



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CIVIL CASE 84 OF 2011**

**MARY CHELANGAT TOGOM.....PLAINTIFF**  
**VERSUS**  
**DAVID K. SOI.....DEFENDANT**

**RULING**

By an Amended Plaint dated 11th April 2011, the Plaintiff prayed for orders that -

(a) An order of permanent injunction restraining the Defendant and/or his servants or agents from invading, cultivating, developing or interfering howsoever with the Plaintiff's quiet possession of land parcel L.R. NO. NAKURU/TINET SOTIK SETTLEMENT SCHEME/925.

(b) That the Defendant by himself, servants or agents be restrained by temporary injunction from invading, cultivating, developing or interfering howsoever with the Plaintiff's quiet possession of land parcel L.R. NO. NAKURU/TINET SOTIK SETTLEMENT SCHEME/925 pending the hearing and determination of this suit.

(c) Mesne Profits.

(d) Costs and interest.

Simultaneously with the Plaint, the Applicant also filed a Notice of Motion dated 8th April 2011 for temporary injunction which were granted on 18th May 2011 following the filing of the Amended Plaint on 11th April 2011.

The orders of temporary injunction issued on 14th April 2011 and the Notice of Motion of 8th April 2011 were served upon the Respondent on 16th April 2011 at about 11.00 a.m. That is the substance of the Affidavit of Service of Peter N. Mugo, sworn on 18th April 2011 and filed on 3rd May 2011.

On 4th May 2011, the Defendant's Advocate, Konosi & Co. Advocates, filed a Notice of Appointment of Advocates not a Memorandum of Appearance.

The temporary orders of injunction lapsed by operation of law as the Notice of Motion of 8th April 2011 was not prosecuted inter partes. The plaintiff consequently filed another Notice of Motion dated 12th October 2011, and this is the Motion which is the subject of this Ruling.

The Plaintiff's application is premised upon the provisions of Order 36, rule 1 of the Civil Procedure Rules. That rule is in these terms -

In all suits where a Plaintiff seeks judgment for -

(a) liquidated sum, with or without interest,

(b) the recovery of land, with or without a claim for rent or mesne profits ... or against a trespasser, where the defendant has appeared, the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.

The requirement under this rule is that the defendant, trespasser must enter an appearance. That was

the point of the Preliminary Objection by Miss Mpaka, learned counsel for the Defendant. Mr. Matiri on his part argued that so long as the Defendant is in court, the requirement of the rule were fulfilled.

I do not with respect think so. The Defendant's counsel's appearance in court was a result of the service of the Notice of Motion for the temporary orders of injunction pending the hearing inter partes. The Motion was never urged inter partes, and so the temporary orders lapses under Order 40 rule 3 of the Civil Procedure Rules.

For the Plaintiff to seek order of summary judgment, the plaintiff need to show that summons to Enter Appearance were issued and served upon the Defendant or the Defendant's Advocate. That is the requirement of both Order 6, and indeed Order 36 rule 1(1) of the Civil Procedure Rules. Rule 7 of Order 6, requires that Summons be served by delivering or tendering a duplicate copy thereof signed by the judge, or such officer as he appoints in this behalf and sealed with the seal of the court.

Although Summons to Enter Appearance were issued on 20th April 2011 and the original collected by a Mr. Njoroge for Matiri on 20th April 2012, there is no Affidavit of Service that the Summons to Enter Appearance was served upon the Defendant personally or upon his Advocates, Konosi & Co. Advocates who had filed a Notice of Appointment on 4th May 2011.

The Defendant's Preliminary Objection dated 31st January 2012 was well taken, as it raised a point of law which would dispose of the application in issue, whether or not summary judgment should be entered against the Defendant, under Order 36, rule (1) of the Civil Procedure Rules.

For those reasons, the Plaintiff's Notice of Motion dated 12th October 2011 and filed on 2nd November 2011 is dismissed with costs to the Defendant.

I direct that the Plaintiff does serve the Defendant's Advocates with the Summons to Enter Appearance forthwith and the Defendant do Enter Appearance and file its defence (if any) within 15 days of service.

There shall be orders accordingly.

**Dated, signed and delivered at Nakuru this 6th day of July, 2012**

**J. ANYARA EMUKULE  
JUDGE**