REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT 246 OF 2004

WILLIAM PETER MAYAKA………....………………PLAINTIFF

VERSUS

RICHARD KIPKORIR MUTAI………..…....1ST DEFENDANT

PETER KIPKOECH BIEGON……………….2ND DEFENDANT

JOSHUA KIPROP CHIRCHIR……….………3RD DEFENDANT

REUBEN KIRUI KIPKEMOI……….…..…...4TH DEFENDANT

RULING

On the 19th May 2005, this court entered judgment in favour of the plaintiff against the defendants jointly and severally as prayed in his plaint. The court declared the plaintiff to be the owner of the parcel of land known as ***Nakuru/Boron Settlement Scheme/283***. He further ordered the defendants to give vacant possession of the said parcel of land to the plaintiff or in default thereof the plaintiff was to be at liberty to evict them with the assistance of the District Officer of the area where the land is situated. The proceedings leading to the said judgment were exparte. This court was satisfied that the defendants were duly served hence its decision to allow the plaintiff to proceed with his suit on formal proof.

On the 17th August 2005, the 1st made an application under the provisions of **Order 1XA Rule 10 and 11** of the **Civil Procedure Rules** seeking the order of this court to set aside the exparte judgment together with all the consequential orders flowing therefrom. The 1st defendant stated that he was not served with the summons to enter appearance and only became aware of the suit when he was served with the decree of the court dated the 3rd June 2005. The 1st defendant pleaded with the court to set aside the exparte proceedings and allow him to defend the suit appropriately. The application is supported by the annexed affidavit of the 1st defendant. He swore a further affidavit on the 19th of October 2005. In the said affidavits, the 1st defendant deponed that he was never served with summons to enter appearance and therefore was not aware of the proceedings herein. He further deponed that he was the registered owner of the suit land. He annexed a copy of the title in respect of the suit land. He also annexed a copy of his proposed defence and counterclaim. He stated that he had a good defence which raised triable issues. He urged the court to set aide the ex-parte judgment so that he could have an opportunity to ventilate his defence.

The application is opposed. The plaintiff, William Peter Mayaka, swore two affidavits in reply to the

1st defendant's application. He deponed that the 1st defendant was properly served with summons to enter appearance but deliberately failed to attend court. He deponed that the 1st defendant was aware of the pendency of the suit and could not therefore be heard to say that he had not served. He stated that the 1st defendant did not have a good defence on merits. He deponed that the title which the 1st defendant was relying on in support of his claim for the suit land was a forged title and therefore he could not be said to have a legally recognizable claim over the suit land. The plaintiff acknowledged that there existed a criminal case pending before the Molo Principal Magistrate's Court which case related to the 1st defendant's unlawful occupation of the suit land. The plaintiff urged the court to exercise its discretion and refuse to grant the application by the 1st defendant to set aside the ex-parte judgment.

Mr. Kurgat for the 1st defendant reiterated the contents of the application and the supporting affidavit. He submitted that the 1st defendant was not served with summons to enter appearance and only became aware of the suit when the plaintiff sought to execute the judgment against him. He submitted that the dispute between the plaintiff and the 1st defendant involved the suit land which the 1st defendant held title. Mr. Kurgat urged the court to peruse the proposed defence and counterclaim annexed to the 1st defendant's application. In his view, the said defence and counterclaim raised triable issues which should be ventilated in a full trial. He submitted the allegation made by the plaintiff to the effect that the title in possession of the 1st defendant was a forgery is more the reason why the court should hear the dispute herein on merits. Mr. Kurgat relied on several authorities in support of his submission to set aside the ex-parte judgment. He urged the court to allow the application.

Mr. Nyamwange for the plaintiff opposed the application. He relied on the two affidavits sworn by the plaintiff in opposition to the application. He submitted that the 1st defendant was properly served with summons to enter appearance but fail to enter appearance. He explained that the plaintiff had on formal proof established his ownership of the suit land. He maintained that the title which the 1st defendant was purporting to rely on to establish his ownership was a forgery – he insisted that the said title had been disowned by the Land Registrar who had observed the said title was a forgery. He submitted that the 1st defendant had not raised any triable issues in his proposed defence and counterclaim that would enable this court exercise discretion in his favour and set aside the ex-parte judgment. He reiterated that the proposed defence and counter-claim was a sham. He submitted that the 1st defendant had not established a suitable case to enable this court exercise discretion in his favour and thereby set aside the exparte judgment. He urged the court to dismiss the application with costs.

I have carefully considered the rival submission made by Mr. Kurgat for the 1st defendant and Mr. Nyamwange for the plaintiff. I have also read the application and the affidavits sworn thereto. The issue for determination by this court is whether the 1st defendant established a case to enable this court set aside the ex-parte judgment entered against him. The principles to be considered by this court in determining whether or not to set aside ex-parte proceedings are well settled. In **Patel vs E.A Cargo Handling Services Ltd [1974] EA 75** at page 76, Duffus P held that;

"***There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just. Mr. Inamdar has submitted that before the court grants an application under this rule, the court must first be satisfied that (a) there is a good defence, and (b) further be satisfied as to the cause of the delay in entering an appearance. He relied on various English authorities and on our decision in Mbogo vs Shah [1968] EA 93. In his judgment Newbold P, adopted the principles set out by Harris, J in Kimani vs McConnel [1966] EA 547 when he said;***

'…in 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.'

I also agree with this broad statement of principles to be followed. The main concern of the court is to do justice to the parties, and the courts will not impose conditions on itself to fetter the wide discretion

given it by the rules. I agree that where there is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits."

In the present case, the 1st defendant deponed that he was not served with the summons to enter appearance and only became aware of the present suit when he was served with decree of this court upon the conclusion of the case. The 1st defendant did not make any application to this court to examine the process server who swore that he had served him with summons to enter appearance. Before this court heard the case on formal proof, it ordered the plaintiff to serve the defendants for a second time. The defendants, including the 1st defendant, were served with the hearing notice of the date that this court had scheduled for the hearing of the case on formal proof. The 1st defendant chose not to attend court. This court is not persuaded by the submission by the 1st defendant that he was not served with summons to enter appearance or that he was unaware of the proceedings before this court. It was evident that the 1st defendant chose to ignore the proceedings before this court and only woke up when he realized that judgment had been entered against him. I therefore hold that the ex-parte judgment which was entered in this case was regular, since the defendants, including the 1st defendant, were duly served.

This court however has unfettered discretion to set aside exparte judgment even when it was established that the defendant was properly served if the ends of justice so demands. In the present case, the subject matter of the dispute is land. Both the plaintiff and the 1st defendant have titles to the suit land which they both claim to be genuine. Although the plaintiff tried to put forward a case to the effect that the title held by the 1st defendant is a forgery, it was clear to this court that the only way the dispute between the plaintiff and the 1st defendant could be resolved is by this court hearing the dispute and determining it on merits. In land disputes, unless a party gets satisfaction that his case had been heard and determined on merits, such a party will use all means possible to ventilate what he considers to be the justice of his case. I have perused the proposed defence and counterclaim. I am satisfied that the said defence raises triable issues which ought to go to trial for adjudication. As was held by Duffus P in **Patel vs E.A Cargo Handling Services Ltd** case (*Supra)* at page 76,

"***In this respect defence on merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue," that is an issue which raises a prima facie defence and which should go to trial for adjudication."***

I therefore exercise my discretion and set aside the ex-parte judgment entered against the defendants on the 19th May 2007. The said judgment is hereby set aside together with all the consequential orders thereto. The 1st defendant is granted leave to file and serve his defence and counterclaim within fourteen (14) days of today's date. The 1st defendant will however pay the plaintiff thrown away costs which I assess at Ksh.20,000/=. This court found that he was properly served. The said thrown away costs must be paid within fourteen (14) days of today's date. If the 1st defendant does not comply with the conditions for setting aside granted hereinabove, the ex-parte judgment shall be restored. The plaintiff shall have the costs of the application.

DATED at NAKURU this 7th day of December 2007

L. KIMARU

JUDGE