



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

OF KISII

Civil Case 22 of 2009

ENAMBA CONSTRUCTION CO. LTD.....PLAINTIFF

VERSUS

NYAIGWA FARMERS CO-OPERATIVE SOCIETY LTD.....DEFENDANT

RULING

On 27th February, 2009, this court issued a temporary injunction restraining the defendant, its agents and/or servants from enforcing a notice of termination of tenancy dated 18th December, 2008 against the plaintiff. The defendant had been served with the plaintiff's application dated 11th February, 2009 which was scheduled to be heard on 27th February, 2009.

On 26th February, 2009, M/s S.O. Omwega & Co. Advocates wrote to this court's deputy registrar saying that they had been instructed by the defendant in this matter and had prepared their papers but since 23rd February, 2009, the court file could not be traced. They were therefore unable to file the same. They urged him to assist in having the file traced to enable them file the papers. The deputy registrar caused the file to be traced and on the day of the hearing, when Mr.Omwega had gone to Oyugis court, believing that the application will not go on, he was telephoned by the deputy registrar and informed that the file had been placed before the court as scheduled. By the time he arrived in court, the ex parte orders aforesaid had been given.

The defendant now urges this court to vacate those orders and hear the plaintiff's application inter partes.

The plaintiff opposed the application, saying that service of the application had not been denied by the defendant. Mr. Masese submitted that the defendant's advocate should have been in court on 27th February, 2009 at 2.30 P.M. When the application was scheduled to be heard, according to the date and time indicated in the served application.

While I agree with Mr. Masese to some extent, there is no dispute that the court file could not be traced at the registry for sometime and Mr.Omwega had every reason to believe that the application was not going to be heard. Though he should have been more prudent by asking an advocate to hold his brief and inform the court about the issue, in the event that the file was to be traced, I cannot fault him for having attended another court in the circumstances. If the defendant's application is not allowed, the defendant will be penalized for a mistake which was not of its own making.

I allow the defendant's application to the extent that the orders granted by this court on 27th February, 2007 are stayed and the plaintiff's application dated 11th February, 2009 be set down for hearing inter partes. But pending the hearing and determination of that application, the defendant shall not seek to enforce the notice of termination of tenancy aforesaid.

The costs of this application shall be in the cause.

DATED, SIGNED & DELIVERED at Kisii this 9th day of July, 2009.

D.MUSINGA

JUDGE.

9/7/2009

Before: D.Musinga-J

Mobisa-CC

Mr.Masese for the plaintiff

No appearance for the defendant

COURT: Ruling delivered in open court on 9th July, 2009.