

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO.638 OF 2002

MARGARET MWIHAKI WANJAUPLAINTIFF

V E R S U S

JOSEPH MUIRURI MUGODEFENDANT

R U L I N G

This is a Chamber Summons application dated 7-02-03 under O.9B r8 & O.21 & 50 r12 of the Civil Procedure Rules for orders that the ex parte judgment against defendant on 28-1-03 be set aside and a stay of execution and eviction be granted pending hearing of the application and that an order do issue for a valuation to be carried out by Agricultural Officer on destroyed property of the applicant herein. That was order given on 28-1-03 ex parte in default of appearance by defendant. Now in this application supported by affidavit of Joseph Muiruri Mugo and Gathiga Mwangi both sworn on 7-2-03 wherein they say that the case was first listed for hearing on 15-1-03 but was not listed for hearing that day. However, they fixed it for hearing (Notice of motion dated 4-10-02) on 24-03-2003 and they sent a hearing notice which was served on Ms Waruhiu Kowade advocates for the respondents on 23-1-03 but then on 29-1-03 they received a registered letter showing that the case be heard on 28-1-03 a day after the ex parte order. But the respondent through replying affidavit of Margaret Mwihaki Wanjau sworn on 20-3-03 confirms that the case was not listed on 15- 1-03 when it was to be heard but that they fixed the next hearing for 28-1-03. The process server for the respondent Daniel Ndongo Munyoli in an affidavit dated 23-1-03 confirms sending hearing notice by registered post on 17-1- 03 to the last known address of the respondent`s advocates in Nyeri. His letter was actually posted on 22-01-03 from City Square Post Office here in Nairobi.

From this the respondent say they received the notice on 29-1-03 a day after the order being 7th day after postage.

I have considered this evidence and it may just as well be that in fact respondents were not served with this hearing notice in time. There is no evidence to controvert their assertion that they received it on 29-1-2003. It is granted that this was substituted service but that does not make it less effectual and is as good as personal service and the court was entitled to proceed as it does, but it is not necessarily due service and it is open to the defendant to show that he had no knowledge of the applicant being heard. Indeed after fixing the hearing for 24-03-03 which date appears crossed in the court record there could have been a bonafide mistake as to date of hearing. I believe where a party is genuinelyaware of the hearing date in spite of efforts taken by him to attend, the ex parte order should be set aside.

The principle laid down by Harris J in SHAH vs MBOGO [1967] EA 116 seems to support my exercise of discretion here to allow the application which I hereby do. The ex parte order of 28-1-03 is hereby set aside together with consequential orders and I direct that the application be set for fresh hearing on priority basis. Cost will be in the cause.

Delivered this 9th day of May 2003

A. I. HAYANGA

J U D G E

Read to Mr. Kihara for applicant

N/A for Respondent

A. I. HAYANGA

J U D G E