



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

Civil Suit 429 of 2004

LIZZIE MUTHONI WANYOIKE.....PLAINTIFF

VERSUS

OCHIENG OWINO.....1ST DEFENDANT

ANDREW OWINO MIYAGA.....2ND DEFENDANT

RULING

(1) Before me is a Notice of Motion dated the 9th November 2006 taken out by the Plaintiff under Order 44 rule 1 of the Civil Procedure Rules. Among the orders sought in the motion is that there be an stay of the orders and directions issued by me on the 7th November 2006 pending the hearing of this Notice of Motion. The Plaintiff also seeks a review of the orders made on the 18th October 2006 and the 7th November 2006.

(2) On the 18th October 2006, I dealt with the Notice of Motion bearing no date but filed on the 18th October 2006 taken out by the Second Defendant. He asked for a stay of execution of the *ex parte* judgment entered in this case by Aluoch, J. on the 4th July 2006, pending the hearing of his application dated the 27th July 2006 to set aside the said judgment. On that day as I could not myself hear the application for review, I granted a limited stay of execution until the 26th October, 2006, when the application dated the 27th July 2006 would be heard by Aluoch, J. When the matter came before Aluoch, J. on the 26th October 2006, the learned Judge observed that the order Her Ladyship made on the 17th October 2006 had not been complied with and Her Ladyship could not therefore hear the application. Consequently, Her Ladyship stood it over generally. The effect of this was that the limited stay I had granted on the 18th October 2006, lapsed.

(3) The other order the Plaintiff is complaining about is the one I made on the 7th November 2006, when I ordered that the application dated the 27th July 2006 be heard before Aluoch, J. on the 13th November 2006. The record is silent on what transpired when the matter came before Aluoch, J. on the 13th November 2006 but when learned counsel for the Second Defendant mentioned the matter before me later on that day, he informed me from the bar that the learned Judge had intimated that Her Ladyship would deal with the application only after the defect Her Ladyship had pointed out had been cured by appropriate amendment. Counsel said an Amended Chamber Summons had already been filed. On that

basis, I ordered that the application be mentioned before Aluoch, J. on the 15th November 2006 for the purpose of fixing a hearing date thereof.

(4) When both learned counsel appeared before Aluoch, J. on the 15th November 2006, the learned Judge issued an order for the Registry to fix a hearing date for the application. Her Ladyship also ordered that *status quo* be maintained until the following day, the 16th November 2006, on which date for inexplicable reason not recorded, Her Ladyship ordered the parties to appear before the Duty Judge.

(5) In the grounds in support of the application and which are also repeated in the affidavit of Alfred Njeru Ndambiri, Esq., Advocate, dated the 9th November 2006, it is alleged that the Chamber Summons dated the 27th July 2006 was heard and determined by Aluoch, J. on the 26th October 2006. For this averment, Mr. Ndambiri claims to rely on the court record of the 26th October 2006. On that date, according to the record, all that Aluoch, J. said was ?

“My orders of 17.10.2006 have not been complied with, in the circumstances I am unable to hear the application which is marked S.O.G.”

(6) If it is true, as contended by Mr. Ndambiri, that the application had been heard and determined by Aluoch, J. on the 17th October 2006, there would have been no need for the learned Judge to state that Her Ladyship was unable to hear the application and then proceed to stand it over generally.

(7) On the 17th October 2006 the learned Judge had indicated that the application had not been filed under the correct procedure and granted the Second Defendant leave to file an Amended Chamber Summons. Her Ladyship did not strike out or dismiss the application or make any orders in default of amendment. And there is now on record an Amended Chamber Summons filed on the 13th November 2006 for which the learned Judge has issued an order for the Registry to fix a hearing date. Accordingly, the averment by Mr. Ndambiri that the Chamber Summons dated the 26th July 2006 had been heard and determined is patently false and intended to mislead the court. The Second Defendant’s application to set aside the *ex parte* judgment is still pending.

(8) As I have already said, the only order I made which anyone can complain of was that I granted a limited stay of execution until the 26th October 2006, when the said order automatically lapsed. Yet Mr. Ndambiri has the temerity to file this motion on the 10th November 2006, long after the said order had elapsed, to question the legality of the said order. With profound respect, I find that quite absurd.

(9) The other order which Mr. Ndambiri is complaining about is the order I made on the 7th November 2006 that the Chamber Summons dated the 27th July 2006 be heard by Aluoch, J. on the 13th November 2006. That is a perfectly legitimate order which the court is entitled to make in the course of hearing any matter before it. I cannot see how an order of that nature can possibly constitute:

- (a) the discovery of new and important matter;
- (b) evidence not within the knowledge of an applicant; or
- (c) some mistake or error apparent on the face of the record;

to justify an application for review under Order 44 rule 1 of the Civil Procedure Rules.

(10) Mr. Ndambiri as an Advocate must know or be taken to know that since the *ex parte* judgment and decree was issued by Aluoch, J., Her Ladyship is the only Judge who can hear an application to set aside that judgment.

(11) In the end, I am of the opinion that the Plaintiff’s Notice of Motion dated the 9th November 2006

and filed on the 10th November 2006 is devoid of merit and an abuse of the process of this court. I order that it be and is hereby dismissed with costs to the Second Defendant assessed at K.shs.5,000/= to be paid within the next thirty (30) days of the date hereof and in default execution may issue.

Dated and Delivered at Nairobi this Twenty-third day of November, 2006

P. Kihara Kariuki

Judge