



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 120 OF 2003**

PAULINE WANJIRU KINYANJUIPLAINTIFF

VERSUS

JACINTA NJERI KINYANJUI1ST DEFENDANT

CHRISTOPHER KINYAJUI NDUNGU2ND DEFENDANT

R U L I N G

1. This is an Application for orders that the ex-parte orders made by Hayanga, J. on 28th August 2003 and issued on 2nd September 2003 be set aside and also that the ex-parte judgment entered on 7th October 2003 and all subsequent orders issued against the Defendants pursuant to that order be equally set aside. Further, that the Defendants be granted leave to defend the suit and that the Defence annexed to the Application be deemed as filed.

2. The Application is hinged on the contention that the 3rd and 4th Defendants were served with summons to enter appearance and in any event they were sued on behalf of persons who were unknown to them.

Further that they wish to defend their part of the case to the exclusion of the amorphous group of persons known as **“all persons illegally occupying L.R. no. 209/12340 and L.R. No. 209/12341 ”**. I am informed by learned counsel for the Applicants that the orders sought should be granted ex debito justicie – as a matter of right.

3. The Respondent opposes the Application and submits that service was proper and the Applicants did not come to court and the orders made were properly made. The judge heard the urgency of the matter and proceeded to make all the orders ex-parte having been satisfied that there was no appearance by any of the Defendants or those on whose behalf they were sued.

4. I was taken at length through a number of authorities but for the sake of brevity, I shall merely state this; the issue is whether or not based on the facts before me and the submissions by counsel, I should exercise my discretion and set aside all the orders made exparte in this matter.

5. Ole Keiwua, J.A. in ***National Labour Party vs. head of Civil Service and Director of Personnel Management (Kenya Government) Civil Appl. No. NAI. 287 of 2000*** quoted with approval part of the speech of Sir Donaldson MR in *Wea Records Limited vs. Visions Channel 4 Ltd.* (1983) 2 All E.R. 589 at Page 593 ex-parte orders where it was stated: -

“As I have said ex -parte orders are essentially provisional in nature. They are made by a judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the Applicant is under a duty to make full disclosure of all relevant information in his possession whether or not it assists his Application, this is no basis for making a

definite order and every judge knows this. He expects at a later stage to be given the opportunity to review his provisional order in the light of the evidence and argument adduced by the other side and in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order.”

6. I could not agree more as I am now in the shoes of Hayanga, J. who made the provisional order and for my part I am inclined to grant the Application for these reasons: -

Firstly, I have looked at the Affidavits of Service dated 7th October 2003 and filed by John Mark Okello and the one of even date filed by Christopher Oganda. I note that Christopher Oganda is not a process server nor an officer of the court and I am not certain what purpose his document titled ***“further Affidavit of Service”*** was intended to serve. As regards John Mark Okello, his Affidavit is explicit that the 2nd Defendant on being served, ***“suddenly made a clarion call to his neighbours”*** who threatened to lynch the process server. He depones at paragraph 15 that the 2nd Defendant slapped him across the face and the rest of the Defendants descended upon him ***“with kicks and fists ”***. He earlier deponed at paragraph 14 that the crowd was in the tune of a hundred hostile people. More importantly at paragraph 16, he states that a ***“fracas ensued and the crowd beat us up grabbing from our hands all court papers we had”*** . Having so said, he concludes at paragraph 19 by saying that ***“having issued all the Defendants copies (sic) of all pleadings and summons in this case and having positively identified them before service, I verily believe all Defendants were duly served according to rules of service even though they did not acknowledge receipt by signing my copy for return”*** .

7. I am not satisfied. The alleged service was in a hostile environment and it is only the 2nd Defendant who is properly noted to have received his copy of the Plaint and Summons and then worked up the crowd. I do not see how the grabbing of court papers by a crowd can be said at the same time to be service on the 3rd and 4th Defendants specifically.

8. Secondly, the suit is a representative one and the Applicants have said that they want to defend themselves separately. I also agree that the nature of the suit as I have said is that the group of persons is known by reference to the land they occupy and in my view that is so ambiguous a title as to give credence to the Applicant’s claims.

9. For these reasons, I am inclined to allow the Application dated 10th November 2003 with costs to the Applicants.

Orders Accordingly.

Dated and delivered at Nairobi this 5th day of February 2004.

I. LENAOLA

Ag. JUDGE

5.2.2004

Ruling read in the presence of:

Mr. Nyamu for the Applicants

No appearance for the Respondents

I. LENAOLA

Ag. JUDGE

