

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 75 OF 2012

1. **KISHORO LEPONYO NTIAPUYOK**
2. **WILSON WUANTAI KISHORO PLAINTIFF/RESPONDENT**

VERSUS

PUFFINS INVESTMENT LIMITED DEFENDANT/APPLICANT

R U L I N G

1. The application dated 24/4/12 seeks orders that the orders granted by this court on 11/2/2012 be set aside.
2. According to the affidavit in support sworn by **Kartic K. Shah**, one of the Directors of the Defendant company, the application dated 12/3/2012 was heard and allowed in their absence on 28th March 2012 whereby the Plaintiffs obtained an order of temporary injunction restraining the Defendant from dealing with **Land Parcel No. Kajiado/Kaputiei North/1426**. The Applicant has deposed that they were served with the interim orders issued on 28/3/2012 and a hearing notice for 4/4/2012 but were never served with the suit papers. That the Applicants requested for the pleadings from the counsel for the Defendants/Respondents but they were not supplied with the same forcing the Applicants to obtain the copies thereof from the court.
3. The application is opposed. In the replying affidavit sworn on behalf of the Plaintiffs/Respondents, it is averred that the Applicants are misleading the court. That the application in question was served on the Defendant/Applicant and with all the pleadings and even served with the interim orders issued on 28/3/2012 and a Notice of Appointment filed by the counsel for the Defendant/Applicant was filed on 2/4/2012 without the filing of any papers in opposition to the application. It is contended that the Defendant/Applicant was properly served for the hearing of the application on 28/3/2012 and thereafter with the subsequent hearing date on 4/4/2012. That the interim orders issued on 28/3/2012 were also served on the Defendant/Applicant on 29/3/2012. That the Defendant/Applicant filed a Notice of Appointment of Advocate on 2/4/2012. That the Defendant/Applicant was served with the hearing notice for 11/4/2012 when the Defendant/Applicant failed to attend court.
4. The application proceeded by way of written submissions. The crux of the matter is whether the Defendant/Applicant was served with the application dated 12/3/2012 or not. I have considered the facts and circumstances of this case as outlined in the affidavits of the respective parties herein. Whereas it is difficult to verify any of the allegations and counter allegations, the original document allegedly served and signed by the Applicant does not form part of the court record and nor has it been annexed in the replying affidavit. That is the only document that could have settled the question of service.
5. However, as stated by the Court of Appeal in **Muthaiga Road Trust Co. Ltd –vs- Five Continents Stationers Ltd & 2 Others Civil Appeal No. 298 of 2000:-**

“The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules.”

6. To meet the ends of justice, I will exercise this court’s discretion and set aside the *ex parte* orders so that the application can proceed on the merits. I therefore allow the application with costs in cause. The conservatory orders issued on 28/3/12 to remain in force pending the hearing of the application dated 12/3/12.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **15th** day of **May 2014**.

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B. THURANIRA JADEN

JUDGE