



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 865 OF 2004**

**SAMUEL CHEGE MWANGI.....PLAINTIFF/RESPONDENT**

**VERSUS**

**FRANCIS MUHIA MWANGI.....DEFENDANT/APPLICANT**

**RULING**

The Defendant's application by Chamber Summons dated 20<sup>th</sup> September, 2004 and filed on 21<sup>st</sup> September, 2004 was brought under Order IXB, rule 8 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act (Cap. 21). The Plaintiff's substantive prayers were as follows:

- (i) that, the Court be pleased to set aside its orders made on 1<sup>st</sup> September, 2004;
- (ii) that, the Court do order the exhumation of the body buried in the Plaintiff's parcel of land pursuant to the said order issued on 1<sup>st</sup> September, 2004;
- (iii) that, the Defendant be granted leave to present his case against the Respondent's application dated 9<sup>th</sup> August, 2004.

The following grounds were advanced in support of the Defendant's application:

- (a) that, the application dated 9<sup>th</sup> August, 2004 was heard **ex parte** on the 1<sup>st</sup> September, 2004 and the Defendant did not have a fair opportunity to be heard;
- (b) that, the orders issued on the said date were prejudicial to the Defendant;
- (c) that, the firm of Mirugi Kariuki & Co. Advocates which was acting for the Defendant, had filed pleadings and served the same upon the Plaintiff on 24<sup>th</sup> August, 2004;
- (d) that, the said pleadings were not placed in the Court file by the Registry staff, and as a consequence the Court did not have occasion to see the same before allowing the matter to proceed **ex parte** and before issuing the orders of 1<sup>st</sup> September, 2004;
- (e) that, the Plaintiff failed to disclose to the Court that the Defendant was represented by counsel, and this resulted in the granting of the orders;
- (f) that, the Defendant has a good case that ought to be heard on the merits.

The evidentiary basis of the application is set out in the affidavit of **Kiingati Ndirangu**, dated 20<sup>th</sup> September, 2004. The deponent is the advocate having the conduct of this matter, instructed by M/s. Mirugi Kariuki & Co. Advocates and on behalf of the Defendant/Applicant. He deposes that on 17<sup>th</sup> August, 2004 he had received instructions to file appearance, replying affidavit, grounds of opposition and notice of preliminary objection in this matter and to attend the hearings. He avers that on 18<sup>th</sup> August, 2004 he duly presented the pleadings to the Court and paid for the same at the Registry; his copies were duly stamped and the Court copies were left with the Registry staff to file. He deposes that he was then advised by Registry staff that the matter could not be heard as scheduled, as all the judges were away in Mombasa. The deponent avers that on 24<sup>th</sup> August, 2004 at the Court premises he duly served the Plaintiff with copies of all the said pleadings, and the Plaintiff received the same but declined to sign on the principal copies. He further deposes that he subsequently learned from the instructing firm that the Plaintiff's application had been heard *ex parte* on 1<sup>st</sup> September, 2004. He deposed further that on 15<sup>th</sup> September, 2004 he had learnt upon inquiry with Registry staff, that the pleadings filed on 18<sup>th</sup> August, 2004 had not been placed in the Court file as required. He avers that in his belief, had the said pleadings been on the Court file, the Court would not have issued the orders of 1<sup>st</sup> September, 2004. The deponent expresses his belief that the Plaintiff's purported service of hearing notice on the Defendant when he knew that the Defendant was represented by counsel, was mischievous; and "*the failure by the Defendant [Plaintiff]" to inform the Court that the Defendant was represented by counsel was a clear and deliberate intention to have the Court issue orders without full knowledge of the facts.*" The deponent avers that his failure to attend Court on 1<sup>st</sup> September, 2004 arose purely from the mischief perpetrated by the Plaintiff, of failing to serve notice as required by law, and due to no fault on the part of the Defendant who had all along been eager to defend against the suit.

To the supporting affidavit the content of which I have set out hereinabove, the Plaintiff/Respondent, **Samuel Chege Mwangi**, filed a replying affidavit dated 7<sup>th</sup> October, 2004. He deposes that he is a brother to the Defendant/Applicant. He avers that on 1<sup>st</sup> September, 2004 the Court issued an order for the burial of the sister of both the Plaintiff and the Defendant on the parcel of land known as L.R. No. 17/Subukia/Subukia Block 3 (Morro). He deposes that the said parcel of land belonged to the late father of both the Plaintiff and the Defendant, **Mwangi Muhoro**. The deponent denies that **Mr. Kiingati Ndirangu** ever served him in Court with any pleadings filed on 24<sup>th</sup> August, 2004. He avers that the matter was scheduled for *inter partes* hearing on 1<sup>st</sup> September, 2004 and the hearing notice was duly served upon the Defendant as required. The deponent says the Defendant had been fully aware of the hearing of the Plaintiff's application of 9<sup>th</sup> August, 2004 because he had telephoned the Defendant's son, **Stephen Mwangi** through his cellular phone, and informed him of the said hearing and he did confirm that his father was on his way to the Court, but he did not turn up in Court. He further averred that the Defendant had failed to prove that he was the registered owner of the land where the deceased had been interred. The deponent averred that the disputed land is subject to division in the future, for the purpose of distribution among several beneficiaries. He deposed further that the body of the deceased had been interred next to the grave of the mother of both parties, **Grace Njeri** who had died earlier.

This matter was heard on both 11<sup>th</sup> and 19<sup>th</sup> October, 2004 when the Defendant/Applicant was represented by **Mr. Kiingati** while the Plaintiff Respondent appeared in person. Counsel's essential point is that he had served his pleadings upon the Plaintiff on 24<sup>th</sup> August, 2004 and so the Plaintiff ought to have served the hearing notice of 26<sup>th</sup> August, 2004 on the Advocates for the Defendant rather than on the Defendant himself. This claim has, however, been denied by the Plaintiff. The implication is that it is a matter that can only be ascertained through full trial.

The hearing notice of 26<sup>th</sup> August, 2004 is signed by the Plaintiff in person. Service of it was done by **Peter Kariuki Mwangi**, a Court process server. He deposes as follows:

“1. THAT on the 26<sup>th</sup> day of August, 2004 I received in duplicate copies of Hearing Notice dated 26<sup>th</sup> August, 2004, Chamber Summons application dated and filed on 9<sup>th</sup> ...August, 2004 under certificate of urgency, together with supporting affidavit...from the Applicant...with instructions to serve the same upon the Respondent.

“2. THAT on [the] 27<sup>th</sup> day of August, 2004 at around 10.00 a.m. accompanied by Samuel Chege Mwangi, the Applicant herein [I] proceeded to [the] home of the Respondent situated [in] Subukia Location about 100m away from the [Subukia Post Office] and served a copy of the aforesaid bundle of documents upon Francis Muhia Mwangi, the Respondent herein, by tendering a copy thereof to him and requiring his signature on the reverse page of my copy.

“3. THAT he accepted service but declined to sign [on] the reverse page...”

The fact that service was effected as deponed is not contested. But counsel for the Defendant contends that the Plaintiff ought to have made service on him, the Advocate, and that this ought to have been so because the Plaintiff had personally been served with the application documents, and so he must be taken to have known that valid service of hearing notice could only be that effected upon the Defendant's advocate. However, *whether or not the Plaintiff had this knowledge, cannot be determined at this interlocutory stage and must await the full hearing*. Counsel for the Defendant has insisted that service had been effected irregularly, with the effect that the Plaintiff had no locus standi; and consequently the orders of 1<sup>st</sup> September, 2004 were made erroneously and should be set aside. Given the contest there is, on the pertinent facts it cannot be true at this stage, with respect, to say that the Court's orders were made erroneously. Such a conclusion would only come within the range of possibility after the true factual situation is determined; and this can only be done in full trial.

In the replying affidavit, the Plaintiff raises a fundamental issue which can only be resolved in full trial, and an issue which would determine with finality the question as to where the deceased should have been buried: *the point that the land at which the burial took place was not the property of the Defendant, but was, instead, land forming part of the estate of the late father of both the Plaintiff and the Defendant, and land that was later to be the subject of normal distribution as part of the succession process*.

I think these circumstances would dictate that the body of the deceased be not the subject of an exhumation order at this stage; and that any such final orders as might be made, do come in the aftermath of a full hearing. Therefore, it will serve no purpose allowing the instant prayers of the Defendant/Applicant at an interlocutory stage. This matter must proceed to full trial; and it is in the course of such a trial that the Defendant should seek to prove his case for exhumation.

I will, therefore, make the following orders:

1. The Defendant's prayer that the Court's orders of 1<sup>st</sup> September, 2004 be set aside, is refused.
2. The Defendant's prayer that the Court do order exhumation of the deceased, is refused.
3. The Defendant's prayer that he be granted leave to present his case against the Plaintiff's application of 9<sup>th</sup> August, 2004 is refused.
4. ***The Plaintiff shall move expeditiously, and in any event within 40 days of the date hereof, to set down his suit by Plaint, dated 9<sup>th</sup> August, 2004 for hearing; and in this regard the Registry shall allocate a hearing date on the basis of priority.***

5. If the Plaintiff/Respondent should fail to comply with Order No. 4 hereinabove, the Defendant/Applicant shall be at liberty to make an appropriate application, including taking action to fix a date for the disposal of the suit – in which case, again, a date shall be given on the basis of priority.

6. The costs of this application shall be in the cause.

DATED and DELIVERED at Nairobi this 28<sup>th</sup> day of January, 2005.

**J. B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court clerk: Mwangi**

**For the Defendant/Applicant: Mr. Kiingati Ndirangu, instructed by M/s. Mirugi Kariuki & Co. Advocates**

**The Plaintiff/Respondent in person.**



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