



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

**AT MERU**

**CIVIL SUIT 8 OF 2007**

**JULIA NKIROTE MWITARI ..... PLAINTIFF**

**VERSUS**

**MWENDA KIAMBI MAKATHIMO ..... DEFENDANT**

**RULING**

The respondent in the present application brought Chamber Summons in which she sought to restrain the applicant herein from evicting her from or trespassing on or interfering with land parcel No.Abothuguchi/Riunga/38. He also sought that inhibition order be issued to stop any dealing in the said parcel No.Abothuguchi/Riunga/38 and finally that the orders of injunction be served upon the OCS Meru Police Station to ensure compliance.

The first two prayers were granted *ex parte* pending the hearing and determination of the originating summons *inter partes*. This was after the respondent had satisfied the court that the application had been served upon the applicant.

The applicant then brought this application in which he seeks that the injunctive relief issued against him be discharged or set aside and the application be heard *inter partes* and the applicant be granted leave to file a replying affidavit. The applicant contends that the application was not served upon him, and disowns the person served, who was alleged to be his wife.

The respondent's replying affidavit which was filed (and not served) on the same day the application was slated for hearing was found to be in contravention of order 50 rule 6(1) of the Civil Procedure Rules and was expunged from the record. However, replying on points of law, the respondent's counsel submitted that the annexures to the application have not been certified true copy of the original.

He also maintained that the application and hearing date were served upon the applicant's adult member of his family, his wife.

The application before me is expressed to be brought under order 39 rule 4 of the Civil Procedure Rules. That rule vests in the court the power to discharge, vary or set aside an order of injunction on application by any party dissatisfied with it.

The order of injunction, no doubt affected the applicant in respect of his dealing with the suit property. He was dissatisfied because of this and more so because he was not heard. But he was not heard because the respondent presented an affidavit of service wherein it was averred that

“On 3<sup>rd</sup> March, 2007 at around 8.15am at Kirigara village, Gatimbi Division, Meru Central District, being unable to trace the defendant at his home, I served the above mentioned documents on one Mrs. Ruth Karimi Kiambi by tendering the copies to her and requiring her signature at the back of my copy.

4. THAT she accepted service on behalf of her husband but declined to sign my copy .....

5. THAT during the time of service, the said Karimi was personally known to me for I have severally visited their home in attempt to serve him with documents in(C.M LDT No.58 of 2005 but in vain)”

Those were the averments of Zipporah A. Karimi, the court process server. As I have noted the applicant has deposed that Mrs. Ruth Karimi Kiambi cannot be his wife as he is formally married to Nancy Makena.

In support of this assertion he has annexed to his affidavit in support of the application a copy of a marriage certificate. That certificate has not been challenged in substance. The only objection raised regarding it is that it is not certified a true copy of the original.

I think the only law the applicant was required to comply with and which he infact did is Rule 9 of the Oaths and Statutory Declaration Rules, which provides that;-

“9. All exhibits of affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification”.

A copy of the Marriage Certificate No[*particulars withheld*] is marked “MKM2”, dated 12<sup>th</sup> April, 2007, sealed and signed by a Commissioner of Oaths, in compliance with the above provision. It was for the respondent, through the process server, to rebut this and show that indeed Ruth Karimi Kiambi is the applicant’s wife.

The applicant has also denied that he or his family live in Kirigara village. He maintains that they live in Nairobi and that no efforts were made to trace him.

Having failed to lead evidence to rebut these averments, the respondent’s claim that an adult member of the applicant’s family was served cannot stand. Consequently I come to the conclusion that the applicant was not served. This application is allowed with costs and it is ordered that the orders issued on 14<sup>th</sup> March, 2007 are set aside.

The applicant shall have leave, within 14 days of today’s date, to file and serve a replying affidavit and the application dated 21<sup>st</sup> February, 2007 set down for hearing *interpartes*.

**DATED AND DELIVERED AT MERU THIS 8<sup>TH</sup> DAY OF JUNE 2007**

**W. OUKO**

**JUDGE**