REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 3122 of 1986

MALDIT SINGH & FOUR OTHERS.....PLAINTIFF

VERSUS

H. S. MAHASAN.....DEFENDANT

RULING

This is the defendants application for an order that the judgment entered against the defendant on 23.3.98 be set aside. The application is brought under order 1 x B Rule 8 Civil Procedure Rules and S. 3A Civil Procedure Act.

The application has arisen as a result of the Ruling of the court of 23.2.98 essentially allowing the plaintiffs application dated 28.5.97 and filed in court on 5.6.97.

The plaintiffs application allowed on 23.2.98 was brought under Order 24 Rule 6 of Civil Procedure Rules for an order that the suit be marked as settled and or compromised on the terms shown in the application.

The plaintiffs application came for hearing on 7.10.97 Mr. Johnston K. Mitey, then an advocate, says in the affidavit to support the present application, that, M/S Bett & Co., Advocates were acting for defendant but they could not attend court on 7.10.97. Mr. Mitey, who was a friend of defendant, then asked Mr. Oduk Advocate to take over the matter and Mr. Oduk agreed Mr. Oduk then indicated that he could apply for adjournment on 7.10.97 so that he would file notice of change of Advocates.

That is what happened on 7.10.,97. Mr. Oduk applied for adjournment to file a Notice of change of Advocates I allowed the application and adjourned the application to 27.11.97. Mr. Oduk was absent and one Mr. Okal was holding his brief. Mr. Okal informed court that Mr. Oduk had informed him that he had not yet received instructions from defendant. Mr. Okal further informed court that Mr. Oduk had gone to Kisumu. Mr. Okal applied for adjournment, The application for adjournment was opposed by plaintiffs advocate. The court rejected the application for adjournment and ordered the application to proceed to hearing. Mr. Okal then left the court and did not participate in the hearing of the application.

I agree with Mr. Parekh for plaintiff that the proceedings of 27.11.97 were not exparte The defendant appeared for the hearing by a counsel. The counsel applied for adjournment and when the application was refused, defendants counsel opted not to proceed to oppose the application. Mr. Johnson Mitey deposes in para 10 of the supporting affidavit, that, Mr. Oduk's Assistant had told him on 27.11.97, that, he would proceed with the application. Mr. Mitey must be referring to Mr. Okal who appeared on

27.11.97 but declined to proceed with the application.

Further, as the Ruling of 23.2.98 shows, the court considered the entire case on merit including the defendants counterclaim and the defendants replying affidavit to the plaintiffs application dated 28.5.97.

By Order 1XB Rule 3 Civil Procedure Rules, the proceedings are exparte if defendant who is served fails to attend the hearing. In this case, defendant appeared by a counsel on the hearing date but failed to participate in the proceedings when the application for adjournment was rejected.

By the clear words of order 1XB Rule 8 Civil Procedure Rules, an application to set aside or vary judgment arises only where the judgment has been entered under that order (order 1XB).

As the proceeding of 27.11.97 were not exparte the orders sought to be set aside were not entered under order 1XB. Rather, the orders of 23.2.98 were sough and given under order XXIV Rule 6(1) Civil Procedure Rules. By Order XLII(1)(q), an order compromising appellable a suit is as of right. The order can also be reviewed under order XLIV Civil Procedure Rules.

It follows that the orders of 23.2.98 cannot competently be set aside under order 1XB Rule 8 Civil Procedure Rules and that applicants remedy lies either in an appeal or in a review application.

The Ruling of 23.2.98 is comprehensive. Plaintiffs case and the defendants counterclaim were considered. The affidavits filed by defendant including his affidavit in reply to plaintiffs application was also considered. As the Ruling of 23.2.98 shows, defendant had by his Defence and counter claim sought an order that he transfers titles to each plaintiff upon immediate payment by each plaintiff of the balance of purchase price of 400,000.

By the compromise, the subject matter of the plaintiffs application, each plaintiff was to pay defendant shs 480.890.

As I observed in the Ruling, the compromise gave defendant shs 80,890 more from each plaintiff than he had claimed in the counter-claim. The transaction took place in 1980. Defendant gave each plaintiff possession of the respective Maisonnette in January 1983. Each of plaintiff has been in possession since then. This suit was filed in 1986.

As I determined the application on merit and considered the defendants case in full, setting aside the orders of 23.3.98 will be an exercise in futility as there is nothing else left to be heard. This is a good reason why defendant should have either appealed against the ruling or filed a review application.

Further, as I have shown above, plaintiffs will suffer great injustice due to delay if the application is allowed.

Lastly, the applicant does not seem to be interested in the application. The application to support present application is sworn by an advocate who was not on record by 27.11.97 when plaintiffs application came for hearing.

The affidavit should have been sworn by the defendant. He is the only one who could have shown that he is keen to have the matter heard and show what prejudice or injustice he will suffer if the orders of 23.2.98 are not set aside.

For above reasons, I dismiss the application with costs to plaintiff

E. M. Githinji

Judge

6.3.2001 - 2.45p.m.

Mr. Katwa for applicant present

Mr. parekh for plaintiff present