



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL CASE NO.76 OF 2002

ISAAC KIPRONO BUSIENEIPLAINTIFF

VERSUS

PATRICK ROTICH1ST DEFENDANT

ALEXANDER CHERUIYOT 2ND DEFENDANT

PHILIP ROP 3RD DEFENDANT

RULING

This is an application made by the defendants under the provisions of order IXA rule 10, **order XXI Rule 22(1)** of the Civil **Procedure Rules** and **section 3A of the Civil Procedure Act** seeking for the orders of this court to set aside the default judgment entered on the 11th June, 2004 in favour of the plaintiff and be allowed to file their defence out of time. The Defendants have also sought stay of execution of the decree of this court pending the hearing and determination of the Application. The Application is supported by the annexed affidavit of Patrick Rotich and is based on the grounds stated on the face of the application. Patrick Rotich has filed a further affidavit. The thrust of the said grounds were that the Defendants were not served with the summons to enter appearance and therefore could not have been expected to file a defence within the requisite period; that the Defendants have raised serious triable issues in their Defence which should be allowed to be ventilated on merits; that the Defendants would suffer prejudice if the applications set aside is not allowed and the case is heard on merits. The Application is opposed. The Plaintiff has filed a replying affidavit opposing the Defendants application.

In his submission before court, Mr Chelule Learned Counsel for the Defendants submitted that the Defendants did not receive summons to enter appearance. Learned Counsel further submitted that the Defendants only learnt of the case when the Auctioneers went to their premises and sought to attach their properties. The Defendants argued that they should be given a chance to defend this suit as the matter involved land which was a sensitive issue. The Defendants further submitted that they legally purchased the said parcel of land from one of the beneficiaries of the deceased's Estate who was the son of one of the administrators of the Estate of the deceased called Taputany Chesimet. The Defendant further argued that they had been sold the land after the suit land had been sub-divided following the confirmation of grant of letters of administration issued in **Kericho High Court Succession Cause number 45 of 1993**. The Defendants further submitted that they had extensively developed the portions of land that they had so purchased and therefore they should be given a chance to be heard before they are condemned. Mr. Chelule urged this court to allow the Application.

Mr Migiro, Learned Counsel for the Plaintiff opposed the Application. Learned Counsel submitted that the Defendants were duly served and affidavits of service duly filed in court. Learned Counsel submitted that the interlocutory judgment had been entered regularly and the subsequent hearing by way

of formal proof was also regular. The Plaintiff further submitted that this court had been satisfied that the Defendants were properly served before making the order that the Plaintiff proceeds with the hearing of the case in the absence of the Defendants. The Plaintiff has further submitted that it is only one of the Defendants who had sworn an affidavit to the effect that he had not been served with summons to enter appearance. The other two Defendants did not swear any affidavit to confirm or deny that they were served with the summons to enter appearance. Mr Migiro further submitted that the averments contained in the supporting affidavit was not true as the suit land was still registered in the name of the deceased and had not been subdivided as alleged by the Defendants. The Plaintiff submitted that the Defendants had not been candid with the court as they had failed to disclose how and when the suit land was subdivided. The Plaintiff further argued that the Defendants did not deserve the exercise of the discretion of this court in their favour as they had slept on their rights after they were properly served but only choose to come to court after execution had been levied. Learned Counsel argued that the Defendants had not come to court with clean hands and therefore they did not deserve the exercise of the courts discretion in their favour.

In reply, Mr Chelule Learned Counsel for the Defendant submitted that the Defendants had come to court with clean hands. It was further his submission that the Defendants were claiming a specific and determined portion of the suit land which they had legally purchased. Learned Counsel admitted that the 2nd and 3rd Defendants did not file any affidavit in support of the application but urged the court to allow the application.

I have anxiously considered the rival arguments made by the Counsel of the Defendant and the Counsel for the Plaintiff. I have also read the pleadings filed in court by the parties in this case. My attention was drawn to the fact that the Defendants had filed further supporting affidavit without the leave of this court on the 24th of September, 2004. I proceed to strike out the said affidavit before addressing the substantive issues raised before me. I will not consider it in this ruling. The issue for determination by this court is whether the Defendants were properly served. The other issue for determination is whether this court should exercise its discretion to set aside the exparte judgment and allow the Defendants to defend the suit. The Law as regards the setting aside of exparte judgment is now settled. The court will set aside exparte judgments if it is proved that the Defendants were not properly served with the summons to enter appearance. The court will set aside such exparte judgments as a matter of course. This Court will set aside an exparte judgment even if it is proved that the Defendant was served, if it is of the opinion that it would serve the ends of justice. In this regard it has been held by the Court of Appeal in several decisions that this court has unfettered discretion to set aside an exparte judgment entered. (**See Mbogo versus Shah [1968] EA 93, Kimani versus Mc Connell [1966] EA 547**). This discretion though unfettered should always be exercised judicially. The court in considering applications to set aside exparte judgments, should always lean towards deciding cases on merit and not on legal technicalities (**see Karatina Garments Ltd versus Nyanarua [1976] KLR 94**).

Applying the law to the facts of this case, it is evident that the Defendants were served with the summons to enter appearance. Even though the Defendants were not personally served, their wives were served on their behalf. The Defendants chose not to enter appearance or file defences in this case. The interlocutory judgment entered was therefore regular. I do not find any merit in the submission by the 1st Defendant that he was not served. The 2nd and the 3rd Defendants did not file any affidavits in support of the application to set aside. This court draws the inference from the lack of any affidavit by the 2nd and the 3rd Defendants that they were indeed served. If the Defendants were indeed serious in challenging the fact that they were not served, the first thing that they should have done upon this application being fixed for hearing was to seek the orders of this court to have the Process Server cross-examined on his affidavit. The Defendants chose not to exercise this option, clearly wary that the Process Server would confirm the fact that they were indeed served with the summons to enter appearance.

Having found that indeed the Defendants were served, this court has to consider if the Defendants deserve the exercise of the unfettered discretion of this court to set aside the exparte judgment. The 1st Defendant has deponed in his affidavit in support of the application that, he and his co-defendants purchased portion of land from one of the beneficiaries of the Estate of Samuel Chesimet – deceased. The Defendants submitted that they purchased the said parcels of land after they were convinced that the

beneficiary in question had inherited the portions of land that he was selling to them. The Defendants were even aware of the Succession Cause filed in court by the administrators of the deceased Estate. The Defendants have submitted that they have extensively developed the said parcels of land. They have argued that the court should give them an opportunity to be heard on merits. The Defendants have further submitted that they have a strong defence which raises triable issues. They have annexed the said draft defence in their affidavit in support of the application.

I have considered the submissions made by the Defendants. Even though the Defendants were served with summons to enter appearance, this court is of the view that the issues raised by the Defendants in their draft defence is weighty and should be ventilated on merit. I have considered that this case involves land which is very close to the heart of many a Kenyan African. I am also minded of the fact that the court should lean towards deciding cases on merits. For the said reasons, I hereby exercise my discretion and set aside the ex parte judgment entered on the 11th of June, 2004 together with all the consequential orders thereto. The Defendants are granted leave to file their defence within seven (7) days from today's date. The Plaintiff, who is an innocent party in this application, shall adequately be compensated by an award of costs. He shall be paid thrown away costs of Ksh.10, 000/= within seven days from today's date in default execution to issue forthwith. The Defendants shall also pay the Auctioneers charges and all the costs incurred by the Plaintiff in execution of the said ex parte judgment now set aside.

DATED at KERICHO this 29th day of October 2004

L. KIMARU

AG JUDGE