

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 18 of 2004 (O.S.)

FATUMA RAMADHANI MURINGWA.....PLAINTIFF/RESPONDENT

Versus

AISHA RAJAB RAMADHANI.....DEFENDANT/APPLICANT

RULING

The Plaintiff began this action by way of Originating Summons. The Plaintiff seeks orders in that Originating Summons as follows:

1. ***THAT there be a declaration that the Defendant/Respondent holds the suit and TITLE NO. AGUTHI/GATITU/11 in trust of the Plaintiff/Applicant to the extent of half thereof.***
2. ***THAT by reason of breach of trust the Defendant/Respondent be ordered to have the said portion of half of the said suit land registered in the name of the Plaintiff/Applicant.***
3. ***THAT the Defendant/Respondent be ordered to execute all the necessary documents to effect the said transfer failing which the Executive Officer of this Honourable Court be authorised to do so.***
4. ***THAT the costs hereof be granted to the Plaintiff/Applicant.***
5. ***THAT this Honourable Court may be pleased to make such further or better orders as the same may deem fit.***

The Originating Summons was served upon the Defendant's daughter in-law on the 15th March 2004. The Defendant did not file an appearance or a Replying Affidavit and the Plaintiff by a letter filed in court on 11th May 2004 applied for interlocutory judgment to be entered. The Deputy Registrar on 11th May 2004 entered interlocutory judgment against the Defendant for failure to file an appearance or defence within the stipulated time. It is the entry of that judgment that has provoked the present application by the Defendant.

The application is by Chamber Summons brought under *Order IXA Rule 10* of the Civil Procedure Rules. The application seeks that the *ex parte* judgment be set aside and that the Defendant be allowed to file a defence or replying affidavit. The Defendant annexed to the Supporting Affidavit the draft Replying Affidavit. The Defendant by her Supporting Affidavit stated that she is the registered trustee in the title No. **AGUTHI/GATITU/11** on behalf of four other persons. A copy of the title was annexed to the affidavit. The Defendant became aware of this suit when she was in the process of sub dividing that property with a view to obtaining titles for the persons she holds in trust. That on carrying out a search she found a caution registered by the Plaintiff. On perusing this court file she discovered that interlocutory judgment was entered against her in default of appearance and defence. The Defendant stated that she was not served with the summons and that on questioning her daughter in-law she was informed that she did receive those summons but that she did not understand the nature of them and she subsequently misplaced them. The Defendant deponed that at the time of service she had traveled out of the country and that the daughter in-law had visited her at her home in Mombasa when she was served. The application is opposed and the Plaintiff in opposition has filed a Replying Affidavit. In the replying affidavit the Plaintiff stated that Originating Summons were served on an adult member of the Defendant's family. For that reason the Plaintiff stated that there is no good reason why judgment should

be set aside. She termed the Defendant's application as a delaying tactic and stated that the Defendant had written a letter after service of the summons. The court would wish to state that that letter is of no assistance to the Plaintiff because it is written in Kiswahili and the Plaintiff failed to attach an English translation. I have however considered the application and the opposition raised by the Plaintiff. The Originating Summons is brought under *Order XXXVI*. Under that order there is no provision for the Defendant to file an appearance and defence. That being the case it follows that the Deputy Registrar should not have entered judgment in default of appearance and defence. Further, *Order IXA* of the Civil Procedure Rules, which order deals with consequence of non appearance and default of defence does not relate to Originating Summons. Going through the whole order one finds that time and time again mentioned therein is Plaintiff and failure of defendants to file their defences. There is no provision for failure to file a Replying Affidavit in answer to an Originating Summons and accordingly, I am of the view that the Defendant's application is merited. Furthermore in consideration of *Order XXXVI Rule 10(1)* the court can make orders at any stage in the proceedings for an action to proceed as a plaint. I have considered the Originating Summons herein and the prayers that are sought. The prayers therein do not suit an Originating Summons when one considers *Order XXXVI*. Such an action ought to have been started by way of a Plaint. Accordingly the court makes the following orders:

1. The court does hereby set aside interlocutory judgment entered against the Defendant on 11th May 2004.
2. The court orders that the suit herein does proceed as though it was filed by way of a plaint and the Originating Summons dated 26th February 2004 shall and is hereby converted to be a plaint.
3. The Defendant shall within 14 days from this date hereof file and serve a defence in this matter.
4. The costs of the chamber Summons dated 9th February 2007 are awarded to the defendant.

Dated and delivered at Nyeri this 6th day of July 2007.

MARY KASANGO

JUDGE