



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 1219 of 2003

1. Land and Environmental Law Division
2. Civil Practice and Procedure
3. Subject of main suit- Land Loc.12/sub Loc2/1033

Loc.12/Sub.Loc2/1034

Loc12/Sub.Loc2/1035

Loc12/sub-Loc3/523

4. Application 12 July 05

1: Setting aside Interlocutory Judgment IX a r 10,11 Civil Procedure Rules

Applicant used order IX(b) r 8 Civil Procedure Rules

i) Reasons

- a) The defendants were never served with summons to enter appearance.
- b) 29 January 04 – during hearing of application for injunction dated 19 November 03 – notified court they were never served
(Ochieng Ag J).
- c) Served in court with all documents save summons to enter appearance
- d) Interlocutory Judgment entered on 2 August 04 for failing to file defence
- e) Application filed to set aside Interlocutory Judgment 12 July 05

6. In reply to application 12 July 05

- a) Defendants were served 13 January 04. Affidavit of service

16 January 04

- b) Application defence filed under order IX(b) r 8 Civil Procedure Rules

7. Findings

Held:

a) Ocheing J Ordered reserve of all pleading on 29 January 04.

This included summons to enter application appearance

b) Application ought to be made under order IXa r 10,11 Civil Procedure Rules. No preliminary objection had been taken prior to hearing. No injustice caused.

c) Application allowed. Interlocutory judgment set aside

8. Case Law - Nil

9. Advocates

L.W.Kiama for Kamotho & Mbatia Advocates for the plaintiff/respondent

A.G. Kamau from Kituo Cha Sheria Advocates for the defendant/applicant

CATHERINE WAMBUI KUYAKI 1ST PLAINTIFF

LOISE NYAMBURA MWANGI 2ND PLAINTIFF

MARGARET WANJIRU GACHANJA3RD PLAINTIFF

ALICE WAIHERA KARANJA4TH PLAIN TIFF

WINFRED MUGURU MUGO5TH PLAINTIFF

VERSUS

PHARIS KUIYAKI1ST DEFENDANT

MWANGI WANDERI2ND DEFENDANT

CHARITY WARIUNI3RD DEFENDANT

BENSON IRUNGU4TH DEFENDANT

RULING

Background for the application dated 12 July 2005 – seeking the setting aside of an Interlocutory Judgment.

1. The file plaintiffs herein are related to each other as mother- Catherine Wambui Kuyaki (plaintiff No.1) and four daughters (married) Loise Nyambura Mwangi (plaintiff No.2), Margaret Wanjiru Gachanja (Plaintiff N.3), Alice Waithera Karanja (Plaintiff No.4) and Winfred Muguru Mugo (Plaintiff No.5).

2. They all are the beneficiaries to the estate of the late PHARIS KUIYAKI WANDERI who left a

will dated 5 May 1984 bequeathing his properties and wealth to his wife, the plaintiff No.1 and daughters the plaintiff No. 2 to 5.

3. As a result, two parcels of land was given to them equally. They all hold separate title deeds and transfers were duly made in their names.

4. According to the pleading Catherine Wambui Kuyiki and her late husband Pharis Kuyiki Wanderi had four daughters and one son who died at the age of 30 years. Therefore they had no sons. They took in their house hold one Charity Waruini as their daughter together with two of her children Benson Mwangi Wanderi, the 2nd defendant herein and Nelson Irungu Wanderi, the 4th defendant herein. It is unclear who Pharis Kuyiki the 1st defendant herein is. Charity Wariuni has been sued as the 3rd defendant.

It is alleged that all the four defendants evaded a parcel of land known as

Loc 12/Sub Loc2/1033

Loc 12/sub Loc 2/1034

Loc 12/Sub Loc 2/1035

And began to cut down trees and cause destruction.

6. The land had been left vacant but was owned legally by the four daughters. Loc 12 sub Loc 3/523, it is presumed, remained with the mother. Part of the daughters land was under coffee and others under forest.

7. When the defendants invaded the land the plaintiff filed suit on 24 November 2003, Hccc 1219/2003 and filed for an injunction.

8. At the inter parties hearing before Ochieng J the defendants claimed they were never served with applications or pleading to this suit. The Hon. Judge ordered they be served at once and that the defendants do look for a lawyer to defend them. This was on 29 January 04. On 8 March 2004 the defendants came with an advocate who was attached to the Legal advice Centre. This is a centre that gives free legal advice to the poor. They were given time to put in a reply. The Hon. Judge was transferred to the Criminal Division and was unable to deal with this matter. The application dated 19 November 03 for an injunction came for hearing on 17 May 04 before Lenaola J. In his ruling of 11 June 2004 he granted the prayers of injunction restraining the 4 defendants from wasting the said property until the disposal of the main suit and on further orders of the court.

9. On the 2 of August 2004 at the request of the plaintiffs, the Deputy Registrar entered Interlocutory Judgment against the defendant 1 to 4 for failure to file defence.

10. The defendant 1-4 filed the application dated 12 July 2005 as ordered by Ransely J on 22 June 05 during the date set down for formal proof.

11. The inter parties hearing of this application was not reached till 6 June 2007 before the Land Environmental Law Division.

II: Application 12 July 2005

12. The parties ask that I determine whether the Interlocutory Judgment entered against the 1st to 4th defendant should be set aside?

13. According to the defendant/applicants advocate the parties came to the Legal Advice Centre with

Papers. These papers consisting of the application did not contain any summons to enter appearance. The Interlocutory Judgments was therefore entered irregularly.

14. In reply, the plaintiff/respondents stated that the defendants/respondents were served and they cannot say otherwise. Further the application was brought under the wrong order being order IXb r 8 Civil Procedure Rules instead of Order IXA r10,11 Civil Procedure Rules. The defendant/applicant stated that this is curable under order L r 12 Civil Procedure Rules.

A) Is the application actually defective?

15. Order IX b r 8 Civil Procedure Rules which deals with a situation where a suit coming for hearing and parties are absent it may be dismissed for non-attendance. That thereafter a party may apply to have the suit reinstated for good cause.

16. In this case the issue was not non-attendance to court but failure to file a defence. The rules provide where a person fails to file a defence to this case on application the Deputy Registrar may enter an Interlocutory Judgment under order IXa Civil Procedure Rules. Where this occurs the concerned party who for good cause is able to show that they have a good cause would in effect apply under order IXa r 10,11 by way of summons to set aside such orders.

17. The defendant/applicants admit they came in by the wrong rules. The court finds that the plaintiff/respondent should have taken this point at the state of a Preliminary Objection and not during the main application. The defendants respondent were permitted to amend the order to read the correct order under order VI a r 8 Civil Procedure Rules and that can so be orally made. Instead they referred me to order L r 12 Civil Procedure Rules that states the “provision under which application is made is to be stated.” The rule also states that regardless “but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.”

18. I would accordingly rule that the wrong order was quoted but will rule that there is no injustice occasioned herein. In this matter I will proceed to the main merits of the application to determine the matters in issue.

B) Application 12 July 2005

19. I perused the first affidavit of service. It clearly shows that the said plaintiffs were correctly served with the plaint and summons to enter appearance but refused to sign the said documents at the back. The Deputy Registrar is permitted to enter Interlocutory Judgment where a person refuses to sign the documents.

20. The parties appearing before Ochieng J (29 January 04) claimed they were never served. The court ordered that:

“The plaintiff to make available to defendants a copy of the pleading and in particular the application.”

21. The plaintiff did just that and stated that the defendants were served in court. Armed with these papers the defendants gave the Legal advice centre what documents they were served with.

22. It is therefore not possible for the summons to enter application to have been served as the original copy is left with the litigant and a copy within the court file. It would require an order by the Deputy Registrar to release a copy of the original documents of summons to enter appearance to the plaintiff in order to serve the defendants. I am therefore convinced that when orders by Ochieng J were made on 29 January 04 there required to be issued a copy of the summons to enter appearance again. The service earlier made upon the defendants was challenged in court but instead of going to the proof of such service, the plaintiffs were ordered to service afresh.

23. I hereby hold that the said plaintiff’s Interlocutory Judgment entered by the Deputy Registrar on

2nd August 2004 is under Order 48 Civil Procedure Rules be and is hereby set aside.

24. I order that the said plaintiff extract a copy of the summons to enter appearance and service the same upon the defendant 1 – 4 and or advocates who are now instructed.

25. There will be costs in the cause.

Dated this 6th day of June 2007 at Nairobi.

M.A ANG'AWA

JUDGE

L.W. Kiama for Kamotho & Mbatia & Co. Advocates for the plaintiff/respondent

A.G. Kamau from Kituo Cha Sheria advocate for the defendant/applicant