



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 201 OF 2015

KINGSBENCH LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

SARAH NYAWIRA WAMBUGU.....DEFENDANT/APPLICANT

RULING

1) Sarah Nyawira Wambugu, the defendant/applicant herein took out the motion dated 18th November 2021 whereof she sought for the following orders:

i. THAT this honourable court do certify this application as urgent and place the same to be heard on priority basis and service of the same be dispensed with in the first instance.

ii. THAT this honourable court do issue an order suspending, lifting and/or staying execution of warrants of arrest issued on 18th November 2021 against the defendant/decreed holder and stay execution of the decree issued against the defendant/decreed holder herein pending hearing and determination of this application.

iii. THAT the defendant/judgment debtor be granted leave to file this application for review, varying and/or setting aside of the judgment out of time.

iv. THAT this honourable court be pleased to grant the defendant leave to defend the suit albeit out of time as per the draft replying affidavit annexed to this application that raises cogent triable issues.

v. THAT this honourable court does make such orders or alternative orders as the court might deem it fit.

vi. THAT costs of this application be provided for.

2) The applicant filed two affidavits he swore in support of the application. Kings Bench Ltd, the plaintiff/respondent filed the replying affidavit sworn by Kanyi Gachoka to oppose the motion. When the motion came up for interpartes hearing learned counsels recorded a consent order to have the application disposed of by written submissions.

3) I have considered the grounds stated on the face of the motion plus the facts deponed in the rival affidavits. It is the submission of the defendant/applicant that ever since this matter was filed in the year 2015 the applicant has never been served with any court documents and only came to be aware of this case when she was served with a notice to show cause dated 1st September 2021.

4) The defendant further averred that the plaintiff failed to serve the defendant with the originating dated 23rd January 2015 and judgment against her was entered exparte. The defendant further avers that she was never served with a bill of costs which was later taxed without according to her the right to respond.

5) It is also pointed out that the notice to show cause dated 1st September 2021. It is the applicants submission that she stands greatly prejudiced because the warrants of arrest may be executed before she is accorded the opportunity to be heard on merit.

6) The plaintiff/respondent opposed the defendant's application stating that the originating summons dated 5th July 2014 was served upon the defendant who failed and neglected to enter appearance or file a response in the matter. It is pointed out that the court being satisfied that the defendant had been served and failed to enter appearance granted the plaintiff leave to proceed with the originating summons as undefended.

7) The plaintiff further argued that the court entered judgment in favour of the plaintiff on 8th November 2017 whereof the defendant was

ordered to pay the plaintiff a sum of ksh.1,030,192 together with costs of the suit. The plaintiff also stated that it filed a party and party Bill of costs dated 20th March 2018 and effected personal service upon the defendant who in turn failed to participate in the taxation proceedings therefore the Bill was taxed in her absence.

8) The plaintiff pointed out that the judgment was regularly entered. The plaintiff further stated that the warrants of arrest were lawfully issued when the defendant failed to comply with the directions of the court on filing an affidavit in response to the notice to show cause despite being granted ample opportunity.

9) Having considered the material placed before this court together with the rival written submissions, the dispute before this court is clear. The plaintiff and the defendant entered into an agreement on 20th September 2013 over the sale of the parcel of land known as Nairobi/Block 110/697 for kshs.30,000,000/=.

10) The defendant was required to pay kshs.6,000,000/= within 60 days from the date of execution of the agreement and obtain a loan facility of ksh.24,000,000/=. The plaintiff released the completion documents upon receiving a professional undertaking from Mssrs Mamicha & Co. Advocates acting for Equity bank for the balance of the purchase price in the sum of kshs.24,000,000/= and an undertaking from Mssrs Wamuyu Omung'ala & Co. Advocates then acting for the defendant to pay the deposit in the sum of kshs.6,000,000/=.

11) It is not in dispute that the transfer and change were duly registered in favour of the defendant and Equity bank and a sum of ksh.24,000,000/= by transferred Equity bank to the plaintiff 28 days after the completion date.

12) The agreement the parties executed shows that the outstanding purchase price would attract interest at the rate of 18% per annum. It is not in dispute the defendant failed to settle the balance of ksh.6,000,000/= within the agreed completion period and therefore attracting a change of interest.

13) According to the plaintiff the accrued interest as at 18th July 2018 was ksh.1,030,192/=. It would appear the defendant had approached the plaintiff vide a letter dated 26th August 2014 to instead pay ksh.600,000/= interest by way of monthly instalment from September to November 2014 and in default she would pay the entire interest of ksh.1,030,192/=.

14) It is not in dispute that the defendant did not pay the amount she proposed prompting the plaintiff to take out the originating summons dated 23rd January 2015 seeking to compel the defendant to settle the sum of kshs.1,030,192/= being the accrued interest of the purchase.

15) The plaintiff avers that the originating summons was served upon the defendant but she denies she was served. In the replying affidavit sworn by Kanyi Gachoka states in paragraph 15 that the originating summons in the instant matter is dated 23rd January 2015.

16) The plaintiff did not attach to the replying affidavit a copy of the affidavit of service. The plaintiff further refers to the originating summons dated 5th May 2014 in its submissions in page 4 at paragraph 8. The plaintiff failed to provide an affidavit of service showing that the originating summons dated 23rd January 2015 was served upon the defendant.

17) In the absence of a competent affidavit of service showing that the originating summons dated 23rd January 2015 was served, I find that it is doubtful whether the aforesaid summons was served. There is no affidavit of service which expressly states that the originating summons dated 23rd January 2015 was served. In the circumstances I am convinced that the originating summons dated 23rd January 2015 was not served. I find the defendant's motion dated 18th November 2021 to be meritorious. It is allowed, thus giving rise to issuance of the following orders:

i. The ex parte proceedings and judgment entered on 8th November 2017 and resultant orders are hereby set aside.

ii. The defendant is granted leave to enter appearance and file a response to the summons out of time within a period of 15 days from the date of this order.

iii. The matter to be mentioned on 24/5/2022 for further orders and directions.

iv. Costs of the aforesaid motion to abide the outcome of the originating summons.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 25TH DAY OF MARCH, 2022.

.....

J. K. SERGON

JUDGE

IN THE PRESENCE OF:

..... **FOR THE APPLICANT/ADVOCATE**

..... **FOR THE RESPONDENT**