



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
LAND AND ENVIRONMENTAL LAW DIVISION
CIVIL SUIT (ELC) NO.395 OF 2009

BEATRICE GATHONI MUKUHA.....PLAINTIFF/RESPONDENT

VERSUS

CHRISTOPHER KAMANDE.....1ST DEFENDANT/APPLICANT
COMMISSIONER OF LANDS.....2ND DEFENDANT
THE ATTORNEY GENERAL.....3RD DEFENDANT

RULING

1. Christopher Kamande Mbugua, (hereinafter referred to as the applicant), is the 1st defendant in this suit. He has come to this court by way of chamber summons under Order 9B Rule 8 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, seeking to have the interlocutory judgment which was entered against him on 15th February, 2010 set aside. The applicant explains that the failure to file the defence was an error on the part of his counsel. He pleads that the error should not be visited upon.
2. The applicant's advocate one Geoffrey Maina has sworn an affidavit in support of the application. The advocate explains that although he was served with a plaint and summons to enter appearance, he was preoccupied with the interlocutory application which was also filed at the same time. Therefore, the advocate overlooked the filing of the defence. The applicant pleads that the suit herein relates to land and therefore it is in the interest of substantive justice that the applicant be given an opportunity to be heard.
3. The plaintiff/respondent objects to the application contending that the same lacks merit. The respondent points out that the applicant became aware of the interlocutory judgment about 5 months ago. Therefore there was inordinate delay in filing the current application.
4. I have given due consideration to this application. It is not disputed that the applicant was duly served with summons to enter appearance. Although the applicant did not file any appearance, his advocate did file his notice of appointment on 26th August, 2009. However, no defence was filed. The applicant's advocate has taken responsibility for the failure to file the defence in time.
5. Looking at the proceedings it is evident that the applicant entrusted his advocate with the conduct of the proceedings. It is further evident from the applicant's replying affidavit filed in response to the interlocutory application, that the applicant disputed the plaintiff's claim to the suit property, maintaining

that he i.e. the applicant purchased the property from the former owner.

6. This is a case where there was clearly an inadvertent mistake made by counsel, which mistake should not be visited upon the applicant. There was delay in filing the application for setting aside the interlocutory judgment as the applicant's advocate was informed about the judgment in May 2010. The advocate has not explained the delay. That notwithstanding, once again the blame lies with the applicant's counsel, who was informed of the judgment. It is clear that this suit involves a dispute over ownership of land which is a very emotive issue. The applicant is taking great risk by relying on an advocate who does not appear to be very organized.

7. Nonetheless, in the light of the above circumstances, it is only fair and just that the application for setting aside the interlocutory judgment is allowed so that the suit can be heard and determined on merit. I therefore allow the application, set aside the interlocutory judgment dated 15th February, 2010. The applicant shall file and serve the defence within 7 days from today. The applicant shall further pay all thrown away costs and costs of this application to the plaintiff/respondent.

Orders accordingly.

Dated and delivered this 23rd day of May, 2011

H. M. OKWENGU
JUDGE

In the presence of: -
Kabaiko H/B for Mrs Wamaitha for the plaintiff/respondent
Maina for the 1st defendant/applicant
B. Kosgei - Court clerk