



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Suit 154 of 1998

JOHN KIPLAGAT TUWEI
PLAINTIFF

VERSUS

JOHN KIPSEREM KITUR
DEFENDANT

R U L I N G

John Kiplagat Tuwei filed this suit against John Kipserem Kitur on 7/9/1998. He obtained inter-locutory judgment on 18/8/1998 on the basis of the fact that though served with the plaint and summons to enter appearance, Kitur neither entered appearance, nor did he file his defence.

Kitur who claims that he was never served and was thus not aware of the suit against him, has now moved this court in an application wherein he seeks an order to set aside the judgment and all consequential orders. It is also his prayer that he be allowed to file his defence, a copy of which is annexed to his further supporting affidavit.

He bases his application on the grounds that he was never served with the pleadings as alleged and also that the suit is res judicata as the issues herein were resolved in Kapsabet Land Disputes Tribunal case No. 18/1997. He has deponed as much in his supporting affidavit, to which he has also attached the decree in the Kapsabet matter, in which judgment was entered on his behalf and he was awarded three acres of NANDI/MOGOBICH/226 ("the subject property").

Though he had filed his grounds of opposition, Tuwei was not represented and the application proceeded ex-parte. He however objects to the application on the grounds that it is fatally flawed, incompetent and misconceived.

"1. The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties.

2. Where a regular judgment has been entered the court would not usually set aside the judgment unless it was satisfied that there was a triable issue." (Philip Keipto Chemwolo and Mumias Sugar Co. Ltd vs. Augustine Kabenda (1982-88) 1 KAR).

Order IXA rule 10 and 11 of the Civil Procedure Rules under which this application is made stipulate that:

“10. Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.

11. Applications under this Order shall be made by summons.”

The first issue for my determination is whether the plaint and summons to enter appearance were ever served on Kitur (whom I shall now refer to as “the applicant”). The process server, one Robert Owich has deponed that he served him with the said documents on 7/7/1999, after he was pointed out by Tuwei (“the respondent”). He also depones that he came to know the applicant on that day. Surprisingly, Owich has filed several affidavits of service whereby he depones that he had served the applicant with applications and hearing notices on diverse dates prior to, the most notable one being on 14/9/1998 when he served him with an application under Certificate of Urgency and Chamber Summons, 7/9/1998, when he served him with an application under Certificate of Urgency, 5/10/1998 when he served him with a court order and Notice of Penal consequence, 6/4/1999, when he served him with a hearing notice. It is interesting to note despite having served him with the aforementioned documents on the four previous occasions, he however depones that the applicant became known to him on 7/7/1999 when he served him with the Plaint and Summons to Enter appearance which raises doubts in my mind, as to whether it was Owich who actually served him, or even then whether service was effected at all. I am inclined to conclude that the Process Server wasn’t candid.

Be that as it may, the applicant pleads that the suit is res judicata as it had already been decided and decision of the Land Disputes Tribunal adopted as a decree of the SRM’s Court at Kapsabet on 3/4/1997; almost one and half years prior to the filing of this suit. That, to my mind is a triable issue.

I do in the circumstances allow the application with an order that the applicant do file and serve his defence within the next 14 days. Costs shall however be in the cause.

Dated and delivered at Eldoret this 23rd day of February 2006.

JEANNE GACHECHE

JUDGE

Delivered in the presence of:

Mr. Mitei for the applicant

No appearance for the respondent