



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

E & L NO. 26 OF 2013.

JOHN MURIUNGI MUGWIKA.....Plaintiff

VERSUS

CHARITY MPINDA M'MUGWIKA.....Defendant

RULING

This Application is dated 18th June, 2013 and seeks orders:

- 1. THAT this Application is certified as urgent and be heard on priority basis.**
- 2. THAT the Judgment and the Decree entered herein against the Defendant/Applicant be set aside and Defendant be allowed to defend.**
- 3. THAT there be stay of further proceedings and/or execution pending hearing and determination of this Application.**
- 4. THAT the cost of this Application be provided for.**

The Application was heard interpartes on 21.8.2013. The applicant's case was that she was not served with the suit papers. The Court was also told that there was a succession case, number 225 of 2011 involving the suit land parcel No. **ABOTHUGUCHI/RUIGA/336** which had not been determined. The applicant referred the Court to her draft defence and counter claim which raised triable issues. She urged the Court to set aside the Interlocutory Judgment obtained by the Plaintiff and to have the suit heard and determined on its merits.

The Plaintiff opposed the Application. He categorically stated that the Defendant had been properly served and her denial that she had not been served was untruthful. He narrated the involvement of his family in this suit and told the Court that the Plaintiff was the only person opposed to what their family had agreed upon with regard to the sharing out of their late father's property. The Defendant was his sister.

I have looked at the averments and submissions of the parties. Most of the issues raised can only be properly ventilated at the hearing of the suit. There are claims and counterclaims whose veracity the Court cannot establish at this stage.

In the Interests of justice both parties should be heard during the hearing of the suit as the draft defence and counterclaim filed by the defendant evince triable issues. Order 10 rule 11 of the Civil Procedure Rules allows the Court to set aside or vary an Interlocutory Judgment and any consequential decree or order upon such terms as are just.

Lord Atkin in *Evans V Bartlam* [1937] A. C. 474, pages 479 – 480, had this to say about the equivalents of Order 10 of the Civil Procedure Rules:

“I agree that both rules, Order XIII, r.10 and Order XXVII, r. 15, give a discretionary power to the Judge in chambers to set aside a default judgment. The discretion is in terms unconditional. The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. ... The principle obviously, is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any rules of procedure.”

An interlocutory judgment is not a judgment pronounced upon the merits or by consent.

It is necessary that the Interlocutory Judgment be set aside upon such terms as are just. I do note that a copy of the green card annexed to the averments of the Plaintiff shows that Land Parcel **NO. ABOTHUGUCHI/RUIGA/336** is registered in the name of John Muriungi Mugwika, the Plaintiff herein. For this reason, he is seeking an order of eviction against the Defendant. I find it necessary that this suit be heard on priority basis.

In the circumstances, I direct as follows:

- 1. The Application herein be allowed.**
- 2. The Defendant to file her defence within 60 days from the date of this order.**
- 3. The parties to comply with the provisions of Order II of the Civil Procedure Rules within 60 days and the case be listed down for hearing on a priority basis.**

Delivered in Open Court at Meru this 8th day of October, 2013 in the presence of:

Cc. Daniel.

Rimita for Defendant/Applicant

John Muriungi – Plaintiff

P. M. NJORGE

JUDGE