



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT KERUGOYA**

**ELC CASE NO. 166 OF 2015 (O.S)**

**IMMACULATE WAMBIA MUNGAI.....PLAINTIFF/RESPONDENT**

**VERSUS**

**FREDRICK MWAI MWIHIA.....DEFENDANT/APPLICANT**

**RULING**

***Order 40 Rule 4 (3) of the Civil Procedure Rules*** provides as follows:-

***“In any case where the Court grants an ex-parte injunction, the applicant shall within three days from the date of issue of the order serve the order, the application and pleading on the party sought to be restrained. In default of service of any of the documents specified under this rule, the injunction shall automatically lapse”.*** Emphasis added

On 17th December 2015, the plaintiff filed an Originating Summons seeking orders that she has acquired, by way of adverse possession, land parcel No. MWERUA/BARICHO/882 (the suit land) and that she is therefore entitled to be registered as owner thereof in place of the defendant.

On 5th February 2016, the plaintiff moved this Court by way of a Notice of Motion under ***Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules*** and sought, inter alia, the following two orders which are relevant for the purpose of this ruling.

- 1. That the application be certified as urgent and be heard ex-parte in the first instance owing to the urgency involved.***
- 2. That a temporary injunction do issue restraining the respondent, by himself, his agents, servants, heirs or any other person acting under him from disposing, selling, transferring, partitioning or in any way whatsoever interfering with L.R No. MWERUA/BARICHO/882 pending hearing and final determination of this application and or until further orders of this Honourable Court.***

That application was placed before me on 8th February 2016 and I granted the above two prayers and directed that the application be served for hearing inter-parte on 23rd February 2016. On that day however, I was not sitting and the Deputy Registrar extended the orders although she did not indicate for how long,

On 19th April 2016, the defendant filed a Notice of Motion citing ***Order 40 Rule 7, Order 51 Rule 15 of the Civil Procedure Rules*** and ***Sections 1A and 3A of the Civil Procedure Act*** seeking the main prayer

that this Court do discharge, vary or set aside the injunctive order issued on 8th February 2016. That application which is the subject of this ruling is based on the grounds set out therein and supported by the affidavit of **FREDRICK MWAI MWIHIA** the defendant herein. From the application and supporting affidavit, the main reason for seeking the discharge, variation or setting aside of the injunctive orders issued on 8th February 2016 is that the defendant was never served with any of the pleadings and further, that the injunctive orders were obtained through deliberate concealment of material facts.

In opposing that application, the plaintiff filed a replying affidavit in which she deponed to various issues such as when she started utilizing the suit land in 1962 to-date and that she has a strong case and that the suit land was originally registered in her late husband's names. Those are not really relevant matters to the application at hand. What is relevant in her replying affidavit in my view, is what is deponed to in paragraphs 8 and 9 thereof which is:

***8: That I have been informed by my advocate on record that the applicant was served and that's the reason he has now come to defend this suit"***

***9: That since this Court only granted temporary orders and the application is pending for inter party hearing, the applicant should file his replying affidavit so that the matter can be heard on merits instead of filing another application which seems to deal with technicalities".***

The application has been canvassed by way of written submissions which have been filed both by **J. NDANA advocate** for the plaintiff and **MUNGAI KALANDE advocate** for the defendant.

I have considered the application, the rival affidavits and submissions by counsel.

In my view, the issue for determination in this application is whether there was compliance with the provisions of **Order 40 Rule 4 (3) of the Civil Procedure Rules** following this Court's orders issued on 8th February 2016. Counsel for the defendant has made a strong submission that the process server ought to have been cross-examined since service upon him has been denied. Indeed on 26th September 2016, counsel for the defendant sought to cross-examine the process server but I declined to summon him because in my view, the affidavit of service dated 22nd February 2016 and filed by the process server **PETER MWAI WANJAU** is sufficient to dispose of this application. In that replying affidavit, the said process server has deponed as follows in paragraph two (2) thereof which is relevant to this application:-

***"That on 16th February 2016, I received a copy of certificate of urgency, Notice of Motion, supporting affidavit with annexures attached thereto all dated 5th February 2016 and an order dated 11th February 2016 from the firm of J. NDANA & COMPANY with instructions to serve the same upon FREDRICK MWAI MWIHIA the Respondent herein"***

It is clear from the above affidavit of service filed by the said process server that he only served the defendant with the ***"certificate of urgency, Notice of Motion, supporting affidavit with annexures attached thereto all dated 5th February 2016 and an order dated 11th February 2016"*** on the defendant. The only annexures referred to in the supporting affidavit are a copy of the Green Card to the suit land and a confirmation of grant issued in **HIGH COURT OF KENYA AT KERUGOYA IN SUCCESSION CAUSE No. 258 of 2001** – annexure **IWM 1** and **IWM 2** respectively. There is no evidence that the pleading referred to in **Order 40 Rule 4 (3) of the Civil Procedure Rules** and which is primarily the Originating Summons dated 15th December 2015 and filed herein on 17th December 2015 was even served on the defendant as required. Indeed it is clear from the affidavit of service filed by the process server that the Originating Summons was not among the documents served upon the defendant on 16th February 2016 contrary to the requirements of the law. No explanation has been preferred as to why the Originating Summons was not served upon the defendant. In paragraphs 8 and 9 of his replying affidavit, the plaintiff depones that the defendant was served and that is why he has now come to defend the suit and further, that this application deals with technicalities. The defendant on the other hand has deponed in paragraph 2 of his supporting affidavit that he has ***"never been served with any of the pleadings to this suit"***. The record is clear that the Originating Summons dated 15th December 2015 has never been served upon the defendant and that explains why no defence has been filed herein. And as to

whether or not the defendant's application is dealing with mere technicalities as envisaged under **Article 159 (2) (d) of the Constitution**, it is clear to me that **Order 40 Rule 4 (3) Civil Procedure Rules** is not a mere technicality but its violation offends the overriding objectives of the **Civil Procedure Act and Rules** made thereunder which are meant to facilitate the just, expeditious proportionate and affordable resolutions of disputes. It cannot be in furtherance of those noble objectives where one party deliberately fails to serve the other party with a pleading as required in law.

Secondly, under **Order 40 Rule 4 (3) of the Civil Procedure Rules**, once the Court grants an ex-parte injunction, the order shall be served upon the other party "**within three days from the date of issue of the order**". **Order 50 Rule 8 of the Civil Procedure Rules** which deals with computation of time reads as follows:-

***"In any case in which any particular number of days not expressed to be clear days is prescribed under these Rules or by an order or directions of the Court, the same shall be reckoned exclusively of the first day and inclusively of the last day"***.

Similarly, it is clear that under **Order 50 Rule 2 of the Civil Procedure Rules**, only Sundays, Christmas Day, Good Friday and any other public holiday are excluded in computation of time where the period for doing anything is less than six days. The injunction herein was granted Ex-parte on 8th February 2016 and the order issued by Deputy Registrar on 11th February 2016. When 14th February 2016 which is a Sunday is excluded, it is clear that the three days within which the order should have been served upon the defendant expired on 15th February 2016 which was the third day. That order, as is clear from the affidavit of the process server was served upon the defendant on 16th February 2016 one day after the day on which it ought to have been served as provided by the Rules. As was held by the Court of Appeal in **NICHOLAS SALAT VS I.E.B.C & OTHERS 2013 e K.L.R**

***"This Court, indeed all Courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules"***.

The Supreme Court of Kenya has also in the case of **ZACHARIA OKOTH OBADO VS EDWARD AKONG'O OYUGI & OTHERS (2014) e K.L.R** emphasized that **Article 159 of the Constitution** is not a panacea for all procedural shortfalls and is applicable on a case by case basis. In the case now before me, not only was the injunctive order served outside the time stipulated in the rules and for which no explanation is offered but further, the defendant was not served with the pleadings subject of this dispute as required. Basically, there is no application before me to extend any period under **Order 50 Rule 6 of the Civil Procedure Rules**.

It follows therefore that the order for injunction issued on 11th February 2016 "**automatically**" lapsed on 15th February 2016. What the defendant has done, and for which he must be commended, is to move to Court to have that order discharged or set aside. That is because, as was held in **HADKINSON VS HADKINSON 1952 2 ALL E.R 567**, where an injunction order is issued, it operates until it is revoked by the Court and must therefore be obeyed whether or not it should have been granted in the first place.

In the circumstances and taking into account all that I have stated above, I find this to be a proper case in which to set aside the Ex-parte order of injunction issued on 8th February 2016.

I therefore allow the defendant's Notice of Motion dated 18th April 2016 in the following terms:-

- 1. The ex-parte order of injunction issued on 8th February 2016 is set aside.***
- 2. The plaintiff shall meet the costs of this application.***

**B.N. OLAO**

**JUDGE**

**1<sup>ST</sup> FEBRUARY, 2017**

Ruling dated, delivered and signed in open Court this 1<sup>st</sup> day of February 2017

Mr. Ndana for the Respondent present

Mr. Mungai for the Applicant absent.

**B.N. OLAO**

**JUDGE**

**1<sup>ST</sup> FEBRUARY, 2017**