

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL SUIT NO.306 OF 1996

MIKE KARANJA GITHIRU.....PLAINTIFF

VERSUS

PETER MWAURA)

JOSEPH KEPKURUI CHEPKWONY).....DEFENDANTS

GENERATION MILLERS KISII)

R U L I N G

The application is a Chamber Summons dated 15th October, 2003. It is brought under Order IXA Rule 11 of Civil Procedure Rules and Section 3A of the Civil Procedure Act. The applicant argued prayers 3 and 4 of the application which states:-

“3 **That this court be pleased to set aside the** ex-parte Judgment entered against the 2nd and 3rd defendants/applicants herein.

4. That flowing from prayer numbers 3 above the 2nd and 3rd defendants/applicants be granted leave to file a statement of defence **out of time and to defend the suit herein.**”

The main ground in support of this application is that the 2nd and 3rd defendants were never served with Summons and further that the advocate who entered appearance on their behalf was never instructed by them. The advocate, KARIGO THUO, filed an affidavit stating that only the 1st defendant instructed him in the case but that he erroneously entered appearance for all defendants. He filed no defence for them.

The application is opposed. The only point the Counsel for the Respondent argued is that the affidavit of KARIGO THUO is deficient as to reason for filing memo of appearance for the applicants who had not instructed him.

The issue before court is whether or not the 2nd and 3rd defendants in this case were served with Summons to enter appearance. There is no affidavit of service on record to allege such service. The respondents have not annexed any in reply to this application and neither have they offered for cross-examination process server who may have served it. It is safe then to argue that no service was effected on the applicants. It is irrelevant that the applicants have come to court many years after Judgment in default was entered. In my view there appears to be nothing on record that warranted the Deputy Registrar to believe that the two applicants had been served. The entry of Judgment against them is therefore irregular and both deserve to have it set aside.

Accordingly I will allow the application conditionally. The applicants’ application is allowed in terms of prayer 3. The plaintiff to serve the two defendants with Summons and the plaintiff to enable them file the Memo of Appearance and the defence within the time prescribed by the law.

Orders accordingly.

Dated this 6th day of March, 2004 at Nakuru.

JESSIE LESIIT

JUDGE