



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Case 47 of 2007

LONRHO AGRIBUSINESS

(EAST AFRICA) LIMITEDPLAINTIFF/RESPONDENT

VERSUS

DAVID KIBOIT MITEI DEFENDANT/APPLICANT

RULING

Before me is an application by way of Notice of Motion brought by the Defendant under Order XLIV Rule 1 and Order L Rule 17 of the Civil Procedure Rules seeking orders that pending the hearing and determination of this application inter partes there be a stay of ex parte orders given on 11th June, 2007 and issued on 14th June, 2007; that the ex parte orders given on 11th June 2007 be set aside and the application dated 16th March, 2007 be heard de novo and decided on merits; that in the alternative the ex parte orders given on 11th June, 2007 and issued on 14th June, 2007 be reviewed and set aside.

The application is based on the grounds that the Applicant did not get a chance to be heard owing to lack of communication with his former Counsel; that the Applicant was condemned unheard; that the Court issued ex parte orders without the benefit of crucial information to the Applicant; that the ex parte orders issued are too onerous to the Applicant and is not in the best interest of justice; that the Plaintiff in this case ceased to exist and that it is fair and justice that the Applicant be heard.

The application is also supported by an affidavit sworn by the Applicant. This Notice of Motion is opposed by the Plaintiff/Respondent who has filed Replying Affidavit.

The facts giving rise to this application briefly may be stated. On 16th March, 2007 the Plaintiff filed an application by way of a Chamber Summons seeking:-

1. Temporary injunctive orders to restrain the Defendant his servants and or agents from trespassing into, entering upon, cultivating, planting, transferring, leasing, encumbering, taking possession and or in any other way whatsoever interfering with land parcel No. PIONEER/NGERIA BLOCK 1 (EATEC) 1851 pending the hearing and determination of this application inter partes.
2. A temporary injunction to restrain the Defendant, his servants and or agents from trespassing into, entering upon, cultivating, planting, transferring, leasing, encumbering, taking possession and or in any other way whatsoever interfering with land parcel No. PIONEER/NGERIA BLOCK 1 (EATEC) 1851 pending the hearing and determination of this suit.

3. An order directing the Defendant to deposit the original title deed and transfer forms for land parcel No. PIONEER/NGERIA BLOCK 1 (EATEC) 1851 into Court pending the hearing and determination of this suit.

The Defendant was duly served with the application together with Summons and Plaint. The Defendant was represented in Court by Counsel on 28th March when the said application came up for hearing for the first time. The Defendant was granted leave to file a Replying Affidavit within fourteen (14) days by the Consent of both parties and the application be scheduled to 22nd May, 2007 for hearing. When the application came up for hearing on 22nd May, 2007 the Defendant/Applicant had not filed any Replying Affidavit or Defence. The Defendant/Applicant sought for an adjournment and the application was opposed by Counsel for the Plaintiff/Respondent. The Court considered the application for adjournment and dismissed it as lacking merits and ordered the application to proceed and at that stage Counsel for the Defendant walked away.

The hearing proceeded and the Judge delivered the ruling on 11th June, 2007 granting the orders sought. The orders so granted were issued on 14th June, 2007. These were the orders the Defendant applied to have reviewed and set aside and the ground that the same were issued ex parte denying the Defendant an opportunity to be heard.

The Respondent in opposing the application submitted that the orders so granted were not ex parte. The Court was referred to the case of DIN MOHAMED VS. LALJI VISRAM & CO. LTD [1932] EACA 1, in which facts were exactly the same. In that case Counsel for the Defendant applied for adjournment which application was refused by the Court. Counsel then withdrew from the suit and the hearing proceeded and Judgment was entered. Subsequently the Defendant by Notice of Motion sought to set aside the Judgment on the ground that it was a Judgment entered ex parte. "It was held that if Counsel fully instructed, on being refused an adjournment, elects to leave the Court and takes no further part in the case, that fact does not constitute proceedings ex parte."

In the instant case the parties had agreed to the date of the hearing and the defendant did appear by his advocate duly instructed when the suit was called out for hearing. The fact that the advocate declined to go on when his application for adjournment was refused and walked away, does not in my opinion make the subsequent proceedings in his absence ex parte. On the facts here that was not an ex parte judgment and the remedy of the defendant was to appeal and not to apply for review.

For the reasons above stated, the Defendant's application is dismissed with costs to the Plaintiff.

DELIVERED AND DATED AT ELDORET THIS 13TH DAY OF OCTOBER, 2009.

J. L. A. OSIEMO

JUDGE