

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

Civil Suit 48 of 2000

WILLIAM KIPLANGAT CHIRCHIRPLAINTIFF

VERSUS

SAMWEL TESOT TANGUS1ST DEFENDANT

EDNA CHERONO MISIONGI2ND DEFENDANT

RULING

The plaintiff entered into an agreement whereby he agreed to exchange his parcel of land registered as **Kericho/Olokyin/306** with an unregistered parcel of land owned by the 1st defendant in Narok district. This agreement was verbal. It was made in 1993. The 1st defendant took possession of the plaintiff's parcel of land. However, it appears from the pleadings that the plaintiff did not occupy the 1st defendant's parcel of land. The said verbal agreement was not formalized by the parties transferring to each other their respective portions of land.

In the year 2000, the plaintiff filed this suit seeking to reverse the said agreement and take back possession of his parcel of land. The plaintiff served the defendants with summons to enter appearance. The defendants instructed the firm of Oboso & company advocates to act on their behalf in the suit. The said firm of advocates entered appearance but did not file a defence. Interlocutory judgment was entered against the defendants and the case was listed for formal proof before Muga Apondi. J. He delivered his judgment on the 1st of October 2004 allowing the plaintiff's suit as prayed in his plaint. On the material part, he stated that;

“A perusal of the above clearly shows that the plaintiff's evidence was not challenged nor controverted in any manner. The plaintiff proved as a fact that the exchange of land had not been presented to the relevant Land Control Board for consent. That means that the exchange of land was null and void. It was also obvious that the 1st defendant never had any valid title that he could pass to the plaintiff for the land in Narok”.

The defendants have now made an application to set aside the said *exparte* judgment which was entered against them. The application to set aside the *exparte* judgment is opposed by the plaintiff. At the hearing of the application, Mr. Kilele learned counsel for the defendants made forceful submissions urging this court to allow the application to set aside the *exparte* judgment. In essence, the thrust of his submission was that the defendants were not served with summons to enter appearance. In any event, even if this court were to find that the defendants were duly served, the suit being in respect of land, he submitted that it should ideally be heard and determined on merits but not on legal technicalities. He further submitted that the defendants had a good defence on merit which this court should allow the same to be presented to the court. The defendants referred to several authorities in support of the application to set aside the *exparte* judgment. Mr. Kilele urged this court to allow the application of setting aside so that the defendants are given an opportunity for their case to be heard and determined on merits.

Mrs. Bett for the plaintiff opposed the application. She submitted that the defendants had not satisfied the legal requirements set that would make this court set aside the *exparte* judgment. She submitted that there was no reason why this court should set aside a judgment which was regularly entered after the

defendants were served, entered appearance and failed to file a defence. She submitted that the allegation made by the defendants that they were not served were not true since after the defendants were served, they instructed the firm of Oboso & Company advocates to act on their behalf. She further submitted that the defendants did not have a good defence on merit because they were seeking to defend a suit which was indefensible. She submitted that the exchange agreement related to agricultural land which required the consent of the Land Control Board which was neither sought nor was granted. She urged this court to disallow the application with costs.

I have read the pleadings filed by the parties in support of their respective cases in this application. I have also carefully considered the rival submissions made before me by Mr. Kilele on behalf of the defendants and by Mrs. Bett on behalf of the plaintiff. The issue for determination by this court is whether the defendants have presented a case so as to enable this court grant them the application sought to set aside the *ex parte* judgment which was entered against them. The principles to be considered by this court in considering whether or not to set aside an *ex parte* judgment are well settled. As was held by Ringera J. (as he was then) in **Gandhi brothers Vs. H.K. Njage T/A H.K. Enterprises Nairobi HCCC No. 1330 of 2001 (Milimani) (unreported)** at page 3;

“Case law on the exercise of discretion is plenty. The cases show that the main concern of the court is to do justice between the parties: Patel vs. E.A Cargo Handling Services Ltd. [1975] E.A 75. The discretion is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Shah vs. Mbogo [1967] EA 116 and Pithon Waweru Maina vs Thuku Mugiria [1982- 88] 1 KAR 177. In exercising the discretion the court should consider among other things, the facts and circumstances both prior and subsequent, and all the respective merits of the parties. The question as to whether the affected party can reasonably be compensated by costs for any delay occasioned by the setting aside of the judgment should be considered and it should be always be remembered that to deny a person a hearing should be the last resort of the court.”

In this case, there is evidence that the defendants were served with summons to enter appearance. The defendants even instructed a firm of advocates to enter appearance on their behalf. The said firm of advocates did not however file a defence. Interlocutory judgment was entered and the case against the defendants was heard and determined on formal proof. Although the defendants have insisted that they were not served, the facts on the record clearly establishes the contrary. I do hold that the defendants were properly served, entered appearance, but failed to file a defence within the requisite period. This court however has unfettered discretion to set aside any *ex parte* judgment even if it was regularly entered if it is of the view that the ends of justice would be met.

What are the issues in dispute between the plaintiff and the defendants? This case involves land. In fact it involved an exchange agreement of two parcels of land. One parcel of land was registered while the other was unregistered. Both parcels of land are agricultural land. The consent of the Land Control Board was required before the said transaction could be said to be legal. As was held by the Court of Appeal in the case of **Onyango & Another vs. Luwayi [1986] KLR page 513** any transaction in respect of land which is governed by the provisions of the **Land Control Act** is null and void for all purposes if the consent of the Land Control Board was not granted (**See Section 6(1) of the Land Control Act**). So, in this case, even if this court were inclined to exercise its discretion in favour of the defendants and set aside the *ex parte* judgment, this court would be acting in vain because even if the case between the plaintiff and the defendants were to be heard on merit, it could not change the fact that the exchange agreement between the plaintiff and the defendants was void for all purposes because the consent of the Land Control Board was not sought and secured within six months of the said exchange agreement.

The upshot of the above is that I hold that the defendants were properly served with summons to enter appearance. They entered appearance. They failed to file a defence within the requisite period. This court heard and determined the suit on formal proof making a finding that the exchange agreement between the plaintiff and the defendants was null and void in law due to the fact that the consent of the Land Control Board was not obtained. This court cannot exercise its discretion in vain. The application to

set aside is therefore disallowed. It is dismissed with costs.

DATED at KERICHO this 2nd day of November, 2006

L. KIMARU

JUDGE