REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 296 OF 2005
BERESI KERUBO NYAMBOKI ……..…… APPELLANT
-VERSUS-
NYAKUNDI OGOTI
M/S KOINA ONYANCHA …… RESPONDENTS
JUDGMENT

Order 9a rule 10 of the **Civil Procedure rules** confers upon the court an unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms are just. In Palet E.A Cargo Handling Services Limited (1974) E.A 75 (supra) the court of Appeal, following its previous decision in Mbogo v Shah (1968) E.A 93 adopted the opinion of Harris Jin Kimani V McConnel (1966) E.A 547 where he said:

"In the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms to be imposed."

But the court went on to explain (on page 76, that the main concern was to do justice to the parties and would not impose conditions on itself to fetter the wide discretion given to it by the rules. On the other hand, where a regular judgment had been entered, the court would not usually set aside the judgment, unless it was satisfied that there were triable issues which raised a prima facie defence which should go for trial …" See **Chemwolo & Another V Kubende (1986) KLR 492**.

"……..The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure …." See Evans V Bartlam (1937) A.C 473.

Pursuant to the default judgment entered in favour of the respondent on 22nd August, 2003 in a suit commenced against the appellant in the Chief Magistrate's Court at Kisii, the appellant took out a chamber summons application seeking to set aside the said exparte judgment amongst other prayers. The application was canvassed interpartes before the subordinate court and by a ruling dated 21st October 2005 the court dismissed the application thereby provoking this appeal.

The brief background to this appeal is that the appellant was the registered proprietor of **LR NO. KITUTU/IKURUMA/1529**, which parcel of land was a sub-division of **LR NO. CENTRAL KITUTU/IKURUMA/125.** Upon the sub-division, the other portion namely **LR. NO. CENTRAL KITUTU/IKURUMA/1530** was transferred and registered in the name of one **George Bundi Onchore** on 18th August, 1997. The respondent on 8th May, 1997 filed **KISII HCC NO. 199 OF 1997** which suit together with one filed by the appellant to wit **KISII HCC NO. 195 OF 1997**, on the 7th day of May 1997 were consolidated and transferred to the Subordinate Court for hearing and disposal by an order of this court made on the 8th February, 2000. On 4th August, 2003 the suit came up for hearing before **Mr. O. Opondo** SRM. The respondent proceeded with the hearing of the suit Ex-parte, after the court was satisfied that the appellant's previous counsel had been served with a hearing notice but had failed to attend court. The appellant too was absent. Subsequently, the trial magistrate granted judgment in favour of the respondent in terms of the plaint dated 8th May 1997. It was against that judgment that the appellant filed an application to set it aside on grounds that the appellant's then advocates had neglected to inform her of the hearing date. The land parcel and the subject of the judgment no longer existed, that the appellant had formidable defence to the respondent's claim, that the appellant's claim, that she had been prevented from attending court on the hearing date by circumstances beyond her control, that

mistake of counsel should not be visited upon her and that the respondent had obtained judgment due to gross misrepresentation of facts.

The application was opposed on the grounds that the appellant deliberately failed to attend court though duly served with the hearing notice, that while the suit was pending and with intentions of defending justice, the appellant had subdivided and transferred portion of the suit premises to her son. Thus the application was made in bad faith.

The learned magistrate having considered the application ruled thus:-

"….. This application expressed to be brought under Order 9 B rule 8 of the C.P.R and Section 3A and 63(e) of the CPA principally seeks an order to set aside, very, review of the ex parte judgment entered into on 22nd August, 2003 and further that the matter be heard de novo. The application is predicated on 14 grounds which are on the face of the application and is supported by the affidavit of Beresi Kerubo Nyamboki sworn on 20th July, 2005. The application was opposed and a replying affidavit sworn by Nyakundi Ogoti: on 29th July, 2005 to that effect. I have considered the averments in both affidavits and submissions made by both sides. The remedy sought by the applicant is a discretionary one. The applicant proceeded to transfer the subject matter when the suit was pending in court as evidenced by the respondent's annextures. She does not deserve the mercy of the court. I am minded to dismiss the application with costs…."

Aggrieved by the said ruling and order, the appellant through **Messrs Oguttu – Mboya & company Advocates** filed the instant appeal setting up 7 grounds of attack in her memorandum of appeal dated 28th October, 2005 and filed in court on 31st October, 2005. They are:

1. The learned trial magistrate erred in law in failing to appreciate the nature and extent of his discretion in respect of an application to set aside an Ex-parte judgment, in terms of Order IX B Rules 10 & 11 of the Civil Procedure Rules and thus reached an erroneous conclusion.

2. The learned trial magistrate misapprehended the relevant principles of law governing the application for setting aside an Ex-parte judgment and thus arrived at a wrong conclusion in refusing to set aside the Ex-parte judgment dated 22nd August, 2003.

3. The learned trial magistrate failed to take into account relevant and material issues, namely, that the transaction the subject matter of the Ex-parte judgment sought to be set aside, was a controlled transaction, which required Land Control Board consent, the absence of which invalidates any transfer of interests in the suit land. Consequently, the learned trial magistrate did not exercise his discretion judiciously.

4. The learned trial magistrate erred in taking into account and/or consideration issues/matters, which were irrelevant in the exercise of his judicial discretion, hence the exercise of discretion by the learned trial magistrate was coloured by misdirection.

5. That the learned trial magistrate erred in fact and law in failing to exhaustively and/or cumulatively evaluate, scrutinize and/or analyze the submissions of the appellant and thus reached an erroneous conclusion.

6. That the ruling of the learned trial magistrate is patently illegal, hence null and void, insofar as same concerns and/or respects a parcel of land, which ceased to be in existence in the year 1995, long before the filing of the suit, the subject matter of the instant appeal.

7. The ruling of the learned trial magistrate has evidently failed to capture the points for determination, the determination thereof and the reasons for such determination hence the said ruling contravenes the mandatory provisions of Order XX Rule 4 of the Civil Procedure Rules.

When the appeal came up for hearing before me on 15th June, 2010, counsel for the appellant was present. However neither the respondent nor his counsel were present. Satisfied that there was no reason why the respondent and or his counsel could not attend court, the hearing date having been taken by consent, I allowed the appellant to prosecute the appeal, the absence of the respondent notwithstanding. The appellant opted to ventilate the appeal through written submissions. Those submissions were subsequently filed. I have carefully read and considered them alongside cited

authority. As it is therefore, this appeal was uncontested and or unchallenged

As already stated at the commencement of this judgment, a court has a wide and unlimited discretion to set aside or vary a default judgment upon such terms as are just. In exercising such discretion the conduct of the parties to the suit prior and after entry of judgment comes into focus. The other issue for consideration is of course whether there is a defence on merit which raises triable issues. Consideration too must be heard to the prejudice that may be suffered by the parties and whether an order for costs may ameliorate such prejudice. Going through the record of the proceedings, I am satisfied that the conduct of the parties prior and after the entry of the default judgment is beyond reproach. The application too was in the circumstances made without undue or inordinate delay. However it appears to me that the trial magistrate failed to take into account facts, which were material to the exercise of his judicial discretion. In particular, the learned trial magistrate failed to consider and take into account the reasons advanced by the appellant, as the basis for her non participation in the Ex-parte proceedings. In particular, the learned trial magistrate, appear to have visited the consequences of the failure by the Appellant's Counsel, to attend court upon the appellant. It is the appellant's submission that in failing to take into account the reasons why judgment was entered Ex-parte, the trial magistrate, abdicated his judicial responsibility. Consequently, the learned trial magistrate meted out a punishment upon the appellant, instead of endeavoring to ensure that Justice was done to both parties. It has been constantly stated that the sins of counsel should never by visited upon an innocent litigant. The deposition by the appellant that she was never kept abreast of the progress of the suit by her counsel then on record was never controverted or rebutted. Besides, the learned trial magistrate failed to consider the nature of the defence, on record. In this regard, it was incumbent upon the court to take cognizance of the appellant's claim, which included a claim for Adverse Possession. The defence filed raised triable issues and in particular one of jurisdiction. Had the trial magistrate considered this aspect of the matter, no doubt, he could have come to the conclusion, that same was not seized of Jurisdiction to grant the orders sought bearing in mind the provisions of Section 38 of the **Limitation of Actions Act**. No doubt a triable issue arises.

As correctly submitted by the appellant, the learned trial magistrate's discretion appears to have been coloured by the belief that the appellant had sub-divided the suit land, during the pendency of the suit in the subordinate Court. However on the uncontroverted evidence on record, it is apparent that the original land, that is, **LR NO. CENTRAL KITUTU/IKURUMA/125**, was sub-divided, giving rise to two new parcels of land, that is, **LR NO'S CENTRAL KITUTU/IKURUMA/1529 & 1530** long before the lodgment of the instant suit.

In the premises, the appellant, as the registered owner of the **LR NO. CENTRAL KITUTU/IKURUMA/1529** was entitled to deal the suit land in the manner he wished. The respondent's claim was also predicated upon a Sale Agreement, in respect of a portion of **LR NO. CENTRAL KITUTU/IKURUMA/125**, prior to the sub-division of same into two parcels, namely, **LR NO'S CENTRAL KITUTU/IKURUMA/1529 & 1530**. It is not in dispute that the suit land was Agricultural land. Consequently, the respondent was required to seek for and obtain Land Control Board Consent to the transaction. However it is conceded that, no such consent was ever sought and/or obtained. In the premises, the entry of Judgment, ***albeit Ex-parte***, in favour of the respondent, amounts to sanctioning an illegality. In deed failure to obtain such a consent even invites criminal sanctions. Had the trial magistrate considered this aspect of the matter he could not have failed to allow the application. Consequently, the judgment sought to be impeached was a nullity ab initio and hence ought to have been set aside ***Ex-Debito Justitiae***. See **Kariuki V Kariuki (1983) KLR 225**.

From the Affidavit evidence on record and as already stated, **LR NO. CENTRAL KITUTU/IKURUMA/1529,** had been sub-divided and alienated culminating into two other parcels namely **LR NO'S CENTRAL KITUTU/IKURUMA/1630 & 1631**. On the other hand, **LR NO. CENTRAL KITUTU/IKURUMA/ 1530**, had long been transferred and registered in the name of **George Bundi Onchore.** In fact, the registration in the name of the said **George Bundi Onchore,** took place on the 18th day of August 1997. Consequently, no adverse order could issue, affecting the interests of the Third Party, without him having been joined in the proceedings. The effect of the judgment that the learned magistrate refused to set aside is that it will affect the interest of some parties who were not involved in the suit. Thus they were condemned unheard against the rules of natural justice

In view of the foregoing, this appeal is allowed with no order as to costs and the ruling of the learned magistrate is set aside. In substitution, I order that the application be allowed with costs including thrown away costs to be paid to the respondent.

Judgment dated, signed and **delivered** at Kisii on 16th July 2010.

ASIKE-MAKHANDIA
JUDGE