



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIV SUIT 73 OF 02
JOYCE N. MUSOKO PLAINTIFF
VS
HENRY MUTENYO DEFENDANT

J U D G M E N T

By a plaint dated 20.5.2002 Joyce N. Musoko sued Henry Mutenyo and made the following prayers against him:

- (a) A declaration that the defendant has erected a building which substantially encroaches on the Plaintiff's plot No. E. BUKUSU/S. KANDUYI/4171 and should compensate the plaintiff for inconvenience and trespass.
- (b) A demolition order for the removal of the encroachment.
- (c) A permanent Injunction restraining the defendant his agent and or servants from further interference, construction and or working on the Plaintiff's parcel No. E. BUKUSU/S. KANDUYI/4171.
- (d) Costs of this suit.
- (e) Interest at the usual court rates.
- (f) Any other relief that this Honourable court may deem fit and just to grant.

It would appear the pleadings plus the summons were served upon the defendant and he failed to enter appearance nor file a defence. Interlocutory Judgment is said to have been entered against the defendant on 1st April 2003 upon the request of the plaintiff. The suit was therefore fixed for formal proof.

The plaintiff testified without calling a witness. Before considering the plaintiff's evidence which were tendered before me I must satisfy myself that the interlocutory Judgment was properly entered. The record reveals that on 1st April 2003 one Mr. Chango appeared at the Civil registry representing the firm of Mr. Khakula for the plaintiff. It is also indicated that the defendant was absent. It is noted that the defendant did not enter appearance. On the same date the matter was placed before the Deputy Registrar who made an order for this suit to proceed for hearing on formal proof.

The request for Judgment dated 17th September 2002 was lodged in court on 24th September 2002.

There is no interlocutory Judgment made by the Deputy Registrar on record. This suit therefore proceeded by formal proof on the mistaken belief that there was an interlocutory Judgment. Hence the proceedings of 11.2.2004 were erroneously taken in the absence of the defendant. The defendant should have been served with a hearing notice.

In the event that I am shown that indeed there was an interlocutory Judgment then I am of the view that the same was erroneously entered because there was no proper service. The affidavit of service of Moses Wafula Simiyu sworn on 10th August 2002 shows that the defendant was not personally served. It would appear service was effected upon one Edwin Mutenyo, who is alleged to be the defendant's son. This is contrary to the provisions of order V rule 9 of the Civil Procedure rules which provides that a defendant must be served personally or in the alternative his agent empowered to accept service. The aforesaid affidavit of service does not mention that Edwin Mutenyo was the agent of the defendant.

In the end I have concluded that there was no proper service. Consequently any ex parte Judgment which might have been entered is ordered set aside. The defendant was not served with a hearing Notice to attend the hearing of 11.2.2004, hence there were no competent proceedings. I exercise my inherent power to set aside the said ex parte proceedings exbito Justitiae.

The defendant should be properly served with the pleadings and summons.

Costs shall be in the cause.

DATED THIS 26th DAY OF March 2004

J.K. SERGON

JUDGE