



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL CASE NO. 6901 OF 1991**

**MOSES GICHUHO KANGETHE.....PLAINTIFF**

**VERSUS**

**JOHN NJORONGE WAMENJU.....DEFENDANT**

**RULING**

In this application filed on 27th June, 2002, the plaintiff/applicant seeks order made on 29th April, 2002, setting aside an exparte judgment against the defendant entered on 5th February, 1998 to be set aside on the grounds inter alia that the subject matter has since been alienated to a third party. The Respondent however contends that the matter is res judicata.

Briefly, in 1991, the plaintiff/applicant Moses Gichuhu Kangethe filed suit against the defendant / respondent John Njoronge Wamenju for eviction of the said respondent as he was the registered owner of the suit premises known Limuru/Ngecha/T.37. As the respondent was a man of small means he filed a defence and counter claim inter alia that he had been in possession of the suit premises as from 1960 and by the time the suit was filed in 1991 the applicants time had long been extinguished and the parties held in trust for him. The applicant had not filed a reply to the defence.

After many abortive hearings, the matter was fixed by the applicant for hearing on 4th and 5th February, 1998 by consent by Counsel for the applicant and the respondent. On 4th February, 1998, the court adjourned it to 5th February, 1998 the counsel was again absent and the matter proceeded Exparte and judgment given in favour of the applicant. The applicant then proceeded with execution. However, when the matter came to the attention of the of the respondent's counsel, She quickly filed an application to set aside the exparte judgment and stay on 17th July, 1998 contending that although she had been in court on that date, the file had not been produced at the right time and it had been agreed with the consent for the applicant that a hearing notice should be served on them for a new hearing date. Despite being served with the application to set aside the exparte order and for stay of execution, the applicant appears to have proceeded with the execution and even transferred the suit premises to a third party in December 1998.

The application to set aside did not come up for hearing until 29th April,2002. As the court has submitted that the hearing notice was served, it proceeded with the matter and set aside the exparte judgment leaving the matter to proceed to hearing. The applicant now contends that the exparte order be set aside as the plot no longer belongs to the applicants as it has been sold.

As can be seen the defence and counterclaim herein was based on adverse possession. If it is heard and determined not by the time the suit was filed by the applicant his title was no more, then the transfer of the title to the third party was of no effect. He would not have had anything to transfer. The setting aside has therefore not been for no purpose in vain. The respondent can still pursue it if not he should now amend the counter claim and include the third party in as co-plaintiff and obtain an inhibition against the title. He is of cause at liberty to abandon the court proceedings and start originating summons for in adverse possession against the third party and the applicant as well.

In view of the above and as the setting aside would not serve any purpose, I dismiss this application with no order as to costs as the Counsel for respondent is to blame for not taking decisive steps herein despite accepting instructions to act for the respondent who is a man of small means. Orders accordingly.

Delivered and signed this 10th day of December 2002.

G. P. MBITO

JUDGE