



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 188 of 2003**

**MANJIT SINGH SETH .....1<sup>ST</sup> PLAINTIFF**

**PERMINDER SINGH SETHI .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**SAMSON KARIUKI NJENGI .....1<sup>ST</sup> DEFENDANT**

**SUSAN WAITHERERO NJENGI.....2<sup>ND</sup> DEFENDANT**

**RULING**

The Plaintiffs chamber summons dated 20<sup>th</sup> February, 2006 is brought under Order IXA Rule 10 of the Civil Procedure Rules. The Defendant by their application seeks that judgement entered on 16<sup>th</sup> June, 2003 and all consequential orders be set aside. That he be granted leave to defend this suit. The application is supported by the affidavit of the 1<sup>st</sup> Defendant herein. The said Defendant stated that on being served with summons and Plaint in this matter he instructed the firm of Ramesh Manek Advocates to act for him and his co-defendant. That it transpired that the said advocate filed a memorandum of appearance but failed to file a defence on their behalf. Subsequently the said advocate withdrew from acting for the defendants. The Defendant further stated that he and his codefendant have never entered into a contract of sale with the Plaintiffs. That the agreement to sell their property namely LR. NO.2259/71 Karen was with RUAHA CONCRETE Company Limited. An agreement of sale was annexed to the application between the said company and the Defendant. The Defendant further stated that the transaction did not obtain the consent of the Land Board Control. He further stated that the exparte judgement that was entered in default of a defence took into account interest for a date prior to this suit. That further the Plaintiff in that exparte judgement obtained prayers which were in alternative. He therefore concluded that the exparte judgement is irregular and ought to be set aside. The Defendant annexed the proposed defence of the Defendants whereby the Defendants have denied entering into a contract with the Plaintiffs in this matter. They further pleaded that the Plaintiff's claim is statute barred and is lacking of legal force for failure of obtaining the Land Control Board consent. The Defendants denied that the sale agreement was executed between the parties as claimed and further stated that the Plaintiffs' claim is vitiated by other irregularities. The Plaintiff opposed the application and in the replying affidavit the Plaintiffs claim that there was another subsequent agreement with the 2<sup>nd</sup> Plaintiff dated 3<sup>rd</sup> September, 2003 which provided the following terms amongst others:-

**(i) The land to be subdivided to half acre plots (subject to approval of land office) otherwise**

**one acre plots.**

- (ii) Mr. Manjit Sethi and Mr. Perminder S. Sethi to receive 4.5 acres.**
- (iii) The cost of sub-division be borne by Manjit S. Sethi and Perminder S. Sethi.**
- (iv) Each party is to pay the land office for the new title deeds.**
- (v) Mr. C. N. Kariuki is to submit a copy of the title deed and plan for the purpose of sub-division.**
- (vi) The exercise is to be implemented immediately**

The Plaintiff further deponed that service was effected upon the Defendants of the summons and plaint in this matter. He therefore, concluded that the Defendants' application lacks merit and it is merely calculated to delay the Plaintiffs right to enjoy the fruits of its judgement. The Plaintiff further stated that there is no requirement for the suit property to be granted consent of the Land Control Board. The Plaintiff's counsel further in submission stated that even if the judgement entered in favour of the Plaintiff was irregular so long as the summons and Plaint were served that judgement would be regular. He was of the view that the only proper course for the Defendants was to file a claim against their former advocate in negligence for failing to file their defence in time. The Plaintiff's counsel did accept that the decree issued herein was erroneous for having contained both alternative prayers thereof. He was of the view that such an accidental slip can be dealt with by the court ordering for the amendment of the same.

The defence in support of their application relied on a quote from the case of **C. A. Patel v E. A. Cargo Handling Service [1974] E.A. 75** as follows:-

**“The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it 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 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”.**

Having considered the application before court and submission made by counsel, I am of the view that in exercise of the discretion donated by Order IXA Rule 10 of the Civil Procedure Rules that it is proper to grant the prayers that are sought by the Defendants. The Defendants in make their present application have not denied that proper service of the summons and Plaint was effected on them. Their explanation for failing to file a defence is that their advocate although instructed to act for them failed to so file. The judgement therefore, was properly entered for the Plaintiff. Although properly entered the decree thereof is irregular for indeed it has allowed the Plaintiff to both have judgement entered against the defendants for the subdivision of the suit property equivalent to the amount of Kshs.6,117,137.30. The decree then stated that judgement had been entered for the Plaintiff for the alternative prayer of Kshs.6,117,137.30 with interest from 27<sup>th</sup> April, 1998. It does therefore, seem that the Plaintiff will have both the subdivision and the monies allegedly paid to the Defendants. It does therefore, seem from that decree that the Plaintiffs have double the judgement they would be entitled to. That is entirely irregular particularly in regard to the subdivision order there would have need of the case being formerly proofed before judgement would be entered. That did not happen here and is difficult to know how from the decree there would be determination of the subdivision equivalent to the stated amount. However, much more than that the defendants by the proposed defence filed herein have to my mind sufficiently proved that there is a bona fide defence to the Plaintiffs' claim. Even considering the alternative agreement contained in the Plaintiff's replying affidavit dated 3<sup>rd</sup> September, 2003 the same was only signed by the 1<sup>st</sup> Defendant yet judgement is sought against both defendants. The other issue raised in the Defendant's defence that the agreement to sell the suit property was made between them and limited liability company this I believe is an issued that ought to go into full hearing for this court to determine the legality of this transaction. I am aware that the Plaintiff was concerned that the Defendants are seeking to set aside a judgement that is

over 3 years old. That as it may be the justice of this matter demands that if indeed judgement will be entered against the Defendants that they be afforded an opportunity to raise the defence which they have displayed in their application. I am of the view that the court in deciding an application such as this one has unfettered discretion whether or not to set aside the exparte judgement. Having considered in totality the issues brought before court, it is only right that that discretion be exercised in favour of the defendants. The orders of this court therefore are that:-

- 1. The judgement entered on 16<sup>th</sup> June, 2003 and all consequential orders thereof is hereby set aside.**
- 2. The defendants are hereby granted leave to defend this suit and to file their defence within 14 days from this date hereof.**
- 3. The costs of the application dated 14<sup>th</sup> June, 2006 shall be in the cause.**

**MARY KASANGO**

**JUDGE**

Dated and delivered this 3<sup>rd</sup> day of November, 2006.

**MARY KASANGO**

**JUDGE**