



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CIVIL CASE NO 1926 OF 1990**

**KAMUNYI.....APPLICANT**

**VERSUS**

**MACHARIA & ANOTHER..... RESPONDENT**

**RULING**

By a Chamber Summons dated 17th but filed in court on 18th May, 1990 the applicants as defendants in the suit pray, for an order vacating the order in injunction which was made on 8th May 1990 upon an *ex parte* hearing of a Chamber Summons which was filed on 20th April, 1990. The hearing proceeded *ex parte* because neither the defendants nor their advocates appeared. Nor was there any explanation as to their nonattendance. In the instant application the defendants have endeavoured to explain their counsel's non-attendance and have advanced reasons why I should exercise my unfettered judicial discretion in favour of setting aside the order.

In an affidavit in support of the application, Joseph Njoroge Mbugua, advocate of the firm of Githuka Mbugua & Co Advocates who are on record for the defendants, gave the reason for their non-attendance as being the absence of this case on the Cause List for 3rd May 1990. The 3<sup>rd</sup> May 1990 had been posted by consent. Infact the suit was listed contrary to the deponment by Mr Mbugua in his affidavit dated 17th May 1990. Indeed a copy of the cause list which they have annexed to the supporting affidavit has the case first on the list of matters which were listed before me. That excuse does not avail the applicants.

There is a more formidable excuse or reason for not turning up in court, *viz* that Mr Githuka, advocate, who had the conduct of the case for the applicants was taken ill on the night before the hearing date. He, therefore, went to see a dentist on the morning of the hearing date with the result that he was not able to attend. That ground was given much later after this application had been filed. I gathered from learned counsel for the respondent that a supplementary affidavit was filed by the applicants but I cannot find it on record. It deponed to the fact of Mr Githuka's illness. That ground is clearly an afterthought. How could the applicants' advocates forget that important ground if truly it was the cause for their nonattendance? To my mind there is no justifiable ground advanced to explain the failure on the part of the applicants' representation on 3rd May 1990. Miss Atinga, counsel for the respondent raised a procedural issue which I propose to grapple with before considering other aspects of the application. The application is expressed to be brought under O.IXB rule 8 Civil Procedure Rules. That order deals with the setting aside of judgment entered in default of attendance on the date of hearing or the dismissal of a suit for the same reason. It in no wise deals with the setting aside of orders made *ex parte* in applications of an interlocutory nature. The *ex parte* order of injunction was made after hearing the plaintiff who was the applicant. The present applicants who were the respondents had notice of the date, place and time the application was to be heard. They did not appear and hence the *ex parte* order. They were aggrieved. Their application should therefore have been brought under the provisions of order XXXIX rule 4 Civil Procedure Rules which donates the power to apply for the discharge, variation or setting aside of such an order. This application was improperly brought under O.IXB rule 8 Civil Procedure Rules.

In light of what I have stated above are the applicants entitled to the orders prayed for? Mr Mbugua cited several authorities which mainly deal with the power of the court to set aside *ex parte* judgments. They are of little if any assistance to the applicants' case. The principles enunciated in those cases are based on the fact that a defendant may be shut out completely unless he is granted an opportunity to put forward a

defence to the action against him. The circumstances in the instant case are different. It is the preservation of the status quo which is paramount. An issue does arise as to which status quo is to be maintained or preserved. The plaintiff in our case alleges that he was the tenant of the 1st applicant. The applicant has sought to evict him from the premises the subject matter of the alleged tenancy. The plaintiff thinks the action is unwarranted and contrary to the law. Consequently he sought the protection of this court. The legality or otherwise of the 1st defendant's action is yet to be determined. Unless an injunction is granted there is a likelihood of the plaintiff losing the premises without an adjudication of his claim.

The applicants contend the premises have been demolished and are under reconstruction. If there was demolition it must have been after the injunction order sought to be vacated had been made. The demolition would then be a contempt. The evidence which was before me which had not been controverted by the applicants was that only doors had been pulled down. Consequently I made an appropriate order as to their replacement. The respondent has not complained that the premises are no more. That being so and regard being had of what I stated earlier I do not repent. There is no material to make me exercise my discretion in favour of vacating the order made on 8th May 1990. I disallow the application. Costs to the respondent assessed at Kshs 800/=.

Orders accordingly.

Dated and Delivered at Nairobi this 19<sup>th</sup> Day of June, 1990,

**S.E.O. BOSIRE**

.....

**JUDGE**