



**KARIUKI & GATHECHA RESOURCES LTD.....PLAINTIFF**

**VERSUS**

**GICHANGA CHUI.....1<sup>ST</sup> DEFENDANT**

**MAINA KAMAU MUCHEGE MUCHEKE.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. Land & Environmental Law Division
2. Civil Practice and Procedure
3. Subject of Main Suit
  - i. Trespass
  - ii. Other pending case in subordinate court (MCC9634/2005 Gichangachui v Karibu & Gathecha Resources Ltd.)
4. Application of 5 April, 2007
  - i. Complaint filed on 11-7-2006 for trespass
  - ii. Defense filed with counter-claim
  - iii. No reply or defense filed to counter-claim by the plaintiff
  - iv. Defendants request for Interlocutory Judgment to the counter-claim
  - v. Deputy Registrar enters Interlocutory Judgment on 19 December, 2006
  - vi. Application of 5.4.2007 seeking to set aside the interlocutory Judgment and file defense.
5. Held Kenya courts have no jurisdiction to enter such judgment in default of filing defence to the counter claim
  - i). Interlocutory Judgment be and is hereby set aside.
  - ii) Conflicting decisions.
7. Case Law

Kahura Bus Service & Praful Patel (1979) KLR 213

## 8. Advocates

G.J. Langi for Kwengu & Co. Advocates for the Plaintiff – Present

Kaai Mugambi for Mugambi & Co. Advocates for the 2<sup>nd</sup> Defendant - Absent

Z.M. Kimani for Kirundi & Co. Advocates for the 1<sup>st</sup> defendant – Present

### **1. Background of Application of 5.4.2007**

1. The Plaintiff filed suit in persons seeking this court's orders for trespass against the defendants.
2. An application for injunction was granted (temporarily) (Visram J. 11 July 2006). No inter parties hearing was ever heard thereafter on the issue of injunction.
3. The defendant/respondent herein filed a defense and a counter claim. They then applied for an interlocutory judgment on the said counter claim for there being no reply and defense filed by the plaintiff to the defense and counter-claim. On application to the Deputy Registrar that an interlocutory judgment be entered against the Plaintiff/applicant, this request was duly granted (19 December 2006) by the said Deputy Registrar.
4. The application herein of 5 April 2007 by the plaintiff is to set aside the said Interlocutory Judgment

### II. Application of 5 April, 2007

5. The Defendant/Respondents M/s Gichanga Chui and Main Kamau Mucheke on being served with the plaint and an application for an injunction filed defense and counter claim to the same. They at once applied for interlocutory Judgment against the Plaintiff/Applicant on the said counter-claim. The Defendant/Respondent then set the suit for hearing on the formal proof to the counter-claim only.
6. The Plaintiff/Applicant files this application of 5 April, 2007 seeking the setting aside of the Interlocutory Judgment. The dates of hearing of the formal proof had been set for 7 May 2007 (in the future).
7. The Defendant/Respondent filed a reply to the application late and failed to attend court. The 2<sup>nd</sup> Defendant made no reply as the matters did not concern them. The 2<sup>nd</sup> Defendants were in court when the application was being argued and had nothing useful to add.
8. The gist of the application is that the said Deputy Registrar had no jurisdiction to enter interlocutory judgment against the counter-claim. The applicant relied on the case law of Kahura Bus Services v Praful Patel (1979) KLR 213 whereby the court recognized that there is no jurisdiction for courts in Kenya to enter-interlocutory judgment on a counter-claim.
9. The said case noted that there are contradictory decision on this point but the correct position is that under Order IX r 9 (1), (3) Civil Procedure Rules dealing with Pleadings should not be used to the effect of Order IX(a) Civil Procedure Rules were judgment is dealt with based on absence of pleadings.
10. The Kenya law does not specifically plead that if a party fails to file defense to a counter-claim they are placed in the same position as a defense party who has no defense filed. The case law referred to Order IX r 8 Supreme Court Rules of 1965 that does not apply to Kenya.
11. I would agree with this case law as no provision similar to Order IX r 8 of the Supreme Court Rules of 1965 in England in the Kenyan provisions of Order VI and Order IX(a) Civil Procedure Rules.

## II Findings

12. I find that the interlocutory judgment entered against the plaintiff for failure to file defense to the counter claim be and is hereby set aside as the Kenya courts have no jurisdiction to enter such judgment in default of filing defense to the counter claim.

13. There will be costs to the Plaintiff/Applicant pending the second defendant/respondent and costs to the 1<sup>st</sup> Respondent.

Dated this 3<sup>rd</sup> day of May, 2007 at Nairobi.

M.A. Ang'awa

JUDGE

### **Advocates:**

G.J. Langi for Kwengu & Co. Advocate for the Plaintiff – Present

Kaai Mugambi for Mugambi & Co. Advocates for the 2<sup>nd</sup> Defendant - Absent

Z.M. Kimani for Kirundi & Co. Advocates for 1<sup>st</sup> Defendant – Present