



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KITALE

CIVIL SUIT NO. 35 OF 2008

SIMATWA KAPTUWAI NJANDET.....PLAINTIFF

VERSUS

GEOFFREY KISA SIMATWA.....1ST DEFENDANT

LINUS SIMATWA.....2ND DEFENDANT

RULING

1. The Chamber Summons dated 16th February, 2010 is brought under the Provisions of Order 9 B Rule 1 and 8 of the Civil Procedure Rules. The applicants are seeking to set aside the exparte judgment entered on 4th February, 2010 and all the consequential orders. The applicants are also seeking for leave to file a defence out of time. This application is predicated on the grounds stated at the body thereto and supporting affidavit sworn by **Geoffrey Khisa Simatwa** on 16th February, 2010.
2. According to the applicants, they are the sons of the plaintiff and when the suit was filed and also a Chamber Summons seeking to restrain them from interfering with the plaintiff's quiet possession of 12 acres of land out of plot No. 34 Kipsagam farm, the trial Judge advised the parties to explore an out of court settlement.
3. The arbitrator was appointed but the plaintiff refused to attend the meeting. The defendants were advised by the arbitrator to wait for communication and that is why they did not file a defence because they were optimistic the matter would be settled amicably. The defendants were surprised to learn that the matter proceeded ex-parte. They would now wish to be granted leave to file a defence which raises triable issues as they are the sons of the plaintiff and they have beneficial interests over the suit premises. Secondly, the defendants had entered appearance and they should have been served with a hearing notice when the matter proceeded for formal proof.
4. This application was opposed; counsel for the plaintiff relied on the replying affidavit sworn by the plaintiff on 2nd May, 2009. It was submitted that the application is defective as the provisions of Order 9B Rule 1 are not available for this kind of application. The plaintiff's suit was seeking for orders of declaration. They failed to file a defence and the matter proceeded for formal proof. The plaintiff also filed a bill of costs which was taxed by consent. It is at the execution stage that the applicants have decided to file this application which is a mere after thought.
5. Even before the matter was referred for arbitration, the defendants were late to file a defence. It is the defendant who threatened to beat the plaintiff and that is what prevented him from attending the reconciliation meeting at the offices of Mr. Wafula. It was further argued that the defendants have no

defence as the plaintiff is the registered proprietor of the suit premises. Counsel made reference to the case of **OBIERO Vs OPIYO AND OTHERS {1972} EAST AFRICA LAW REPORTS P. 227.**

6. This application seeks to set aside an ex parte judgment on two principle grounds. Firstly, it is argued that the defendants failed to file a defence because they were optimistic that an out of court settlement will be reached. It is common ground that the parties were engaged in an out of court settlement that did not succeed. It is also common ground that the matter involves a father and the defendants are his sons, thus this is a family matter. The other issue is the contention by the defendants that they were not served with the hearing notice after interlocutory judgment was entered despite the fact that they had entered an appearance on 27th May, 2009 and the ex parte judgment was entered on 23rd June, 2009. Under the Provisions of Order 9 B 1 (2) it is provided as follows;-

“At any time after the entry of interlocutory judgment, the plaintiff may upon giving not less than 14 days notice to every defendant who has appeared, set down the suit for assessment of damages or of the value of goods and damages as the case may be”

7. For the above reasons, I am not persuaded that this application is unmeritorious. The defendants should have been served with a hearing notice to notify them that the matter will be proceeding by way of formal proof. Secondly, I am also not satisfied that there is no defence that raises triable issues as the defendant contend that they are the sons of the plaintiff and they occupy the suit premises from the time they were born. For the above reasons, I will allow the application and set aside the ex parte judgment entered on 4th February, 2010 and all the consequential orders. The defendants are given 14 days within which to file and serve a defence. The plaintiff shall have the costs of this application.

Ruling read and signed this 19th day of November, 2010

MARTHA KOOME

JUDGE