



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**HCCC NO. 7 OF 2013**

**ZACHARY KIARIE NJUGUNA.....PLAINTIFF**

**-VERSUS-**

**NELLIUS WAIRIMU IRUNGU.....1ST DEFENDANT**

**MARY WANGUI NDIRITU.....2ND DEFENDANT**

**JOYCE WAMBUI NDIRITU.....3RD DEFENDANT**

**RULING**

1. On 29th October, 2016 the 1st and the 2nd defendants herein filed the notice of motion dated **28th October, 2016** seeking:

- i. Certification of the application as urgent and deserving to be heard *ex parte* within the first instance;**
- ii. Temporary stay of execution of the proceedings commenced in this matter;**
- iii. An order setting aside the judgment delivered on 28th January, 2016 against them and all the consequential proceedings and orders;**
- iv. A declaration that the the execution proceedings emanating from the said judgment are irregular, unprocedural and illegal;**
- v. Leave to enter appearance and file the draft defence annexed to the affidavit out of time;**
- vi. Refund of all monies they paid in excess of the taxed costs of the suit;**
- vii. Costs of the application.**

2. The application is premised on grounds that the applicants were neither served with summons to enter appearance nor a notice of entry of judgment against them as by law required; that the applicants have filed a draft statement of defence which raises triable issues and that unless the orders sought are granted, the applicants risk suffering irreparable loss and hardship.

3. In support of the application, the applicants have deposed that they were never served with the court processes herein hence making the entire process irregular.

4. In reply and opposition to the application, the respondent has deposed that the applicants were served with court processes but failed to defend their interest.

5. Concerning execution against Asha Njugu Maina yet she is not a party to the suit, the respondent explains that Asha Njugu Maina misrepresented herself as the third respondent, Joyce Wambui Nderitu.

6. The respondent also blames the said Asha Njugu Maina for having failed to inform the court that she is not a party to the suit.

**Analysis and determination**

7. I have carefully read and considered the averment made in support and against the application. I have also read and considered the affidavit sworn in support of the impugned court process and in particular that of the plaintiff's advocate in respect of service of summons on the defendants/applicants.

8. In my view, that affidavit falls short of proof of service as it does not satisfy the provisions of **Order 5, Rule 15(1)** of the Civil Procedure Rules (CPR) which provides as follows:-

**“(1) The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons.”**

9. A review of the affidavit of service sworn by the plaintiff's advocate, falls short of the foregoing legal threshold in that it does not identify the person who identified the applicants to him and/or who witnessed the delivery or tender of summons.

10. I also note that the deponent of the affidavit of service has not stated whether or not the defendants/applicants were known to him or he knew their place of abode.

11. Whereas the plaintiff maintains that the defendants/applicants were served with summons to enter appearance and other court processes concerning the suit, it is noteworthy that he has not given the basis for that assertion- he does not clarify whether he witnessed the impugned service or he is merely swearing on information. Without such averment, I find his affidavit to be in violation of **Order 19 Rule 3** of the CPR and to that extent incapable of being relied on in support of the averments contained therein.

12. **Order 19 Rule 3** of the CPR aforementioned provides as follows:

**“(3) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:**

**Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”**

13. The fact that the execution was effected on a person who was not a party to the suit amplifies the defendants'/applicants' contention that the proceedings hereto were irregular.

14. Concerning the allegation that execution against Asha Njugu Maina was caused by misrepresentation on the part of the said Asha Njugu, I note that the respondent did not produce any evidence capable of proving the said misrepresentation.

15. The claim that the said Asha failed to inform the court that she was not a party to the suit is, in my view, misguided as there is no way she would have known what was urged against her when she had not been served with the court processes.

16. I have also read and considered the draft statement of defence annexed to the applicant's supporting affidavit. In my view, the draft statement of defence raises a triable issue, to wit, whether or not there exists an access on the defendants' parcels of land and if yes, whether the defendants have blocked it.

17. In view of the foregoing, I need not say anything more to demonstrate that the defendants/applicants have made up a case for being granted an opportunity to defend the case urged against them. Consequently, I allow the application in terms of prayers **(i)** to **(v)**. Prayers **(vi)** and **(vii)** shall abide the outcome of the suit.

Orders accordingly.

**Dated, signed and delivered at Nyeri this 12<sup>th</sup> day of June, 2017.**

**L N WAITHAKA**

**JUDGE.**

**In the presence of:**

Mr. Gitih for the applicant

Ms Maina h/b for Mr. Gori for the respondent's

N/A for the Interested party

Court assistant – Esther