of this application. I have discussed some of them hereinbefore.

In my view, once the order of **Lady Justice Aluoch** was made on 17th October 2006, counsel for the applicant should have immediately embarked on finding out and filing the appropriate application in accordance with the correct procedure within the requisite period or follow-up after filing a Notice of Appeal to the Court of Appeal to file the intended appeal within the time prescribed by the Court of Appeal Rules. He never did so but instead decided to go back to the same Judge on the same application on 26th October 2006 which move was most unwise. And because of this, of course, time within which he was allowed to file the amended application ran out.

Worse still, without realizing the time allowed by the Court to file the amended application was running or had run out, counsel for the Respondent was also in Court with an application dated 10th November 2006 requesting **Honourable Judge Kariuki** to set aside the temporary stay orders he had made on 18th October 2006, which application was dismissed on 23rd November 2006.

The same counsel raised a preliminary objection to the applicant's application before **Lady Justice Rawal** when the same was set down for hearing on 1st March 2007. The Judge dismissed the preliminary objection on 19th March 2007; hence the delay in hearing this application, which was finally heard before me on 23rd March 2007.

In my view, Counsel for the applicant was concerned about the Court Order of 4th July 2006 which arose

from an application dated and filed in Court on 21st October 2005.

It was filed by counsel for the Plaintiff/Respondent herein. It sought the striking out of the 2nd Defendant's defence dated 19th November 2004 and entry of judgment as prayed in the amended plaint dated 12th May 2005. there was also a prayer for the costs of that application.

The grounds for this application were outlined on the face of it and the averments in the supporting affidavit. Some of the grounds were that the 2nd Defendant's defence had no merit as it disclosed no reasonable cause of action and that it was an abuse of the Court process.

This application was fixed for hearing on 4th July 2006 when only counsel for the Plaintiff appeared before Honourable **Lady Justice Aluoch**. The record before the Judge shows that although the Defendant was absent, he had been served either with the application or the hearing notice. The record further shows the proceedings for the day thus:-

“Ndambiri

I pray that the defence be struck out, and judgment be entered as prayed. The said defendant is a trespasser.

By Court:

The 2nd Defendant was served with today's date. He has not appeared in Court. In the circumstances I grant prayers 1, 2 and 3 in the Chamber summons dated 21st October 2005”.

Nothing else happened here but the record shows the Plaintiff has attempted to execute on this judgment even though the application subject to this ruling is still pending.

But the amended plaint over which **Judge Aluoch** made the order the subject of the present application had raised issues of concern over ownership of the property known **as L.R. No. 13330/259** (Original No. **4920/3/R** and **4921/3/R** (old sub-plot **No. 344 Thome Farmers No. 5** measuring approximately 0.5 acres situated at Ruaraka in Nairobi, which the Plaintiff alleges the defendant has illegally occupied and/or converted to his exclusive use.

Paragraph 6 of the Plaint states that

(6) Between the months of December 2002 and February 2004 the Plaintiff conducted thorough and mind-boggling investigations and established that the 2nd Defendant herein without the consent of the Plaintiff on diverse days between the year 1994 and the present date entered upon and continue to enter upon the said property and took and continue to take possession of the same.

In paragraph 7 of the Plaint the Plaintiff states

That further the 2nd Defendant constructed and continues to construct buildings and/or structures on

the said property without the permission or authority of the Plaintiff.

Paragraph 8:

The Plaintiff avers that the conduct and acts of the 2nd Defendant were and are illegal, irregular and without justification, legal or otherwise.

Paragraph 9:

Further the Plaintiff avers that the said acts amounted to trespass by the 2nd defendant and the trespass is continuing.

Paragraph 10:

By reason of the matters aforesaid the Plaintiff has been deprived of the use and enjoyment of the said property and has thereby suffered loss and damage.

PARTICULARS OF LOSS AND DAMAGE

(To be provided at the hearing hereof).

Among the prayers in the Plaint are:

I. Mandatory injunction restraining the 2nd Defendant herein his servants/agents from entering, trespassing or in any other manner interfering with the Plaintiff's quiet possession of L.R. No. 13330/259 (original No. 4920/3/R and 4921/3/R (old sub-plot number 344) Thome Farmers No. 5.

II. An order that the 2nd Defendant vacates the property known as L.R. No. 13330/259 (original No. 4920/3/R and No. 4921/3/R (old sub-plot No. 344) Thome Farmers No. 5 and delivers vacant possession of the same to the Plaintiff.

III. An order that the 2nd Defendant destroys or pulls down the building or structures constructed on L.R. No. 13330/259 (original number 4920/3/R and 4921/3/R (old sub-plot number 344) Thome Farmers No. 5 or in the alternative the Plaintiff be given the liberty to destroy the buildings and recover the costs from the 2nd Defendant.

IV. General damages and mesne profits.

V. Costs of this suit.

In the defence filed by the 2nd Defendant on 8th December 2004, the 2nd defendant pleaded ignorance on all the allegations made against him in the Plaint and specifically stated that his plot number was **337** and that if there was any mix-up between this plot and plot number **344**, then that was an issue that Thome Farmers Organization should sort out with the Plaintiff and not himself.

Given all these circumstances one would understand why counsel for the applicant referred to the judgment entered on 4th July 2006 as irregular in his application dated 27th July 2006; though he says the learned Judge was referring to the use of that language when she said the application had not been brought to court correct procedure.

But when one talks of procedures I would expect him/her to be talking about the provisions of the law.

The application subject to this ruling was made under **Order IXA, rules 5, 8 and 10, Order IXB Rules 1 and 8 and Order xx Rule 7** of the Civil Procedure Rules. The same orders and rules were cited in the application dated 1st March 2007 except for **Rule 7 of Order XX** which was changed and replaced by **Rules 11 and 20**.

What do those rules say?

Order IXA Rule 5 relate to interlocutory injunction. **Rule 8** is a general rule dealing with where no appearance has been entered; while **Rule 10** deals with setting aside judgment under **Order IXA** – which talks of “**CONSEQUENCE OF NON-APPEARANCE AND DEFAULT OF DEFENCE**”.

Order IXB Rule 1 deals with setting down the suit for hearing while rule 8 deals with setting aside judgment entered or dismissal for non-attendance.

Order XX Rule 11 deals with orders for payment of money by instalments while rule 20 deals with mode of application under that order.

As far as I can find in this case **Orders IXA** and **XX** were not relevant to the present application but **Order IXB Rule 8** was.

Counsel for the Respondent insisted on the lack of jurisdiction of this court to hear this matter due to the Notice of Appeal filed in the Court of Appeal. But this was dealt with at length by Honourable Lady Justice Rawal during the Preliminary Objection raised there which she dismissed.

In any event, since the filing of that notice to the Court of Appeal and no appeal having been filed within sixty (60) days as required under Court of Appeal Rules, the effect of the notice has ceased to exist and that this court has jurisdiction to hear this matter.

The main issue here was whether the applicant should be given extended period to file the amended application.

I have said his counsel should not have engaged in other appearances after being given 14 days to file it. But this notwithstanding, this court has the requisite and inherent discretion and jurisdiction to grant this type of application where the circumstances warrant that this be done.

Having perused the proceedings filed herein as herein before – restated and also the Order made by the Judge on 4th July 2007, I am convinced this is an appropriate case where the application for the extension

of time to file the amended application should be granted. I grant such leave and give the applicant five (5) days to file the same.

Costs of this application to be in the cause.

Delivered and ***dated*** at Nairobi this 10th day of May 2007.

D. K. S. AGANYANYA

JUDGE