REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 106 OF 2000

FRANCIS KIPKEMOI RUTO……..……..PLAINTIFF

VERSUS

JEREMIAH LANGAT ……1ST DEFENDANT

SIMON KIPNGETICH KITUR……2ND DEFENDANT

KIPKEMOI TELE ……3RD DEFENDANT

CHARLES TELE……..4TH DEFENDANT

RULING

The Defendants herein have made an application under the provisions of **Order IXA Rules 10, Order XXI Rule 25 Civil Procedure Rules** and Section 3A of the Civil Procedure Act seeking the orders of this Court to set aside the ex-parte judgment entered against them on the 6th of March 2003. The Defendants have further prayed that they be granted leave to file their defences so that this suit can be heard and determined on merit. The Defendants have further sought to be granted stay of execution pending the hearing and determination of the application. The grounds in support of their application is that they were not served with summons to enter appearance. They further state that they were not notified of the judgment through a lawful notice. The Defendants have further state that unless the ex-parte judgment is set aside they would suffer irreparable harm.

The application is supported by the annexed affidavit of Jeremiah Langat, the 1st Defendant. In the said affidavit he has annexed a draft defence, which if this application is allowed, the Defendants intend to adopt as their defence. The 1st Defendant has also filed a supplementary affidavit sworn on the 21st of May 2004.

The Application is opposed. The Plaintiff, Francis Kipkemoi Rutto, has filed two replying affidavits in opposition to the Defendants application. I shall refer to the said pleadings filed in the course of my ruling. At the hearing of the application, Miss Nyongesa, learned Counsel for the Defendant submitted that the Defendants were not properly served. The Defendants referred to annexture "FKR1" being the affidavit of service. Miss Nyongesa further submitted that the Process Server did not comply with the mandatory provisions of **Order V Rule 15 of the Civil Procedure Rules** which requires that a process server indicates the person who pointed out the Defendant to him. The Defendants further submitted that the interlocutory judgment against the Defendants was improperly entered. It was her argument that the Defendants were allegedly served on the 8th of April 2000. The request for interlocutory judgment to be entered was made on the 19th of May 1999. Interlocutory judgment was entered on the 16th of June 2000.

Learned Counsel for the Defendants submitted that the request to enter interlocutory judgment was made

before even the summons were served.

Miss Nyongesa further submitted that when the Defendant learnt of the suit, they attempted to file a defence but the same could not be accepted by the Court as interlocutory judgment had already been entered. She further submitted that the Defendants were not served with the hearing Notice when the case was fixed for formal proof. It was further the submission of learned Counsel for the Defendants that when the auctioneer went to proclaim the Defendants' property in execution of the Court's Judgment they immediately made the application to set aside the ex-parte judgment. The Defendants contend that it was during this time that they became aware that the suit has been heard and finalised.

The Defendants further submitted that the Draft defence annexed to their application raises triable issue and they should be allowed to ventilate their case on merit. Miss Nyongesa further submitted that the 1st Defendant had resided on the suit land since 1967. It is the contention of the Defendants that the suit land is trust land which has not been adjudicated or demarcated. The Defendants deny that the Plaintiff is the registered owner of the suit land. Miss Nyongesa further submitted that the issues raised were serious as they related to ownership of land. She referred the Court to two decided cases in support of the Defendants application, namely**Pithon Waweru Maina –versus-Thuku Mugiria [1983] KLR 78 and Kenya Ports Authority –versus Kustron (K) Ltd C. A. Civil Appeal No. 142 of 1995** (unreported)

She prayed that the Application be allowed.

The Application was opposed. Mr Karanja learned Counsel for the Plaintiffs submitted the Defendants were no candid in what they had deponed in the supporting affidavits. Mr Karanja submitted that the Defendants were served and affidavits of service duly filed in Court. Learned Counsel for the Plaintiff submitted that the Defendants had attempted to enter appearance but could not do so as Interlocutory Judgment had been entered. It was further submitted that the Defendants even filed another suit at the High Court, Kisii which suit was struck out as it was declared to be *res judicata*. Mr Karanja argued that the Defendants were aware that judgment had been entered against them. The Plaintiff further argued that the request for judgment was made by the Plaintiff on the 19th of May 2000 and therefore interlocutory judgment was properly entered.

He further submitted that the Defendants were not entitled to the discretion of this Court as their draft defence does not raise any triable issues. There was no counter claim to challenge the title of the parcel of land in question which was issued to the Plaintiff. Mr Karanja submitted that no particulars of fraud were pleaded. He further submitted that the Plaintiff was the first registered owner of the said parcel of land whose title could not be defeated. It was the Plaintiff's submission that the Defendants had not established a case as to entitle this Court to set aside

a judgment which was regularly entered. He prayed that the Application before Court be dismissed with costs. In support of the Plaintiffs submissions Mr Karanja relied on the following decided cases; **National Bank of Kenya Limited** ***–versus-*** **Ndzai Katana Jonathan HCCC No. 775/2002 (Milimani**) (unreported), **Express (K) Ltd – versus- Manju Patel C. A. Civil Appeal No. 158/2000 (unreported), Njagi Kanyanguti & Others –versus- David Njeru Njogu C. A. Civil Appeal No. 181 of 1994 (unreported) and Mbogo –versus- Shah [1967] E. A. 116.**

I have read the application filed by the Defendants together with the annexed affidavit and the supplementary affidavit. I have also read the two replying affidavits filed by the Plaintiff together with the annextures thereto. I have also considered the rival arguments made by Counsel for the Defendants and Counsel for the Plaintiff. The issue for determination by this Court is whether the Defendants were served with the summons to enter appearance in this case. The other issue that came to the fore during the arguments for determination is whether the interlocutory judgment against the Defendants was properly entered. The law on the setting aside of ex-parte judgment is now settled. If the Defendant establishes that he was not served, then the ex-parte judgment shall be set aside ***ex debito justitiae*** or as Ringera J (as he was then) was wont to state, the ex-parte judgment shall be set aside "bila maneno". As stated earlier in this ruling the principles guiding the Court in setting it was stated that

;***"The guiding principle that emerges out of all the authorities quoted is in the oft-quoted case of Pithon Waweru Maina –versus- Thuku Muginia (1982-88) 1 KAR 171 in which Kneller, J. A. (as he then was said);***

"The matters which should be considered, when an application is made, were set out by Harris J in Jesse Kimani –versus- McConnel [1966] E.A. 547 555F which included, amongst other matters, the facts and circumstances both prior and subsequent, and all the respective merits of the parties together with any material factor which appears to have been entered into the passing of the judgment, which would not or might not have been present had the judgment not been entered ex-parte and whether or not it would be just and reasonable to set aside or vary the judgment, upon terms to be imposed. This was approved by the former Court of Appeal for East Africa in Mbogo –versus- Shah [1968] E. A. 93, 95F.

There is also the decision of the late Sheridan J in the High Court of Uganda in Sebei District Administration –versus- Gasyali [1968] EA 300, 301, 302 in which he adopted the wise words of Ainley J (as he then was) in the same Court in Jamnadan Sodha –versus- Gordhandas Hemraj [1952] 7 ULR namely;-

"The nature of the action should be considered, the defence if one has been brought to the Notice of the Court, however irregularly, should be considered, the question as to whether the Plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny a subject a hearing should be the last resort of a Court."

Applying the above guiding principles to this case, it is clear that the Defendants in this case were served with summons to enter appearance. According to the affidavits of service filed in Court by Nyabuti O. Maragia a duly authorised Process Server of this Court, he served the four defendants on the 8th of April 2000 at Njiship township TransMara District. The defendants accepted service but declined the endorse at the back of the copy of the summons. The Defendants both in the affidavits filed in Court and in the submissions by learned Counsel did not seriously challenge the averment made by the Process Server Mr Nyabuti O. Maragia that he had served them. If they were aggrieved they would have made an application to this Court to have the said Process-Server cross-examined on the contents of the affidavits of service. The only quarrel that the Defendants have is that the Process Server did not disclose the identity of the person who showed the Defendants to him.

This Court would have put weight on this omission but for the subsequent conduct of the Defendants. A few months after the Defendants were served they came to Court in Nakuru and attempted to enter appearance and file defences. They were informed that they would not be able to enter appearance as interlocutory judgment has been entered. The 1st Defendant admits in his affidavit filed in Court that he was aware of the suit as far back as the year 2001 but he did not deem it appropriate or necessary to file his defence. The conduct of the 1st Defendant clearly shows that he was not at all concerned with the consequences of his non-appearance in Court. His attitude was to say the least that a person who did not show any care as to the fate of the case filed against him. Indeed in the affidavit in support of the application filed on the 24th of October 2003, the 1st Defendant states;

"4. THAT sometime in February 2001 I and the other defendants learnt that there was a suit filed against us through the Plaintiff himself verbally.

5. THAT we were not notified of the case number at all nor where it was filed and we were therefore unable to do anything."

Despite of knowing this fact, i.e. the existence of another suit, the 1st Defendant went ahead and filed another suit at Kisii High Court which was struck out where it was declared to be res judicata. (i.e. Kisii HCCC No. 80 of 2003). The submission by the Plaintiff that the Defendants have been less than candid is therefore not without merit. The Defendants conduct is such that this Court may on the above facts alone dismissed the Defendants application.

This Court is however constrained to consider whether the Draft defence filed by the Defendants raises any triable issues that may persuade this Court to exercise its discretion in their favour. In his Plaint, the Plaintiff claims that he is the registered owner of all that parcel of land known as **TransMara/Njiship/1063**. He also claims that the Defendant trespassed upon the said parcel of land in January 2000 and destroyed his property worth Kshs 400,000/=.What do the Defendants reply to the averments by the Plaintiff? In their draft defence they have denied that the Plaintiff is the registered owner of the said parcel of land. They have further denied that they destroyed the Plaintiff's property. They claim that they have resided on the said parcel of land since 1967 and were entitled to the said parcel of land by adverse possession. Is this a defence which is likely to defeat the Plaintiff's claim? I do not think so. It is my considered view the defence proposed to be filed by the Defendants is speculative, to say the least. The Defendants have not put forward a positive claim over the said property as to displace the Plaintiffs proprietary rights over the said parcel of land. The Plaintiff claims he is the first registered owner. This has not been disputed. He produced the title deed of the said parcel of land during the hearing of his case on formal proof. The Defendants have not attempted to impeach the Plaintiffs title in the said draft defence other than merely denying that the Plaintiff was the registered owner of the said property. The sum total of the above facts is that the Defendants have not disclosed a defence that would enable this Court to exercise its discretion to grant them leave to defend the suit filed by the Plaintiff.

In the premises therefore, I do find that the Defendants have not established a case as to entitle this Court to exercise its discretion in their favour to set aside the ex-parte judgment. The conduct of the Defendants is such that this Court cannot exercise its discretion in their favour. Further the interlocutory judgment which was entered against the Defendants was regularly entered after the Defendants had been properly served. Finally, the Defendants have displayed a lackadaisical attitude in the conduct of this case. They have been indolent. They have shown no seriousness whatsoever in the enforcement of what they purport to be their right. Their Application lacks merit. The same is consequently dismissed with costs to the Plaintiff.

DATED at NAKURU this 20th day of September, 2004.

L. KIMARU

AG. JUDGE