

REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NYERI

(CORAM: NYARANGI, GACHUHI & APALOO JJA)

CIVIL APPEAL NO 82 OF 1984

ONESMUS NJOROGE THIKA.....APPELLANT

V

D H NDEGWA & ANOTH.....RESPONDENT

RULING

The Notice of Motion under rules 80 and 42 of the rules of this court arises in the context of a dispute over land title No Kiine/Kiangai/163 between Onesmus Njoroge Thika the appellant, and D N Ndegwa and Benjamin Githinji Ndegwa, the respondents. The appellant as plaintiff claimed that D N Ndegwa fraudulently procured the registration of the material land title in his names, and the plaintiff's case is that the respondents jointly and severally do transfer to him (the plaintiff) the land title number Kiine/Kiangai/163. following a chamber summons taken out on September 19, 1983 under Order VI rule 8(2) of the Civil Procedure Rules; it was ordered by consent that the plaintiff do within 14 days from September 9, 1983 file and serve upon the advocates for the defendants/ respondents particulars as per the request of particulars which was made on April 14, 1983. It was agreed by the parties that in default of the plaintiff so filing and serving the particulars within the stated period, the plaintiff's suit would be dismissed with costs.

The plaintiff filed the particulars in the court on September 22, 1983 but failed to serve the same order. As a consequence the plaintiff's suit was dismissed with costs on October 19, 1983. By a chamber summons dated November 23, 1983, the appellant moved the high court *inter alia* for an order that the *ex-parte* judgment entered on October 19, 1983 be set aside. The high court, however, ruled in favour of the respondents and accordingly dismissed the appellant's application on June 12, 1984. The appeal at which the Notice of Motion dated May 17, 1985 is directed is against the ruling of the high court dated June 12, 1985. No notice of appeal was lodged in respect of the orders of the high court, made on September 9, and October 10, 1985. The order dated September 9, 1983 which is the crucial issue in this application, is therefore binding on the appellant as is the latter order. The appellant could not challenge the order dated September 9, 1983 by a mere reference to that order in a ground or grounds of an appeal from a decree and order of the high court dated June 12, 1984. The previous order dated October 19, 1983 which was made by the high court dismissed the suit on the terms of the consent order and has not been challenged or appealed against. That order was the basis upon which the judge made the further order dated June 12, 1984. The appellant it not entitled to complain because it will not assist the appellant to have the subsequent order vacated. The consent order dated September 9, 1983 on which the high court acted conclusively determined the rights of the parties with regard to all the matters in controversy and was therefore a decree: Section 2 of the Civil Procedure Act. The consent order did not set aside judgment in default of appearance or pleading nor set aside judgment in consequence of non-appearance. We do not, with respect, agree with Mr Gaturu that order 42 e 1(g) and (h) is applicable to the material consent order.

We would point out that a judgment by consent is binding .. set aside and hat a consent order can be aside in an action acted specifically for that purpose on a ground that would invalidate the agreement:- See The Supreme Court practice 1979 – vol 2 – paragraphs ,, 2010A and 2011 on pages 606-607. When considering the question setting aside the consent order, the parties to this action would, we not benefit

from a helpful passage on page 359, Supreme Court Practice, .. edition.

For the foregoing reasons, we allow the application and order that the appeal be struck out as being incompetent with costs to the respondents.

May 29, 1987

NYARANGI, GACHUHI & APALOO JJA