



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT BUSIA**  
**CIVIL APPEAL NO. 12 OF 1997**

**MARTIN WERUNGA KAPANGA.....APPELLANT**

**-VERSUS**

**SIMON ASAVA LUNGASHI & 3 OTHERS.....RESPONDENTS**

**JUDGEMENT**

By this appeal filed on 16th October, 1996, Martin Werunga Kapanga, the appellant hereby appeals against the ruling of the Busia Senior Resident Magistrates' Court made on 27th September, 1996 dismissing his application to set aside an ex parte judgement in favour of Simon Asava Lungashi, Moses Shuza Lungashi, Respa M. Lungashi and Francis Mulongo, hereafter called the respondents on the grounds inter alia that the court's discretion was not judicially exercised.

The facts leading to this application are not seriously in dispute. It is common ground that on 25th October, 1988, Simon Asava Lungashi and Moses Shuza Lungashi filed suit as the registered owners of a parcel of land known as Bukhayo/Lupida/767 for eviction of the appellant. The appellant in his defence however clarified that he had purchased same from one Respa Mbone Lungayi in 1981, who was then the registered owner. On 26th September, 1988, the appellant though aware of the respondents case, filed suit against the said Respa Mbone Lungayi for the suit premises herein as they were already in the names of the first two respondents as from 13th July, 1988. After hearing the parties, who were acting in person, judgement was entered for the respondents. However as the appellant had not given evidence in his defence, the judgement was set aside and matter ordered to proceed de novo. The third and fourth respondents were also joined as plaintiffs and a counter claim for purchase price was also included in the defence of the appellant herein.

After some haggling, the matter was eventually set down for hearing on 28th June, 1996. Although served, the appellants counsel did not attend and the matter therefore proceeded in his absence. During the hearing, it transpired that the land had by then been sold to the 4th respondent and he held the title.

The court therefore granted the respondent prayers and dismissed the counter claim. An application to set aside the ex parte judgement was also refused as the agreement on which the application was based was not consented to in time by the relevant Land Control Board.

In dealing with applications requiring the court's discretion, the main consideration is whether the setting aside would serve any useful purposes. The court can also grant terms in exercising its discretion.

Keeping the above in view, it is observed that the plaintiffs were the registered owners and that the appellant's agreement had been avoided by lack of Land Control Board consent within 6 months after the Sale Agreement. His only remedy was therefore refund of Shs.8,400/-. A general reopening of this long standing matter would therefore not serve a purpose. The justice of the case could only be served by allowing the plaintiff's suit and the defendants counter claim.

In the result I hereby allow this appeal and set aside the ruling of the lower court. In place thereof, I set aside the ex parte judgement of lower court and enter judgement for the respondents in the lower court as prayed. I also allow judgement for the defendant/appellant herein in the sum of Shs.8,400/- as prayed in the counter-claim. As the respondents were the authors of the dispute I deny them the costs of their suit, the application to set aside in the lower court and in this appeal. I however award the costs of the counter-claim to the appellant with the costs of this appeal as he was the innocent party.

Orders accordingly.

Dated and delivered at Busia this 13th day of March, 2002.

G.P. Mbito

JUDGE