

Ngeno v Sugut

REPUBLIC OF KENYA

High Court, at Kericho

Civil case 24 of 95

RULING

This is an application by the Defendant seeking, in the main, the following orders:

“(c) That the Judgment and all consequential orders be set aside upon such terms as deemed fit.

(d) That the applicant be allowed leave to file defence in the interest of justice.”

The application was stated to be based on the following grounds:

“(a) The applicant has good defence with triable issues.

(b) That there is a pending suit in the Lower Court vide Civil Case Number 444 of 1993 P. M. KERICHO.

(c) That the respondent obtained judgment without complying with order dated March 25, 1999 and the consent order dated April 29, 1999.

(d) That the applicant stand (sic) to suffer loss and damage.

(e) That the entire suit is bad in law and ought to be struck out with costs.”

The application was supported by the affidavit of the Defendant sworn on April 30, 2003. In addition to the substance of the grounds set out above, the Defendant stated that *“the subject matter of the suit is the sale of land which required the necessary consent of the relevant Land Control Board in order to validate the same.”*

According to the said affidavit, the Plaintiff’s Advocate obtained leave to amend the Originating Summons but did not comply therewith. This caused his Advocate not to file defence to the suit. He annexed to his affidavit the defence which he filed in KERICHO PMCC NO. 444 OF 1993.

What the Defendant seeks is to set aside ex parte proceedings but he does not show how it came he was saddled by a decree of this Court without his participation. From the Replying Affidavit of the Plaintiff sworn on June 6, 2003 (and this was not challenged in any way) it is evidence that the Defendant (or at least his Counsel) had notice of the proceedings which resulted in the decree against him but does not say why he did not seize the opportunity to defend himself.

The matters set out as the basis of the application and those in the supporting affidavit cannot entitle this Court to set aside an otherwise regular decree. At the hearing of the application, Mr. Rono (who was acting for the Defendant when the ex parte decree was entered) argued that Order XXXVI Rule 8 (b) of the Civil Procedure Rules was not complied with in issuing notice. He also argued that there was irregular change of Advocates. These matters were not part of the grounds upon which the application was based nor were they raised in the accompanying affidavit. It was also argued that the suit was *“bad in law”* as the title of the suit land was not annexed. I agree with Mr. Oboso for the Plaintiff that in dealing with an application such as the one before the Court, this Court cannot sit on appeal against its own decision. The primary question is whether the Court had jurisdiction to pass the decree that is sought to be set aside and there can be no doubt that the Defendant having been duly served and having chosen not to attend, this

Court was entitled to proceed with the case as it did. As I have already said, the grounds upon which the application was based and the matters stated in the accompanying affidavit are irrelevant in deciding the application before the Court.

I, therefore, dismiss the Defendant's application dated May 2, 2003 with costs to the Plaintiff.

30 Jul 2003

Alnashir Visrim J