

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET
Civil Case 102 of 2003

SIMON KIPKOSGEI LIMO.....PLAINTIFF

=VERSUS=

JOSEPH GATEVI MWANGI.....DEFENDANT

RULING

This is an application to set aside the proceedings of 16/05/2007 plus the judgment of 5/6/2007 and all consequential orders.

I have considered the application and Supporting Affidavit and the Replying Affidavit. I have also considered the submissions. I do not accept that there was no representation or appearance by Counsel for the Applicant at the hearing. On the material day, I refused an application for adjournment. The Court fixed the matter for hearing at 4 p.m.

The Applicant's Counsel chose not to attend the hearing and the Defendant did not appear. The hearing date was taken regularly. Defendant failed to attend the Court His lawyer complained that the Defendant had not contacted him for over one year. The Advocate did not apply to withdraw from acting.

I think that there are no merits in the reasons offered for the non-attendance of the Advocate and the Defendant. While the proceedings or hearing finally went on ex-parte (in the absence of the Defendant), yet the Defendant and his Counsel had not shown or sent representation to show why both of them were absent.

I have taken into consideration the decision and the ratio decidendi in the case of **JESSE KIMANI – V- MA CONNELL & ANOTHER (1966) E.A.L.R. 547**

I have to ask myself whether any different material facts entered into the passing of the ex-parte judgment and so finding and after reviewing the surrounding circumstances and the merits of case the Court's discretion would be exercised in favour of the Defendant on terms

I had looked at the pleadings, applications and all circumstances. It is deemed that the Defence on record is what is still being relied upon. On the basis of the pleadings, in this 2003 case, it does not disclose any triable issues whatsoever. The Defence is weak. The Defendant has no legal or equitable right over the suit property. The Court can only rely on the Defence on record. There will be no useful purpose achieved to set aside the judgment as there are no triable issues.

I hereby dismiss the application with costs to the Plaintiff/Respondent.

DATED AND DELIVERED AT ELDORET THIS 21ST DAY OF NOVEMBER 2007.

M.K. IBRAHIM,

JUDGE.