



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1847 OF 2001

UCHUMI SUPERMARKETS LTD.....PLAINTIFF

VERSUS

AMINA MOHAMMED KULE.....DEFENDANT

RULING

This is the defendants application for an orders that the exparte judgment and decree herein dated 3.7.2002 be set aside and that defendants be given leave to file a defence. The application brought on the grounds, inter alia, that

- (a) Defendants advocates were not served with an invitation to fix a hearing date of the suit or with a hearing notice.
- (b) The plaintiffs letter to court dated 4.4.2002 requesting for an early hearing date was not copied to the defendants advocates.
- (c) There is no evidence that there was service of the hearing notice
- (d) The decree was neither served nor approved by defendants advocates who had ceased to operate from the Development House as he had been appointed Commissioner of customs on 2.4.2002 with immediate effect.

The application is supported by the affidavit of Mumo Matemu defendant's former advocates and the affidavit of Amina Mohamed Kule – defendant. Mr. Mumo Matemu filed memorandum of appearance for defendants on 19.11.2001 and duly gave his address of service in the Memorandum of Appearance. Defendants did not however file a defence As the claims in the plaints were for an order for delivery of possession of land and for a permanent injunction to restrain defendants from trespassing on the land plaintiffs advocates set the suit down for hearing as provided by order IXA Rule 8 as read with order IXB Rule 1(1) Civil Procedure Rules.

The plaintiff's advocates then served a hearing notice on the defendants advocates at the place of service indicated in the Memorandum of Appearance. An affidavit of service was filed on 22.5.2002 showing that the secretary of Mr. Mumo Matemu Advocate was served with the hearing notice Mr. Matemu did not attend the hearing on 27.6.2002.

As the defendant had not filed a defence, plaintiff was not required to call her advocates for fixing of a hearing date As provided by order 1XB Rule 1(1) civil Procedure Rules, all plaintiffs advocate were required to do in to set suit down for hearing and give a reasonable notice of the hearing date to defendants advocates.

I am satisfied from the affidavit of service filed on 22.5.2002 and from the copy of the Delivery Book annexed to the replying affidavit of Mr. Jenny Maranga that defendants advocate were served with a reasonable notice at the place shown in the Memorandum of Appearance. Mr. Matemu says that he had been appointed as Commissioner of Customs on 2.4.2002. firstly he does not verify that assertion by any document.

Secondly, he does not say that he had wound up his practice or closed his offices. He had not given any other address of service to plaintiffs advocates. He does not say that he had ceased to act for the defendants. The officers were open and the service was in accordance with the law. It follows that the proceedings were regular and the judgment was regularly obtained. That notwithstanding, court has unfettered discretion to set aside that judgment if the interest of justice demand so.

The principles involved are well stated in the case of Patel versus East Africa Cargo Handling Services ltd (1974)EA 75 and in that case of Pithon Waweru maina versus Thuka Mugira (1982-88)1 KAR 171.

In the present case, the judgment entered was regular. Mr. Mumo Matemu advocate has not explained why he did not file a defence to the suit. Defendant has not also explained why defence was not filed. By the time the suit was heard Defence was late by about 6 months which is an inordinate delay.

The draft defence is mere denial of trespass. Yet one of the grounds to support the application is that defendants are in danger of eviction from the suit premises. The defendant does not raise any positive defence to the plaintiff claim. Defendants does not assert a claim of right to the suit land or show any legal justification for the occupation of the suit land. Thus the draft defence does not raise any triable issue. In the above circumstances, there is no legal basis for exercising courts discretion in favour of the applicant.

Consequently, I dismiss the application with costs.

E. M. Githinji

JUDGE

5.12.2002

Mr.Kibera for applicant present

Mr. Frazer present

Mr. Kibera

I apply for leave to appeal

E. M. Githinji

Judge

Ruling

The order made is appealable as of right but if leave to appeal is required, I grant it.

E. M. Githinji

JUDGE