



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL CASE NO. 82 OF 2006

PETER LAWRENCE KINYUA MWAI.....PLAINTIFF

VERSUS

ROMAN NGATIA MUNUHE.....DEFENDANT

R U L I N G

On 22.4.2013, the plaintiff addressed the Court and sought to have this case proceed to formal proof as he had obtained an Interlocutory Judgment. The Court informed him that the matter had only been listed for mention. He then requested for a date for the formal proof proceedings to be heard.

Miss Nyaga holding brief for Mr Mwangi told the Court that that the plaintiff should not be allowed to proceed to the formal proof stage as the Memorandum of Appearance had been filed on 18.6.09 and the request for Interlocutory Judgement had been made on 14.11.2006 and rejected by the court due to improper service. Another application for Interlocutory Judgment was made on 2.9.2010 and judgment was entered on 12.11.2010, months after the Memorandum of Appearance had been filed.

Miss Nyaga told the Court that for a long time, the suit file had been lost. Mr. Mwangi had wanted to file an application for setting aside the Interlocutory Judgment, but could not do so due to the unavailability of the file at the registry. Miss Nyaga claimed that some documents such as the Notice of Appointment of the defendant's advocate were missing from the Court file. Miss Nyaga also claimed that the plaintiff had been fixing dates ex-parte and either not serving the defendant or only pretending to do so. Miss Nyaga, on behalf of Mr. Mwangi prayed for 14 days to prosecute his application to have the Interlocutory Judgment set aside.

The plaintiff replied that the Court file never went missing and that it had all along been on the shelves at the Registry. How he categorically knew this to be a fact, I cannot speculate upon. I, however, note that the Interlocutory Judgment was entered for the plaintiff on 12.11.2010, well over 2 years ago. I also note, from the Court file, that on 4.12.06, the Deputy Registrar of this Court had rejected service upon the defendant effected on behalf of the plaintiff and had also refused to enter an Interlocutory Judgment.

I have noted that there is a Memo of Appearance filed by the defendant personally on 7.6.2007. I do not wish it delve into the issue of whether it was filed within the stipulated time or not especially after having noted that the Court was suspicious with regard to the service by the plaintiff upon the defendant earlier on. I also notice that the

defendant's statement of defence had been filed by the firm of Gichure & Co. on 28.5.2009. I, however, do not wish at this stage to speculate on its probative value or other validity.

Regarding the suit herein being Res Judicata Nyeri HCCC No.4 of 2004 and this amounting to an abuse

of the Court Process, I do not wish to make any comment at this stage.

I note that at no time did the Court at its own instance or upon application by the plaintiff strike out the Memorandum of Appearance or defence on account of the same being not filed within the stipulated time.

Having taken all the issues raised herein into consideration and taking into account that Order 10 Rule 11 states that where judgement has been entered under this order, the Court may set aside or vary such judgment and any consequential decree or order upon such terms as are just, I find as followings:

1. **The suit herein will not proceed to Formal Proof Stage.**
2. **The defendant herein is allowed to prosecute his application to set aside the Interlocutory Judgment.**

Delivered and Signed in Open Court at Meru this 10th day of July 2013 in the presence of:

C.c Daniel

Peter Lawrence Kinyua Mwai – Plaintiff

Kimathi for Mwangi for defendant - Present

P. M. NJOROGE

JUDGE