



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 18 OF 2009

RICHARD MWANGI KAMAU ..... PLAINTIFF

VERSUS

LELEREKO LENDIRA & 36 OTHERS..... DEFENDANT

**RULING**

This ruling is the outcome of the summons dated 15<sup>th</sup> November 2009 in which Lelereko Lendir & 36 others, the applicants herein applied for the following orders:

- 1. For reasons to be recorded and on the grounds set out herein and in the certificate of urgency filed herewith this Application be certified urgent and service of the same be initially dispensed with and this application be heard ex parte in the first instance for purposes of prayer 1, 23 & 9 hereof.***
- 2. There be a stay of execution of the ex parte default interlocutory judgment entered against the defendants on 11<sup>th</sup> June 2009 and of the ex parte default (final) judgment entered against the defendants/applicants on 16<sup>th</sup> September 2009 and of any consequential or subsequent decree, order(s), proceedings and/or processes pending the hearing and determination of this application.***
- 3. The Plaintiffs/Respondents by themselves, servants, agents and otherwise howsoever be***

**and are hereby restrained from evicting the Defendants/Applicants from all those lands known as land Reference Numbers 135443/11, 135443/12, 135443/23, 135443/24, 135443/25, 135443/26, 135443/27, & 135443/28 Laikipia and other adjacent and neighbouring parcels occupied/possessed and/or owned by the Defendants/Applicants (herein with the Defendants/Applicants' quiet and peaceful enjoyment and possession/ occupation/ ownership of the suit property/properties pending the hearing and determination of this Application.**

- 4. The ex parte default interlocutory judgment entered against the Defendants on 11<sup>th</sup> June 2009 and the ex parte default (final) judgment entered against the Defendants/Applicants on 16<sup>th</sup> September 2009 and any consequential or subsequent decree, order(s), proceeding(s) and/or processes be and are hereby set aside.**
- 5. This suit(s) be heard de novo.**
- 6. The Defendants/Applicants be and are hereby granted unconditional leave to appear and defend the Suit(s).**
- 7. The names of all persons who ought to have been joined or named as Defendants (as per attached list) be added and that such persons be enjoined in the Suit(s).**
- 8. The Defendants be authorized and granted leave to enter appearance and file defence and counterclaim in the Suit in a representative capacity on behalf of the more than 10,000 other residents of the suit property.**
- 9. This application be heard interpartes on a near/early date to be directed by this honourable court.**
- 10. The purported process server Mr. Julius Kariuki Mundia be and is hereby ordered to attend court on the date fixed for inter partes hearing of this application for cross examination as to veracity of his affidavits of service.**
- 11. The costs of this application be awarded to the Defendants/applicants.**
- 12. This honourable court be pleased to make any other further order(s) and /or give such directions as it may deem, just, expedient or necessary.**

The summons is supported by the affidavit and a supplementary affidavit of John Legei Leseneiyia. Erastus Muraguri Muriuki the 7<sup>th</sup> Plaintiff/Respondent herein filed a replying affidavit and a further affidavit he swore to oppose the summons. When the summons came up for interpartes hearing, the Defendants abandoned prayers 7, 8 and 10.

I have considered the grounds set out on the face of the summons and the facts deponed in the affidavits filed for and against the summons. I have further considered the oral submissions of learned counsels from both sides. The Defendants/Applicants applied for the judgment to be set aside because there was no proper service. The Defendants alleged that they came to know of the existence of the eviction orders when they attended the District Commissioner's baraza. They pointed out various inconsistencies in the affidavits of service for example the 7<sup>th</sup> Defendant is named twice as defendant No. 7 and No. 35. The process server says he served the 7<sup>th</sup> Defendant at home whereas he was unable to serve the 35<sup>th</sup> Defendant. The Applicants further pointed out that most of the pleadings were not personally served upon the Defendants but were left with their wives. Accordingly, it is said that the interlocutory judgment was irregularly entered. The Applicants also complained that since there was no

liquidated claim against the Defendants then the interlocutory judgment was irregular under order IXA rules 3, 4, 5 and 6 of the Civil Procedure Rules. The Defendants further challenged the pleadings filed and verified by the affidavit of Richard Kamau (1<sup>st</sup> Plaintiff) on the basis that he did not obtain nor filed a written authority from the other plaintiffs to authorize him to plead on their behalf under Order I rule 12 of the Civil Procedure Rules. Those submissions applied to the replying affidavits of Erastus Muraguri Muriuki. The defendants argued that they have raised triable issues in the draft defences. It is the submission of the defendants that they have shown a prima facie case with high chances of success which entitles the Defendants an order for interlocutory injunction.

The Plaintiffs on their part urged this court to dismiss the summons since the affidavits of service on each defendant showed that the complaints and the summonses were properly served on each defendant. The plaintiffs further pointed out that under order V rule 5 of the Civil Procedure Rules there was a provision for entry of interlocutory judgment in default of defence.

Having considered the material placed before me and the oral submissions presented to this court, there is no doubt that the Deputy Registrar entered interlocutory judgment in default of appearance and defence on 11<sup>th</sup> June 2009. There is also no dispute that the suit proceeded for hearing as a formal proof on 25<sup>th</sup> June 2009. The Defendants have now come to this court seeking for an order to set aside the interlocutory judgment on the basis that there was no proper service of process effected upon them. It is also said that the law did not provide for an interlocutory judgment in default of appearance where there is no liquidated demand. As far as I am concerned the serious question to be determined by this court is whether or not there was proper service. I have carefully perused each of the affidavits of service sworn by Julius Kariuki Mundia. He deposes that he served the complaints and the summonses upon the defendants on 21<sup>st</sup> May 2009. He averred that he effected service while in company of Richard Mwangi Kamau. A critically look at those affidavits of service will reveal that the process server alleges that he effected service upon the Defendants either personally or by affixing the same on their premises or by leaving those documents with the Defendants wives or relatives. It is important to note that though the process server stated he was in company of the Plaintiff, there is no averment made in those affidavits whether or not the plaintiff knew any of the defendants by name nor whether he knew their wives nor their homes. The names of wives or relatives allegedly served were not given. In cases of those whom the process server alleges he personally served, there is no averment from the process server nor the plaintiff that any of them personally knew the said defendants physically or by name. After anxiously considering the issues raised on service I am convinced that there was no proper service effected upon all the defendants. I am therefore satisfied that the Deputy Registrar improperly entered an interlocutory judgment in default of an appearance and defence whereas there was no cogent evidence of service of processes. There is no note by the Deputy Registrar that he perused the affidavits of service. It would appear the Deputy Registrar mechanically entered judgment in default of appearance and defence without first satisfying himself that there was proper service of processes upon the Defendants. Where it is shown that there was no proper service, then any judgment given as a result of a default of appearance and or defence must be vacated because the same is treated as having been irregularly procured. In the circumstances of this case, the *ex parte* proceedings in favour of a formal proof which gave rise to the judgment of this court delivered on 16<sup>th</sup> September 2009 must be set aside. In such a case the Defendants must be given unconditional leave to defend the suit. I have also perused the draft defence and I am convinced the same raises triable issues

hence the defendants should be heard.

In the final analysis I allow the summons dated 15<sup>th</sup> November 2009 in terms of prayers, 4, 5, 6, and 11.

Dated and delivered this 25<sup>th</sup> day of November 2010.

J.K. SERGON

JUDGE

In open court in the presence of Mr. Nganga holding brief Mai for plaintiff. No appearance for Defendant.



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