



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

Succession Cause 12 of 1986

SIMON AGGREY NGUNZA PLAINTIFF/RESPONDENT

PATRICK SHITAKHA OGABA.....RESPONDENT/3RD PARTY

VERSUS

JOSEPHAT SHIKANGA LUKUNZA.....DEFENDANT/APPLICANT

LINUS LUKUNZA KAKHAYANGA.....DEFENDANT/APPLICANT

RULING

Joseph Shikanga Lukunza, the Applicant/1st Defendant in the suit herein, applied on 2-5-2003 to this court by way of Chamber Summons premised on Order IXA Rules 10 and 11 and Order XLIV of the Civil Procedure Rules and sections 3 and 3A of the Civil Procedure Act for orders that Patrick Shitakha Ogaba be joined in the suit as a party and the interlocutory judgement entered in the suit (on 21.1.98) and all consequential orders be set aside or reviewed, and further that the Applicant be allowed to file defence to the suit. The Applicant also sought an order that the draft statement of defence attached to the application be deemed as duly filed.

In the grounds on the body of the application, the applicant stated that he was never served with the summons to enter appearance and the plaint in the suit, that interlocutory judgement was not available to the plaintiff and that the remedy of specific performance was not appropriate and that the second Defendant was dead when the interlocutory judgement was entered.

He also stated that he had a good defence. In his affidavit in support of the application, the Applicant averred that he lives on the land known as Kakamega/Shikoti/581 (the said land) and that in February 2003, the intended third party, Patrick Shitakha Ogaba, took possession of a portion of the said land and started cultivating it. On enquiry, he discovered that the title to the said land had on 27.1.03 been transferred to the said Patrick Shitakha Ogaba by the Plaintiff.

The applicant claimed that the Plaintiff had transferred the land to the intended third party by virtue of a court order. He averred that his advocates had advised him that the suit herein had been concluded.

The application was opposed by the intended third party, Patrick Shitakha who filed a replying affidavit and a supplementary affidavit. At the time of filing the Replying affidavit, the intended party had not been joined as a party to the suit and was therefore a stranger and had no *locus standi* to oppose the application. His replying affidavit and supplementary affidavit are hereby struck out.

The Plaintiff did not file any replying affidavit or grounds of opposition. He was represented by Advocate Amasakha. The second Defendant was said to be dead while the Applicant/1st Defendant was

represented by advocate Mukavale.

The suit was instituted on 15-5-85 by the plaintiff against the 1st and 2nd Defendants. The 1st Defendant is the son of the 2nd Defendant who, died on 22-8-85. The 1st Defendant was at the time of the institution of the suit the registered proprietor of the said land that is to say land title No. Idakho/Shitoli/581 situated in Idakho Location of Kakamega District (which land is today described as Kakamega/Shitoli/581). The plaintiff alleged in the plaint that the land had been sold to him by the Defendants for a money consideration of Shs.6,000/=. The plaintiff, therefore, sought the remedy of specific performance.

On 21.01.88, this court made an order of specific performance of the agreement between the Plaintiff and the Defendants. The said land was on 12.3.91 transferred to the Plaintiff from the 1st Defendant pursuant to the decree of the court and on 27.1.03 from the 1st Defendant to the intended third party, Patrick Shitakha Ogaba, for a money consideration.

The 2nd Defendant did not at any material time own the title to the said land and at no time did the court make an order against him or his estate. He seems to have been joined because, as the father of the 1st Defendant, he had participated in the alleged deliberations resulting in the sale of the said land by his son, the 1st Defendant, to the plaintiff.

The 1st Defendant did not enter appearance to the suit or file defence after service of summons to enter appearance. As a result, the Plaintiff sought interlocutory judgement. The suit was fixed for ex-parte hearing on 21.1.88 when the order for specific performance was made.

It is axiomatic that the exercise by the court of its discretion to set aside an ex-parte judgement is intended "to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice." (*see Shah v. Mbogo & another, (1967) EA 116*). Rules 10 and 11 of Order IXA of the Civil Procedure Rules give the court unfettered discretion to set aside or vary an ex-parte judgement so as to do justice to the parties. But in considering the case on the basis of the principles enunciated in the various cases on the point including;

- 1) ***MBOGO AND ANOTHER v. SHAH (1968) EA 93;***
- 2) ***KIMANI v.***
- 3) ***MCCONNELL (1966) EA 547;***
- 4) ***EVANS v. BARTLAM (1937) AC 437;***
- 5) ***PHILIP KEIPTO CHEMWOLO & ANOTHER v. AUGUSTINE KUBENDE (1982-88) KAR 1036;***
- 6) ***PITHON WAWERU MAINA v. THUKU MUGIRIA (1982-88) I KAR 171;***
- 7) ***PATEL v. EA. CARGO HANDLING SERVICES LTD. (1974) EA 75.***

and in the light of the circumstances of this case, the question has to be asked whether any useful purpose will be served by setting aside the ex-parte judgement. Admittedly, the suit land is in the name of a stranger to the suit, Patrick Shitakha Oyaba and not the Plaintiff who sold it to the former.

There is no evidence that the said Patrick Shitakha Ogaba was not a bona fide purchaser for value without any notice. The ex-parte judgement was in 1988, seventeen years ago. The suit land has left the hands of the plaintiff and is in the name of a third party against who no act of impropriety has been alleged. Exhibit No.JSL I (Green card) annexed to the application by the applicant shows that the third party obtained the transfer for a money consideration. It is not clear why since January 2003 when

the third party got registered the latter has not brought to the attention of the Applicant the fact that he is the new proprietor nor is it clear why he has taken possession of only a portion of the land when he owns the whole. But I do not wish to make adverse inferences without any evidence. In any case, in view of the decree, there was no suit to which the third party could be joined. And as the subject matter of the suit is registered in the name of a third party as aforesaid, the court is disinclined to grant the orders sought because no useful purpose would be served by setting aside the decree.

In these circumstances, I dismiss the application.

Dated at Kakamega this 11th day of November, 2005.

G. B. M. KARIUKI

J U D G E