



REPUBLIC OF KENYA



KENYA LAW
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Shah & another v Soni & another (Environment and Land Case Civil Suit 308 of 2013) [2023] KEELC 16501 (KLR) (23 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16501 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 308 OF 2013
OA ANGOTE, J
MARCH 23, 2023**

BETWEEN

PRADEEP KHARAMSHI SHAH 1ST PLAINTIFF

JAYANT RACH 2ND PLAINTIFF

AND

MANJULA DHIRAJLAL SONI 1ST DEFENDANT

KETAN KUMAR DHIRAJLAL SONI 2ND DEFENDANT

RULING

1. In the Notice of motion dated September 27, 2013, the Defendants have sought for the following orders;
 - a. That this court be pleased to set aside the interlocutory judgment and the final decree of the court entered herein;
 - b. That this court be pleased to order stay of execution of the final decree of the court commenced hereof pending hearing and determination of the application;
 - c. That this court be pleased to lift the prohibitory order issued by the court on the August 19, 2013 against the Defendants herein;
 - d. That this court be pleased to grant leave to the Defendants herein to file defence out of time and the draft defence annexed herewith be deemed as duly filed and served upon payment of the requisite fees; and



- e. That costs of this application be provided for and be borne by the Respondents.
2. The application is supported by the affidavit of the 1st Defendant who has deponed that in August, the 2nd Defendant, who is his son, informed him that a friend of his was willing to lend him Kshs 1,000,000/-; that he gave the 2nd Defendant the title deed for Nairobi Block/34/524 to be used as security for the said loan and that in August, 2012, the 2nd Plaintiff coerced him and his son to sign a letter which he retained.
 3. It is the 1st Defendant's deposition that in December 2012 and March, 2013, they were again coerced to sign documents which they never read, and without leaving copies with them and that it was only upon perusing the pleadings in this case that they discovered that they had admitted by a letter of agreement dated December 21, 2012 that the Plaintiffs had given to his son a sum of Ksh 18,400,000/- at his request payable by January 31, 2013.
 4. The 1st Defendant denied the Plaintiffs' assertion of having given his son (the 2nd Defendant) the sum of Kshs 18,400,000/- or at all to be paid by January 31, 2013 together with interest of 7 % per month or compounded interest at 10% per month in default.
 5. The 1st Defendant further deposed that on September 18, 2013, the 2nd Plaintiff in the company of his wife gave them a document from the court to sign, which they consulted their advocates who perused the court record, they discovered that a suit had been filed and summons purportedly served upon them on March 14, 2013 which they had signed.
 6. It is the Defendants' case that although the summons were served upon them on March 14, 2013, the same was not left with them; that the summons having been served on them at 8.30 pm, the same is illegal and that no notice of entry of judgment was served upon them before the Plaintiff could proceed with the application for execution.
 7. The 1st Defendant deponed that the order of prohibition dated August 19, 2013 served upon them was irregularly obtained as there was no formal application on record since the only application dated September 16, 2013 praying for the prohibition was no served.
 8. The 1st Defendant finally deponed that they have a good defence to the suit since he never received any money as alleged; that he never agreed on the compound interest of 10% per month or any other rate nor did they make commitments to pay.
 9. In response, the 1st Plaintiff deponed that the Defendants have admitted having received some money as loan on security of their parklands property and that they admitted having received letters dated August 1, 2012; December 21, 2012 and September 5, 2013.
 10. It was deponed that the proposed statement of defence is nothing but a bare denial of the Plaintiff and is not a sufficient and sustainable defence to the Plaintiff and that it is the Plaintiffs who are in possession of the title of the suit property.
 11. The 1st Plaintiff lastly deponed that the notice of judgment was duly given to the Defendants; that the Defendants were served with summons to enter appearance and that the Defendants acknowledged receipt of service by their signatures.
 12. It was deponed that the interim decree and the final decree that have been issued are regular and have been issued in accordance with the *Civil Procedure Act* and Rules and that in any case, the court has powers under the slip rules to amend and correct the record under the provisions of Section 99 and 100 of the *Civil Procedure Act*.



13. In his submissions, the 1st Defendant's advocate submitted that the Defendants have admitted having borrowed from the Plaintiffs a total of Ksh 3,040,000; that the 2nd Defendant has never received the alleged sum of Kshs 18,400,000 by himself or the 1st Defendant and that the 2nd Defendant has never committed in writing or at all to pay Kshs 30,000,000 or 42,517,000 in default.
14. Counsel submitted that order 5 Rules 3 of the [Civil Procedure Rules](#) provides for service of summons upon the Defendants and a copy thereof given to the party being served and that although the summons were signed by the Defendants, they do not remember receiving the documents.
15. It is the submissions of the Defendants' counsel that the Defendants became aware of the suit upon being served with the prohibitory order; that the service of the summons on the Defendants was irregular and that the judgment should be set aside on that ground alone.
16. Counsel submitted that the Defendants have a good defence; that the compound interest being demanded by the Plaintiffs was not contractual and that the Defendants have a right to be heard.
17. The Plaintiff submitted that there was no threat of actual violence or threat of loss of life or real harm and that an alleged threat to auction the 1st Defendant's house cannot amount in law to coercion, duress, intimidation and blackmail.
18. It was submitted that the Defendants' agreements, undertakings and written acknowledgments are not a single event, but are contained in multiple documents and events.
19. It was submitted that before the filing of the suit on September 30, 2013, the 2nd Defendant sold the River Road property and executed an agreement for sale dated September 28, 2013 which was prepared by the same advocate on record and that in her Replying Affidavit sworn on October 25, 2013 she falsely stated that she was not disposing off the properties.
20. Counsel for the Plaintiff submitted that the Defendants have not established the act of coercion and that the Defendants have not established sufficient grounds for the grant of orders of setting aside the judgment.
21. The record shows that on February 28, 2013, the Plaintiffs filed a suit against the Defendants. In the Plaint, the Plaintiff averred that in an agreement dated December 21, 2012, the 1st Defendant confirmed that the Plaintiff's had advanced to her son the sum of Kshs 18,400,000.
22. The Plaintiff further averred that in the same agreement, the Defendants agreed to repay the said sum on or before January 31, 2013 together with compound interest at the rate of 7 % per month and that as security for the loan, the Defendants deposited with the Plaintiffs the title for land known as Nairobi/34/534 registered in the name of the 1st Defendant.
23. The Plaintiffs' case is that the Defendants failed to honour their obligations. The Plaintiffs' claim is for a sum of Ksh 24,674,301 with compound interest of 10% from March 1, 2013 until the date of payment.
24. The record shows that the Defendants were served with summons to enter appearance on March 14, 2013. The Defendants admit that they were served with the said summons and that they were forced to sign the same. Accordingly, to the Defendants, the copy of the summons was not left with them.
25. The non-appearance of the defendants upon the expiry of 15 days indicated in the summons led to the application of the judgment pursuant to order 10 Rule 4 (1) and (2) of the [Civil Procedure Rules](#). The said request was acceded to by the Deputy Registrar on July 10, 2013. A Preliminary Decree of



Ksh 23,158,880 together with compound interest at the rate of 10% per month until payment in full was issued on 155th July, 2013.

26. Although the Defendants have admitted that they signed the said summons, they never remained with a copy. Other than the summons to enter appearance, the Defendants signed other documents before and after the suit was filed but under duress.
27. In the case of *John Mburu vs Consolidated Bank of Kenya* [2018] eKLR, the court held that in determining whether there was coercion of will such that there was no true consent, it is material to enquire whether the person alleged to have been coerced did or did not protest and whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him.
28. Just as was held in the case of *John Mburu* (supra), I do not find any evidence of duress, unconscionable, unreasonable and oppressive conduct on the Respondents part or the process server.
29. In fact, the agreements, undertakings, written acknowledgments and the summons to enter appearance are not in a single event only, but are contained in multiple documents and events and instances, measuring that the Defendants did not only sign willingly, but were aware of the contents of the same.
30. That being the case, it is the finding of the court that the Defendants were served with the Summons to Enter Appearance regularly. Indeed, having given to the Plaintiffs the title deed as security for the money borrowed and signed numerous acknowledgment slips, they were aware that their property could be sold to realise the loan.
31. In the circumstances, the Defendants defence does not raise any triable issue to enable this court exercise its discretion in favour of the Defendants. Indeed, the evidence Defendants were served with the notice of judgment in July, 2013 in accordance with the law.
32. For the reasons I have given, I decline to set aside the interlocutory and final decree of the court. The application dated September 27, 2013 is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 23RD DAY OF MARCH, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Sevany for Plaintiff/Respondent

No appearance for Defendant

Court Assistant - June

