



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

Civil Suit 236 of 2002

ABDALLA ALI ABDULRAHMANPLAINTIFF

VERSUS

ALIYA APARTMENTS LTD.DEFENDANT

RULING

In a Summons dated 13.2.2006 premised under Order IXB rule 8, Order XXI rule 22(1) and 91 of the Civil Procedure Rules, Sections 3A, 63(e) and 91 of the Civil Procedure Act, Aliya Apartments Ltd., the defendant herein sought for the following orders inter alia:

- (i) An order setting aside the judgment delivered on 9th December 2005.
- (ii) An order setting aside the order issued by the Deputy Registrar dated 1st February 2006.
- (iii) An order directing Abdalla Ali Abdulrahman the Plaintiff herein, to demolish and remove structures erected on Plot No. Mombasa/Block XVII/107 and a further order directing the plaintiff to rebuild a perimeter wall and gate, which were demolished on 3rd February 2006. In the alternative issue an order directing one Mahmood H. Khimji to demolish structures put up by the plaintiff on plot No. Mombasa/Block XVII/107 and to rebuild the perimeter wall and gate at the plaintiff's expense.

The defendant filed the affidavit he swore on 8.2.2006

and another of Mahmood H. Khimji sworn on the same date to support the summons.

When served with the summons and the supporting

Affidavit, the plaintiff filed a replying affidavit he swore on 24.2.2006 to oppose the summons.

It is the submission of Mr. Asige advocate that the

defendant was not given an opportunity to be heard on 9th June 2005 because the case proceeded for hearing in his absence yet he was not notified of the hearing date. It is also the argument of the defendant that he was not given judgment notice in the matter. The defendant annexed copies of the proceedings taken before Lady Justice Khaminwa on the 9th day of June 2005 to show that one Mr. Munzu purported to appear for the defendant yet the defendant did not know him. The defendant asserted that it had

instructed the firm of Nzamba Kitonga Advocates.

It is further submitted by the defendant that a hearing notice was served upon the firm of M.K. Mulei & Co. Advocates yet the aforesaid firm had no instructions to receive a hearing notice in respect of the matter. It is the submission of Mr. Asige advocate for the defendant that the court did not comply with order IXB rule 3 of the Civil Procedure Rules by failing to call for the parties and witnesses outside the court premises. It was pointed out that the court proceedings did not show that the defendant was called upon to tender evidence nor called upon to close its case.

Mr. Asige further urged this court to set aside the warrant issued to the court bailiff because it was executed against property, which did not belong to the defendant.

In response to Mr. Asige's submissions, Mr. Abubakar advocate for the plaintiff urged this court to dismiss the application. He argued that the firm of Nzamba Kitonga Advocates was served with a hearing notice and that Mr. Mulei appeared on its behalf as representing the firm of Nzamba Kitonga Advocates for the plaintiff. It was Mr. Abubakar's contention that the judgment was not *ex parte* hence there was no competent application under order IXB of the Civil Procedure rules. It is the argument of the plaintiff's counsel that the defendant was served with a hearing notice but he chose not to attend court for hearing. This court was further asked to disregard and expunge from record the affidavit of Mahmood Khimji because he is not a party to this suit. It is the submission of Mr. Abubakar that even if the attached property belonged to Mohamood Khimji, the only available remedy is for him to file a fresh suit under Order XXI rule 89 and 90 of the Civil Procedure Rules. It was pointed out that the warrant was executed regularly pursuant to the provisions of order XXI of the Civil Procedure Rules. On his part Mr. Asige stated that there was no mandate in the decree for the demotion of a portion of plot No. 107 and that there was no prayer for the creation of a road.

I have considered the submissions of both learned counsels. There are certain facts which are being denied parties. First, that this case came up for hearing substantively on the 9th day of June 2005. It is not denied that both advocates were made aware of the hearing date. Secondly, that when the suit came up for hearing Mr. Munzu advocate presumably holding brief for the firm of Nzamba Kitonga Advocates for the defendant, applied to prosecute the application seeking leave to allow the aforesaid firm to cease from acting for the defendant. The Learned Judge refused that prayer but directed the suit to proceed for hearing as scheduled. That application is still pending unprosecuted to date. Thirdly, that the suit proceeded for hearing in the presence of Mr. Munzu advocate and in the absence of the defendant.

The main complaint raised by the applicant is that the suit proceeded for hearing in its absence. The defendant further claimed that the person who appeared for it during the hearing had no instructions from it. It is further submitted that a hearing notice was received by the firm of M.K. Mulei & Co. Advocates and not Nzamba Kitonga & Co. Advocates. The later submission in my view does not stand. To begin with it is very clear that Mr. Munzu had specific instructions to prosecute the application dated 5/5/2005 on behalf of the firm of Nzamba Kitonga Advocates. Though the record does not disclose that Mr. Munzu was holding brief, it becomes obvious when one peruses the contents of the summons dated 5/5/2005, that the summons indicated that the firm of Nzamba Kitonga Advocates was seeking for leave to withdraw from representing the defendant. It cannot therefore be said that the suit proceeded for hearing *ex parte*. There was counsel in appearance on the part of the firm of Nzamba Kitonga Advocates. I am therefore satisfied that on this score that the provisions of order IXB rule 8 of the Civil Procedure rules do not apply.

The defendant has raised an interesting aspect, that is to say that the hearing notice was served on the wrong advocate. The annexure shows that the hearing notice was served upon the firm of M.K. Mulei & Co. advocates. On the face of it, the argument appears attractive but a critical look at the whole application and the response thereto will show that the firm of M.K Mulei & Co. Advocates received the hearing notice on behalf of the firm of Nzamba Kitonga Advocates. The physical and postal address appear to be the same as that used by the firm of Nzamba Kitonga Advocates. In any case that firm has not complained that it was not served with a hearing notice. I think the defendant has not been candid to this court. The truth of the matter is that the defendant and its erstwhile advocate no longer relate well

over this business. There is an emerging practice by advocates employed by law firms to secretly register their law firms while serving as employees. This practice must be stamped out to avoid confusing clients. An example is that of M. K. Mulei & Co. Advocates. Why would such a firm acknowledge receipt of documents on behalf of Nzamba Kitonga Advocates? This is another form of stealing clients while working as an employee advocate. Such a conduct amounts to professional misconduct, which should not be condoned.

It is evident that Mr. Munzu was bewildered when Lady Justice Khaminwa refused to allow him to prosecute the application dated 5/5/2005 to the extent that he failed to even cross-examine the plaintiff. He also failed to inform the court that he had no evidence to tender on behalf of the defence. He also failed to close the defence case.

In a nutshell he just developed cold feet and failed to represent the defendant. There was no evidence that the defendant was informed by its erstwhile advocate of the hearing date of 9/6/2005. This fact is confirmed by the allegations in the affidavit of Mike Kyalo Mulei sworn on 5th May 2005 filed in support of the summons dated 5th May 2005. My understanding of the defendant is that it wants its day in court. A court of law cannot deny such a party such an opportunity if it is available. I will exercise my discretion under Sections 3A and 63(e) of the Civil Procedure Act to accommodate the defendant with certain conditions which I will enumerate shortly.

The defendant has accused this court of not complying with Order IXB rule 3 of the Civil Procedure Rules. I will dispose of this ground for two reasons. First, I see no justification for the accusation, because the defendant was not present within court precincts so as it could claim it was sidelined. To say the least, the defendant has sworn on matters, which are not within his knowledge. Secondly, this court is being asked to sit on appeal on its own cause. This is not permissible in law. The defendant must know or ought to know that.

The final matter which I need to dispose of before concluding this application is the fact that the decree has been executed against properties not mentioned in the judgment owned by parties not party to the suit. These complaints were conceded to by Mr. Abubakar advocate for the plaintiff who sought to justify. Mr. Abubakar said that it was necessary for the property of one Mahmood Khimji to be interfered with in order to execute the decree. I am clear in my mind that Mahmood Khimji if well advised will realize that his remedies cannot be secured through this summons. His rights are clearly set out elsewhere and he should therefore vigorously pursue those remedies.

In conclusion, it suffices to state that the defendant's problems arose out of a misunderstanding between it and its advocates. It is not the default of the plaintiff. I have already said that the application wholly has no merit save that the defendant was not aware of the hearing date. On that account alone, I allow the application in terms of Prayer 2 on condition that the defendant pays the plaintiff agreed or taxed costs covering the period from the date of filing of the suit up to 9th June 2005 and costs of this application within 30 days from the date hereof. In default the application shall stand dismissed and execution shall proceed to its conclusion.

Dated and delivered at Mombasa this 22nd day of May 2006.

J.K. SERGON

J U D G E

In the presence of Mr. Mwakiriti h/b of Mr. Asige for the defendant and N/A for Mr. Abubakar for the plaintiff.