



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU**

Civil Appeal 102 of 2007

JOSEPH MWANIKI MUCHIRA.....PLAINTIFF

VERSUS

NDIMA TEA FACTORY LTD.....DEFENDANT

RULING

This is the second time the Defendant/Applicant is making application to set aside ex-parte Judgment in this suit.

On 27/9/2004 another application was made by the applicant to set aside ex-parte Judgment entered for plaintiff/Respondent and ruling was made by Hon.J.M. Khamoni J. on 11/3/2005. Mr. Kahari was appearing for the Applicant in that application.

This time the applicant seeks to set aside Judgment entered by court on 17/2/2008 after the hearing of the plaintiff's case. The Applicant failed to appear on the date set down for hearing of the suit. The Respondent had served notice of hearing of the suit and requested to be heard. The hearing was allowed under the powers granted to court under Civil Procedure Rules Order 1X B rule 3. An affidavit of service of hearing notice was shown to court duly accepted by Kahari & Kiai Advocates on 8th October 2007. Also Ms Gitau Kariuki Advocates were served. The reason given for failure to attend court on hearing date is that the hearing notice was not duly served and that the Applicant has good defence and counterclaim. The supporting affidavit was sworn by legal officer of the KTDA the Managing Agent of Dima Tea Factory Ltd who repeats none service of hearing notice as he was informed by their lawyers and that the hearing proceeded on strength of false affidavit and that the Applicant had good defence and counterclaim and should be given a chance to defend the suit. In addition the Applicant sought to cross-examine the process Server Lawrence Kiarie Thuku.

I have considered the Affidavit of process server and his cross-examination and the Replying affidavit of Ms Rika together with annexures especially the exhibit MR1 mentioned under paragraph 5 of that affidavit. I have also perused the several authorities relied upon by the Applicant:-

(a) Maina Vs Mugiria (copy supplied) where it was held that judicial discretion is unlimited since the main concern is to do justice between the parties

(b) the exercise of the discretion is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.

(c) The court has no discretion where it appears there has been no proper service.

In this case I find there was proper service upon the advocates and the Directors of Defendant Mr. John Maina Ruthiru. The affidavit of this person sworn on 25/2/2005 is contradictory with that sworn on 8/10/2004 annexure MR1 of the affidavit of Ms Mwikali Rika. It is not reliable.

That authority reviews all the circumstances to be considered before the discretion is exercised including merits of the Applicants case. Here the applicant has filed a Defence and counterclaim. The defence admits that the Applicant had manifested its interest to purchase the suit parcels of land. And that the pieces of land were registered in its name. However in its counterclaim it denies contract for sale of the parcels of land and prays that the registration in its name and title deeds issued be cancelled with costs of the counterclaim.

Upon considering the counter claim and the defence as a whole, I am convinced that the Applicant is not likely to succeed against the plaintiff and the Defence is calculated to delay the hearing of the plaintiff's case. Apart from the price which is said to be high the other issues raised by the applicant are trivial.

(b) CMC Holdings Ltd Vs Nzioki in which Court of Appeal held that the court exercises its discretion in allowing or rejecting the application to set aside. That discretion must be exercised upon reasons and judiciously.

(c) C.A Patel Vs Cargo Holding Services Ltd. It was held that the discretion of court is not limited.

(d) Baiywo Vs Bach Court of Appeal held that where there is no proper service of summons the Judgment must be set aside ex debito justitiae.

I have considered all the authorities cited by Applicant's advocate and it is my finding that the Applicant was properly served with the hearing notice and should have attended court. There was sufficient time for them to arrange to attend court for hearing in the circumstances. It is my finding that the situation could not have been saved by awarding costs as compensation to the Respondent. No satisfactory explanation has been given for failure to attend court.

I therefore see no merit in this application and the same is dismissed with costs to Respondent.

Dated on this 3rd June, 2008.

J. N. KHAMINWA

JUDGE

3/6/2008

Khaminwa – Judge

Njue- Clerk

Mr. Kahari for Applicant

Ms Rika for Respondent

Read in open court.

J. N. KHAMINWA

JUDGE