



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

Civil Case 9 of 2006

HELLEN WANJUGU KIAGAYU

MATHAI NGATIAPLAINTIFF/APPLICANT

VERSUS

ROBERT KIBIRI WOKABI

MWANGI MATHAI..... DEFENDANT/RESPONDENT

RULING

This Ruling relates to chamber summons dated 16.11.06 and filed the same day by the plaintiff/applicant under Order IXB rule 3 of the Civil Procedure Act, Cap.21 applying for the following orders:-

1. That the matter be certified urgent and service be dispensed with in the first instance.
2. That the honourable court be pleased to reserve the delivery of its Ruling on chamber summons application dated 25.05.06 pending the applicant's application to defend the said application.
3. That in the alternative the honourable court be pleased to grant the applicant leave to defend the aforesaid application (dated 25.05.06) before delivery of the Ruling (thereon) on merit.
4. That costs of the application be provided for.

The grounds upon which the present application is based are:-

- a) That the non-attendance by the applicant's counsel was due to the fact that the existence of the application (dated 25.05.06) was not diarized nor brought to her attention as the previous court clerk by the name Jackson Agire who was allegedly served left having locked the application and hearing notice in his desk and never returned.
- b) That counsel's clerk's error should not be visited on the applicant.
- c) That it is in the best interests of justice that the applicant be granted an opportunity to defend the application dated 25.05.06.
- d) That the applicant has a prima facie defence to the respondent's application dated 25.05.06.

The application is supported by the affidavit of Betty Laura Rashid, counsel for 'petitioner' (plaintiff/applicant) sworn on 16.11.06. Salient facts pertaining to the present application are briefly that on 26.10.06, chamber summons application dated 25.05.06 for Peter Kaniu Ndegwa (Attorney of Daniel Karanja Kaniu) and Harun Njihia Njoroge to be joined as interested parties to this suit came up for hearing before this court and Ruling thereon was fixed for 16.11.06. At the hearing on 26.10.06 the intended interested parties were represented by learned counsel, Mr M.M. Muriuki; the defendant/respondent appeared in person; while there was no appearance for the plaintiff/applicant. Counsel for the intended interested parties informed this court that the plaintiff/applicant had been duly served with that day's hearing notice through her lawyers, Betty Rashid & Co. Advocates on 08.08.06 but there was no appearance for her at the hearing of 26.10.06 for no apparent reason. Counsel for the intended interested parties argued the case for the intended joinder on the basis that the intended interested parties are bona fide purchasers of the two suit properties L.R. No. Ngong/Ngong/23380 and L.R. No. Ngong/Ngong/23381 which are a subject of litigation in Kajiado Principal Magistrate's Court Maintenance Cause No.22 of 2005 between the present parties herein. It was the intended interested parties' case that the plaintiff/applicant filed the present suit in the High Court knowing she had filed the Kajiado case; that the matter in issue in the present suit is substantially in issue in the Kajiado case; that the intended interested parties are not parties to the Kajiado case and are also not parties to the present suit in the High Court despite being bona fide purchasers of the two suit properties; and that, therefore, they should be joined to the present suit to protect their interests as bona fide purchasers of the two suit properties. Counsel submitted that the Kajiado court lacks jurisdiction under the Subordinate Courts (Separation and Maintenance) Act, Cap.153 to apportion property in a matrimonial dispute and that, therefore, the High Court should transfer Kajiado case in which the parties lay claim to the properties in question contending it is their matrimonial property while the same was purchased by the intended interested parties. The purpose of chamber summons dated 25.05.06 is for the intended interested parties to assert their claim over the said properties for the High Court to adjudicate over the matter. Counsel for the intended interested parties added that on 15.06.06 the plaintiff/applicant was allowed to put in a replying affidavit within 14 days but she never did and that the omission should be interpreted to mean the plaintiff/applicant is not interested in contesting the chamber summons application dated 25.05.06.

The defendant/respondent associated himself with the position taken by the intended interested parties to the effect that the two suit properties had indeed already changed from his hands and that he cannot hold the said properties in trust for the plaintiff/applicant as she was claiming in this suit. He (defendant/respondent) prayed for dismissal of the present suit by the plaintiff/applicant with costs.

As already recorded, Ruling on the chamber summons application dated 25.05.06 by the intended interested parties was set for 16.11.06 but both the intended interested parties and the defendant/respondent, who were present when the Ruling date was fixed for 16.11.06, failed to attend court. Instead, it is the plaintiff/applicant who appeared through counsel, Mrs Betty Rashid who informed the court of the mistake by her court clerk in not diarising the matter, leading to non-representation of the plaintiff/applicant at the hearing of the intended interested parties' chamber summons application dated 25.05.06. Plaintiff's/applicant's counsel urged this court to defer delivery of its Ruling pending her chamber summons application dated 16.11.06 seeking the orders enumerated above on the grounds indicated on the face of the application now under consideration.

I directed that the plaintiff's/applicant's chamber summons application dated 16.11.06 be served on the defendant/respondent and the intended interested parties with a view to having it heard *inter-partes*, which took place on 23.11.06.

At the *inter-partes* hearing on 23.1.06, counsel for the intended interested parties submitted that the court should proceed to deliver its Ruling upon the chamber summons application dated 25.05.06 and that if it was adverse to the plaintiff's/applicant's case, only then should the plaintiff/applicant challenge it by applying to have it set aside. It was the intended interested parties' counsel's view that the proceedings as far as the chamber summons application dated 25.05.06 go are closed.

The defendant/respondent adopted the submissions of counsel for the intended interested parties and complained that the plaintiff's/ applicant's late application dated 16.11.06 is reminiscent of a similar late

application made before the Kajiado court.

The rejoinder by the plaintiff's/ applicant's counsel was that she did not get involved in the Kajiado court case until late and that the late application she made there was with a view to correcting an omission by the plaintiff's/applicant's previous counsel in failing to attend court. She said in effect that the plaintiff/applicant has a good defence to the intended interested parties application dated 25.05.06. There was filed with the plaintiff's/applicant's chamber summons application dated 16.11.06 supporting affidavit sworn on 16.11.06 by the plaintiff/applicant to the effect that the suit properties are matrimonial properties and that she desires to defend that position, hence her chamber summons application dated 16.11.06.

I have given due consideration to the chamber summons dated 16.11.06 plus the arguments for and against it.

It is an indisputable fact that the firm of Betty Rashid & Co. Advocates failed to attend court on behalf of the plaintiff/applicant on 26.10.06 when the intended interested parties' chamber summons application dated 25.05.06 seeking their joinder to the present suit came up for hearing. Plaintiff's/applicant's counsel, Mrs Rashid blames the omission on her law firm's court clerk Jackson Agire. Particulars of Agire's impugned omission are reflected in Mrs Rashid's supporting affidavit sworn on 16.11.06 wherein at paragraphs 3 – 8 she deposed as under:

'3. That I came to learn that this matter was pending for ruling when I perused a copy of today's (16.11.06) cause list on the 15th November 2006 afternoon I saw it was pending for ruling before this Honourable Court on 16th November 2006 and I Rung (sic) the Applicant.

4. That I perused my file and found that it had no Hearing Notice or copy of the Application dated 25th May 2006.

5. That I broke the drawer of my former clerk Jackson Agire and found a copy of a Hearing Notice.

6. That the said Jackson Agire had not informed me of the Hearing date nor diarised the matter in the master diary and as such I had no knowledge of the hearing date (Annexed hereto and marked as BLR 1 is a copy of our master diary of 25th (sic) October 2006).

7. That had this matter been brought to my notice and diarised, I would have informed the Applicant and attended court.

8. That the error on the part of my former court clerk should not be visited on the Applicant.'

Having thus acknowledged clerk Jackson Agire's error of omission, plaintiff's/applicant's counsel nevertheless does vide ground (a) in the chamber summons dated 16.11.06 designate service on clerk Jackson Agire as an allegation! How can service on the firm's clerk remain a mere allegation when the papers in question were found locked up in the clerk's drawer?

Plaintiff's/applicant's counsel adds at paragraph 9 of her same affidavit as follows:

'9. That the applicant informs me which information I belief (sic) to be true that she is desirous of defending the aforesaid application dated 25th May 2006 (Annexed hereto is her affidavit.'

And the plaintiff's/applicant's said affidavit sworn on 16.11.06 is to the effect that the two suit properties L.R. Ngong/Ngong/23380 and L.R. No. Ngong/Ngong23381 were transferred irregularly to the intended interested parties after a caveat she says she had lodged against those titles were irregularly cancelled to facilitate transfer of those properties.

The omissions ascribed to court clerk Jackson Agire depict him as extremely careless, or even reckless. Plaintiff's/applicant's counsel urged that the firm's court clerk's error, which the law firm cannot disown, should not be visited on the applicant. I shall temporarily suspend decision on the clerk's omission while looking at another lapse on the part of plaintiff's/applicant's counsel's law firm. On 15.06.06 this matter came up for mention before this court. Mr P. Shah held brief for Mrs B. Rashid who was reported to be indisposed. Mr Shah, on behalf of Mrs Rashid, sought leave to file a further affidavit in reply to defendant's/respondent's replying affidavit sworn on 06.06.06 and filed the same day. That affidavit is to the effect that the plaintiff/applicant never contributed anything towards purchase of the suit properties during the subsistence of the marriage; that she maintained she could not contribute anything as her name was not on the title deeds; and that she maintained a separate bank account. Defendant/respondent also stated in the same affidavit sworn on 06.06.06 that he was not in the process of unilaterally disposing of the (suit) properties as they had been transferred to third parties way back in 2005. This is the affidavit Mr Shah said at the mention on 15.06.06 that plaintiff's/applicant's counsel wished her client to file affidavit response to. The plaintiff/applicant was granted 14 days leave to file and serve further affidavit as requested but no such affidavit appears to have been filed and served within the prescribed period. The court has not been favoured by plaintiff/applicant or her advocate with an explanation for this particular omission.

The controversy surrounding the status of the suit properties looks quite complicated. The intended interested parties have brought forth material pointing to their having interest in the said suit properties. In this, they enjoy the support of the defendant/respondent. On the other hand, plaintiff/applicant contends that the intended interested parties have no claim to the suit properties and that vide the chamber summons application dated 16.11.06, the plaintiff/applicant urges the court to stop them from being joined as interested parties to the suit herein. For that reason, the plaintiff/applicant urges this court to defer its Ruling on the intended interested parties' chamber summons application dated 25.05.06. In view of the material placed before this court by the intended interested parties and in view of the omissions of plaintiff/applicant and/or of her counsel as illustrated hereinabove, I find no good reason for further deferring the Ruling which was due for delivery on 16.11.06 but deferred and the matter stood over generally on account of the absence of the intended interested parties and the defendant/respondent. Accordingly, prayers 2 and 3 in the chamber summons application dated 16.11.06 are refused and the court will now proceed to deliver its Ruling on the chamber summons dated 25.05.06. Costs shall be in the

Cause.

Orders accordingly.

Delivered at Nairobi this 11th day of December, 2006.

B.P. KUBO

JUDGE