



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
Civil Case 498 of 2004

**MUTHITHI INVESTMENTS LIMITED
PLAINTIFF**

VERSUS

ANDREW S. KYENDO1ST DEFENDANT
AMINA MOHAMED2ND DEFENDANT
**WILLIAM K. MWANGAGI3RD
DEFENDANT**
ROSEMARY NYOKABI4TH DEFENDANT
JAMES BANGA5TH DEFENDANT
MESHACK O. AMBUKA.....6TH DEFENDANT
BERNARD MUTTAHA7TH DEFENDANT
W. OKEYO MBATA8TH DEFENDANT
J.M. KAGAI9TH DEFENDANT
JANE WANGECI.....10TH DEFENDANT
RAPHAEL K. THIMBA11TH DEFENDANT
MARY N. KAGO12TH DEFENDANT
DICK OUMA OCHIENG.....13TH DEFENDANT
DAVID AUMA.....14TH DEFENDANT
PATRICK NDIRANGU.....15TH DEFENDANT

SAID ALI ABU.....	16 TH DEFENDANT
SAMUEL NGATIA.....	17 TH DEFENDANT
JAMES NJOROGE.....	18 TH DEFENDANT
MARY NDUKU KIOKO.....	19 TH DEFENDANT
MAINA MUTAHI.....	20 TH DEFENDANT
JOHN MWAURA WAINAINA.....	21 ST DEFENDANT
MUDIA MUCHEMI.....	22 ND DEFENDANT
NAMAN OGEMBO OGWENO.....	23 RD DEFENDANT

R U L I N G

On 14.06.06 learned counsel, Mr G.M. Masese appeared before me and sought directions that the 13th – 23rd defendants/applicants be given a chance to defend this suit plus a time limit to file defence and serve the plaintiff.

Learned counsel, Mr. D. Njogu who appeared for the plaintiff/respondent submitted that the issues on which the 13th – 23rd defendants/applicants were seeking directions were pending before my sister Mugo, J. In particular, plaintiff’s/respondent’s counsel contended that the issue whether or not the 13th – 23rd defendants were properly served or at all should have been determined before Mugo, J at the hearing of chamber summons dated 18.01.06 vide which the issue of service on 13th – 23rd defendants arose.

In reply, Mr Masese for 13th – 23rd defendants/applicants submitted that the issue of service on 13th – 23rd defendants had already been determined by Mugo, J who made a ruling on 31.03.06 to the effect that counsel, Mr Kariuki who had previously represented the plaintiff had deliberately misled my court that the defences of the 13th – 23rd defendants had been struck out by Mugo, J alongside those of the 1st – 12th defendants while only the defences of the 1st – 12th defendants had been so struck out by the learned Judge. Mr. Masese contended before me on behalf of the 13th – 23rd defendants/applicants that if the plaintiff/respondent was dissatisfied with Mugo, J’s ruling of 31.03.06, the said plaintiff/respondent should have appealed against the learned Judge’s ruling or sought its review.

The court record shows that on 25.11.04 learned counsel, Mr. Kariuki represented the plaintiff/applicant in chamber summons application dated 05.07.04 when that application went before my brother P.K. Kariuki, J. The record for that day shows that Mr. Burugu represented the 1st – 12th defendants/respondents and that the court (Kariuki, J) was informed, no doubt by plaintiff’s/applicant’s counsel Mr Kariuki, that the 13th – 23rd defendants/respondents had not entered appearance though they had been served. That is the position I was made to understand to be prevailing on 18.07.05 when this matter first came before me for formal proof. There was no appearance for defendants on that date, i.e. 18.07.05. This was after the defences of the 1st – 12th defendants had been struck out by Mugo, J vide her ruling delivered on 17.06.05. As I understood it, the reference to defendants in the record of 18.07.05 and their non-appearance was to all the 23 defendants, i.e. the 1st – 12th defendants whose defences had been struck out by Mugo, J on 31.03.06 and the 13th – 23rd defendants previously reported by plaintiff’s counsel, Mr. Mariuki to have failed to enter appearance despite having been served. The ex-parte proceedings before me of 18.07.05 and the resultant judgment were, therefore, premised on the above scenario.

Now that the 13th – 23rd defendants have raised the issue of service on them vide their chamber summons application dated 18.01.06 supported by the affidavit of Maina Mutahi (20th defendant) on his own behalf and on behalf of the rest of the 13th – 23rd defendants, I was of the respectful view that the best way to resolve the dispute regarding service on the 13th – 23rd defendants would have been to have the chamber summons dated 18.01.06 plus its supporting affidavit served on the plaintiff's previous counsel, Mr. Kariuki for him to file affidavit response thereto. However, I now understand from Mr. D. Njogu, counsel for plaintiff/respondent that Mr. Kariuki died in a road accident on 02.06.06 and that he is not available to file affidavit response to justify the statement he made to Justice P.K. Kariuki on 25.11.04 regarding service on 13th - 23rd defendants. Mr. Njogu, however, has stated that the process server concerned, Mr. Godfrey Gichuki is available. I order that the said Godfrey Gichuki files affidavit response to the chamber summons dated 18.01.06 on the issue of service on 13th – 23rd defendants/applicants and thereafter this matter to come before me for further directions. Mention on 26.07.06. It is so ordered.

Delivered at Nairobi this 24th day of July, 2006.

B.P. KUBU

JUDGE