



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO. 1846 OF 2001

LEAH AGAO ONGUTO .....PLAINTIFF

VERSUS

CENTRAL ORGANISATION OF

TRADE UNIONS ..... DEFENDANT

RULING

The applicant herein seeks an order for the setting aside of the ex-parte interlocutory judgment entered against it on 25th April 2003 and all subsequent orders arising therefrom. The application is brought by way of a Chamber Summons under Order IXB Rule 8 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and seeks an order that costs be provided for.

The main ground for this application as appearing on the face of the Chamber Summons and as deponed to in the supporting affidavit is that the failure to enter appearance and to file a defence in the action the consequences of which judgment was entered was due to service not having been properly served on the defendant or its advocate on record.

The Respondents herein have raised a preliminary objection by way of a Notice of Preliminary Objection dated 3rd June 2004 and filed on 10th June 2004 to the effect that the Applicants have disobeyed a valid court order restraining them from evicting and/or interfering with the Respondent's occupation of the premises known as COTU Canteen and are therefore in contempt. They should, as submitted by Counsel be denied audience.

It is not disputed that indeed an injunction was granted in favour of the Respondent restraining the Applicant, its servants, and/or agents from

- 1) evicting the Plaintiff from the premises known as COTU Canteen situated on plot NO. 209/2378/2 pending the hearing and determination of the matter
- 2) blocking and/or refusing entry to the applicant (Respondent herein) and or her customers to COTU Canteen Restaurant situated on plot No. 209/2378/2 and/or blocking entry of the Applicant (Respondent herein) and her customers to COTU Canteen toilets pending the hearing and determination of the matter.

The said order was issued on 26th July 2002.

The applicant does not deny having breached this injunction and did at one time apply to have the same set aside on the grounds by an application dated 6th August 2002 that: -

1. The orders were overtaken by events because the Plaintiff has since been evicted.
2. The orders cannot be enforced as there are other tenants in the suit premises.

Dates were taken severally for the hearing of the said application but such hearing never took place, which means the injunction is still very much in place and has been breached. Counsel for the Respondent submitted that unless the applicant purges its contempt the applicant should not be heard on its present application. Counsel for the Applicant in reply to the Preliminary Objection submitted that the same is res judicata in view of a failed application for committal for contempt which was dismissed on the ground that the order was not served personally on the contemnor. That an order is not served does not invalidate the order. It only pre-empts the order being acted upon, without affecting the validity of the order itself.

Applying the principle in MAWANI –vs- MAWANI 1978 KLR 159 submitted herein by the Respondent I find that this being a suit for an injunction against eviction, in which an interim order has been granted pending the determination of the suit, the disobedience of that injunction impedes the course of justice in that it makes the court futilitarian in its attempt to settle the dispute between the parties.

I therefore uphold the objection and find that the Applicant is not entitled to audience. I refuse to entertain the Chamber Summons application dated 13th May 2004 and dismiss the same with costs to the Respondent.

*Dated and Delivered at Nairobi this 24 th day of September 2004.*

M.G. Mugo

Ag. Judge

In the presence of:

Rombo & Company Advocates for th e Plaintiff/Respondent –N/A

J.A. Guserwa & Company Advocates for the Defendant/Applicant -

Rach h/b for Guserwa