



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 429 OF 2015

JAMES MWANGI RIUNGA.....PLAINTIFF

VERSUS

HOUSING FINANCE CORPORATION.....1ST DEFENDANT

MAMUKA VALUERS MANAGEMENT LIMITED.....2ND DEFENDANT

ANDREA BERLOFFA.....3RD DEFENDANT

FRANCESCA TARSIA INCURIA.....4TH DEFENDANT

RULING (2)

NOTICE OF MOTION

The 3rd & 4th Defendants/Applicants filed Notice of Motion Application dated 30th August 2019 for orders; -

1. There be a stay of any other proceedings in this suit pending the hearing and determination of this Application.
2. The Interlocutory Judgment entered on 20th March 2019 against the 3rd and 4th Defendants be set aside and the 3rd and 4th Defendants be granted unconditional leave to file a Defense and other pleadings in the suit.

Which Application was supported by the sworn Affidavit of **Andrea Berloff** dated **30th August 2019** on the grounds that; -

- a. The Plaintiff filed an Amended Plaint on **18th October 2018** joining the 3rd and 4th Defendants as parties to the suit which was originally filed on **8th September 2015**.
- b. The 3rd and 4th Defendants are not resident in Kenya and have never been served with the Amended Plaint and Summons as required by law.
- c. A perusal of the court file confirms that the Plaintiff's Advocate on record filed a Return of Service on 21st January 2019 where she claims that she served the 3rd and 4th Defendants with the Amended Plaint and Summons by serving 'a servant by the name Kilunja' on 18th December 2018.
- d. The 3rd and 4th Defendants relocated from Kenya in 2012 and the person who was allegedly served was/is a servant of the tenant of the suit premises and therefore, there has been no service of the pleadings and summons as required by law.
- e. That despite lack of proper service, Interlocutory judgment was entered against the 3rd & 4th The Defendants on 20th March 2019 in default of appearance and defense.
- f. The judgment was entered whilst there was no liquidated amount.
- g. The 3rd & 4th Defendants lawfully purchased the suit property LR No 1870/111/219 by way of Private Treaty for consideration of

Ksh 10,000,000/- from the 1st Defendant.

h. The Plaintiff's suit against the 3rd & 4th Defendants is statute barred under the provisions of **Section 4 (1) (a) (e) 2 & 3 of Limitation of Actions Act**. The cause of action arose on 28th August 2006 and the claim against the 3rd & 4th Defendants was filed on 18th October 2018.

i. The 3rd & 4th Defendants have a good defense against the Plaintiff's claim in the suit.

REPLYING AFFIDAVIT

a) That pursuant to the 3rd & 4th Defendants were served on 18th December 2018 with Amended Plaintiff and Summons through their Agent by name Kilunja who acknowledged service.

b) That indeed the 3rd & 4th Defendant's duly appointed and recognized agent by the name Kilunja confirmed that the 3rd & 4th Defendants were tenants in LR 187/111/219 at all material times and only emigrated back to Italy in 2012 and further stated that the father of the 4th Defendant lives in Malindi.

c) That the service of the Amended Plaintiff and Summons was at the last known residence of 3rd & 4th Defendants and was undertaken pursuant to Court orders granted on 28th November 2018 and reiterated on 7th February 2019.

d) The Plaintiff's claim is that he already repaid the loaned amount in 2003 and had indeed informed the 1st Defendant and therefore the statutory power of sale was/is an exercise in illegality contrary to **Section 69 A of ITPA**, as no attempts were made to sell the suit property in a public auction but by private treaty.

e) The illegal transaction conferred as noted hereinabove could not have been a basis to confer a right of ownership upon the 3rd & 4th Defendant.

f) The Plaintiff alleged that the 4 defendants connived to manipulate the Accounts to indicate huge outstanding arrears to the Plaintiff's Account to justify illegal sale and deprived him of his home.

On 9th February 2021, the 1st Defendant through Mr Khamala holding brief for Mr Bwire confirmed to Court they would not oppose the Application.

Mr .Gachara for 2nd Defendant waived their right to participate in the instant application.

PLAINTIFF'S SUBMISSIONS

The Plaintiff submitted on the following issues;

a) Whether the Plaintiff's suit is time-barred?

The Plaintiff referred to the following cases to buttress its position with regard to service of Court process to the 3rd & 4th Defendants;

Ahmed Said Mohammed vs Municipal Council of Garissa & Anor [2014] eKLR, the Court of Appeal upheld the Trial Court's decision in reliance on Section 26 of Limitation of Actions Act.

Silvana Corsavo vs Luigi Fornica & Anor [2010]eKLR

The Court held that tort limitation period was/is 3 years Contract limitation period is 6 years, but where fraud is pleaded then time begins to run the time the fraud is discovered.

Mutsongar vs Nyali [1984] KLR 425 held;

Allegations of fraud must be strictly proved and although the standard maybe so heavy as to require proof beyond reasonable doubt, a higher degree of probability is required which is something more than a mere balance of probabilities and is a question for the Trial Judge to answer.

b) Whether there was improper service of Amended Plaintiff and Summons to the 3rd & 4th Defendants?

That indeed the 3rd & 4th Defendant's duly appointed and recognized agent by the name Kilunja confirmed that the 3rd & 4th Defendants were tenants in LR 187/111/219 at all material times and only emigrated back to Italy in 2012.

The Plaintiff relied on the case of;

.....

c) Whether the default judgment entered was regular against the 3rd & 4th Defendants and whether the entry of Interlocutory judgment was regular.

That the service of the Amended plaint and Summons was at the last known residence of 3rd & 4th Defendants and was undertaken pursuant to Court orders granted on 28th November 2018 to serve through substituted service and reiterated on 7th February 2019.

The Default judgment entered against the 3rd & 4th Defendants was regular and proper under **Order 5 CPR 2010**.

d) Whether the Plaintiff has a reasonable cause of action The Plaintiff has a reasonable cause of action against the 3rd & 4th Defendants as prescribed in the Amended Plaint and relied on the case of ;

D.T.Dobie & Co (K) Ltd vs Muchina [1982] eKLR C.A. held;

A reasonable cause of action means some chances of success where allegations in the Plaint only are considered.....

e) Whether the 3rd & 4th Defendants were *bona fide* purchasers.

DEFENDANT'S SUBMISSIONS

The Defendant raised 3 questions in its submissions;

a) Whether proper service was conducted by the Plaintiff to the 3rd & 4th Defendants.

The defendants submitted that the service of summons was not properly done as it was not in accordance with Order 5 Rule 10 CPR 2010.

The Plaintiff failed to establish that the Person served one Kilungu was duly appointed and authorized to receive summons on 3rd & 4th Defendant's behalf.

The Defendants relied on the case of;

Development Bank of Kenya Ltd vs Riva Oils Co Ltd which referred to ***Kimeu vs Kasese*** and held as follows; ***It is not the relationship to the party that matters but if in fact he was authorized to receive Summons.***

See also; Filimona Afuandi Yalwala vs Indimuli & Anor

b) Whether the default judgment was regularly entered.

The Defendant submitted that the default judgment was not regularly entered as the service of summons was not proper and legal and ought to have been as required by **Order 5 Rule 21 CPR 2010**

The Defendants relied on the case of;

Law Society of Kenya vs Martin Day & 3 Others; which held;

Summons ought to be served in a manner provided for in the Rules to enable the Defendants who have no registered office or business in Kenya submit to the jurisdiction of the Court.

c) Whether unconditional leave to defend should be granted.

The Defendants indicated that they have a good defense as annexed to their Application.

The Defendants submitted that this was not a proper case to enter default judgment as there was no liquidated demand and some of the reliefs required to be quantified. The Amended Plaint pleaded for loss and damages and some have not been quantified. The Plaintiff's claim is brought under **Order 10 Rule 9 CPR 2010**.

The Defendants raised other issues in their submissions, exercise of the Court's jurisdiction, that the plaintiff lacks cause of action against the 3rd & 4th Defendants and that they are *Bona fide* purchasers for value.

DETERMINATION

The Court considered parties' pleadings oral and written submissions based on the instant application and the issues for determination are;

a) **Whether there is a competent suit against the Defendants?**

b) **Whether service of Amended Plaintiff and summons by the Plaintiff to the 3rd & 4th Defendants was regular, legal and proper?**

c) **Whether the defendants have a bona fide Defense that raises triable issues for determination at trial or it is a mere denial.**

1. Whether there is a competent suit against the Defendants.

The Defendants deposed in the instant application that the Plaintiff's suit against the 3rd & 4th Defendants is statute barred under the provisions of **Section 4 (1) (a) (e) 2 & 3 of Limitation of Actions Act**. The cause of action arose on 28th August 2006 and the claim against the 3rd & 4th Defendants was filed on 18th October 2018.

The Plaintiff filed the Plaintiff on 9th September 2015 and later filed and served Amended Plaintiff. In both the plaintiffs the Plaintiff raised the issue of fraud. In the Amended Plaintiff, the Plaintiff alleged particulars of Fraud at paragraph 14 against defendants specifically 14 grounds of alleged fraud against all defendants.

Section 4 of Limitation of Actions Act provides;

(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

(a) actions founded on contract;

(b) actions to enforce a recognizance;

(c) actions to enforce an award;

(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;

(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

On the other hand, as the Plaintiff raised allegations of fraud; **Section 26 of Limitations of Actions Act** provides for extension of limitation period in case of fraud or mistake;

Where, in the case of an action for which a period of limitation is prescribed, either—

(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

From the above citation and **Section 4 (2)**, it is clear that, although actions of tort are to be commenced within 3 years from the cause of action and contracts 6 years from the cause of action, where fraud is specifically pleaded then **Section 26 of the Limitation of Actions Act** applies. In this instance, Fraud was/is pleaded in the Amended Plaintiff.

Secondly, the plaintiff and 3rd & 4th Defendants had a tenancy relationship which is not the subject of the suit herein. It is the alleged illegal statutory power of sale that was conducted by 1st Defendant that gave the 3rd & 4th Defendants ownership rights over the suit property where they were tenants to the Plaintiff that is the subject of hearing and determination. Consequently, as the Plaintiff was out of the country in Botswana then, he could not have known or been privy to the impugned sale/auction transaction of the suit property, until much later. Hence, the detection of fraud was much later after the statutory power of sale. From these facts, the limitation period is lawfully and legally extended by virtue of **Section 26 of Limitations of Actions Act**. Whether, there was actually, fraud and/or that the 3rd & 4th Defendants were part of/privy is one of the triable issues to be determined at the full hearing of the suit inter partes. The Agreements annexed to the 3rd & 4th Defendant's application are executed by other parties and do not include the Plaintiff and so he was not involved aware or party to the transaction(s).

Ahmed Said Mohammed vs Municipal Council of Garissa & Anor [2014] eKLR supra applies.

There is a reasonable cause of action as per the Plaintiff's claim subject to hearing where evidence shall be adduced and its veracity tested through cross-examination.

In *Nitia Properties Ltd vs Jagjit Singh Kalsi & Anor C.A.132 of 1937*, the Court observed that;

an allegation of fraud as alleged in the Plaintiff and is disputed in the Defense, the issue of fraud cannot be deemed to be incontestably hopeless and be summarily dismissed by way of an application.

In *DT Dobie & Co (Ky) Ltd vs Muchina supra* the Court expressed itself as follows;

The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case.....

All these considerations based on legal principles applied to the instant case confirm that there is a competent suit for hearing and determination and it is not barred by limitation.

2. Whether service of Amended Plaintiff and summons by the Plaintiff to the 3rd & 4th Defendants was regular, legal and proper?

3. Whether the defendants have a bona fide Defense that raises triable issues for determination at trial or it is a mere denial.

The jurisprudence on setting aside or not is settled. The case of *James Kanyिता Nderitu & another v Marios Philotas Ghikas & another [2016] eKLR* observed in great detail as follows;

We shall first address the ground of appeal that faults the learned judge for setting aside the default judgment and consequential orders in the circumstances of the case. From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered.

*In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defense, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defense, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defense raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See *Mbogo & Another v. Shah (supra)*, *Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75*, *Chemwolo & Another v. Kubende [1986] KLR 492* and *CMC Holdings v. Nzioki [2004] 1 KLR 173*).*

*In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside *ex debito iustitiae*, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango Oloo v. Attorney General [1986-1989] EA 456*). The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in *Sangram Singh v. Election Tribunal, Kotah, AIR 1955 SC 664*, at 711: “[I]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.”*

The Plaintiff through the advocate on record served the 3rd & 4th Defendants pursuant to the Court’s order of 28th November 2018 and reiterated on 7th February 2019. The Affidavit of Service confirms that the Plaintiff’s advocate served one Kilunga who after making phonecalls accepted service of the Court process.

This was the Defendants last known address, the Plaintiff’s house where they were tenants before they purchased the same. The Plaintiff had no further and better information and details to rely on in effecting service.

The defendant’s position that they left the country and relocated to Italy and so they were not in Kenya then is plausible as shown by copies of their passports had entries thereof. However, this information was not relied to and not available to the Plaintiff and/or his advocate.

The Plaintiff pleaded that the said agent Mr.Kilunga confirmed that the 4th Defendant’s father resided in Malindi and he was authorized to accept the documents.

As rightly indicated by the Defendants it is trite that a party is served summons so as to enter appearance and participate in the proceedings and exercise a right to be heard. However, in this instance if the summons were not properly served based on the existing circumstances, that the plaintiff was not aware that they relocated, how and when did they learn of the matter in Court as against them?

Secondly, the Court record confirms that the Defendants had advocates on record prior to the present advocates why did they not instruct their advocate to receive process and inform the Court of their relocation abroad?

Thirdly, why did it take this Court to allow the present advocate on record without consent from previous advocate on record if they were not aware of this matter at all?

The service was to Mr. Kilunga an agent of the 3rd & 4th Defendants as he was in the suit property that the Defendants resided and even though they relocated that was the residence and their last known address. The Defendants failed to present the said Mr Kilunga for cross examination if he was or not authorized to receive process on the Defendants behalf.

Fourthly, the Defendants were served pursuant to the Court orders of 28th November 2018 and 7th February 2019 and the Plaintiff's advocate would have pinned the summons at the last known address as per **Order 5 Rule 17 CPR 2010**.

The Defendant's claim that the defendants ought to have been served by compliance with **Order 5 Rule 21 CPR 2010** as they were out of the country, the Plaintiff cannot possibly effect such service in the absence of knowledge of the defendants whereabouts and their physical postal or residential address.

The Court finds that service was proper and legal under **Order 5 Rules 8,11,12 & 17 CPR 2010**.

The Plaintiff requested for Interlocutory judgment on 27th February 2019 and obtained default judgment on 22nd January 2019. This Court finds that the Court entered judgment on 22nd January 2019 in default of appearance and filing of defense while the 2nd Defendant was granted leave to file defense out of time while the 1st Defendant had filed defense to the Amended Plaintiff.

The Defendants claim that default judgment ought not to be entered except in liquidated sums. The claim for loss and damages ought to be quantified.

Once regular judgment is entered then formal proof proceedings ensue to determine quantum.

Does the Defendants Defense raise triable issues to be determined at a full hearing?

Although the Defendants are properly, served, the issue(s) of whether they are *bona fide* purchasers for value without notice of defective title to the suit property or were part of if proved fraud which; ought to be specifically proved on more than a balance of probabilities or that the statutory power of sale that resulted in provision of ownership rights to the Plaintiff's property was /is regular/valid /legal and lawful is another major issue for determination.

From the above circumstances, these are not issues to be summarily determined at the application stage but at a hearing to determine the various triable issues raised by the Defendants defense among others.

DISPOSITON

For this reason, in the interest of justice, the Court sets aside the default judgment of 22nd January 2019 on the following terms;

- a) That the Draft Defense shall be deemed as filed and served and the Plaintiff has 14 days to file and serve Reply to this Defense.
- b) That upon pleadings closing 14 days thereafter, parties shall appear before the DR Commercial & Tax and conduct CMC for the Defendants to produce documents as per Hon. LJ G.Nzioka's order of 8th June 2018
- c) The 2nd defendant's application to be removed from these proceedings is compromised by the Consent of 24th September 2018, between its principal 1st Defendant & Plaintiff who consented to join 2nd 3rd & 4th Defendants. The 2nd Defendant's application would only succeed if the Consent is set aside as it is its principal that consented to join the agent.
- d) That said, after CMC; which parties shall comply with as it has been ordered by various Courts since 8th February 2018 by Hon Onguto J, 8th June 2018 by Hon LJ G.Nzioka and by this Court on 22nd January 2019 & 8th July 2019.
- e) The matter shall be placed before HOD/PJ for reallocation for hearing in any other Court within the Division as this Court is going on transfer.
- f) The 3rd & 4th Defendants shall pay the Plaintiff throwaway costs Ksh 20,000/-

DELIVERED SIGNED & DATED IN OPEN COURT ON 3RD AUGUST 2021. (VIRTUAL CONFERENCE DUE TO CORVID 19 PANDEMIC MEASURES RESTRICTING OPEN COURT OPERATIONS AS PER CHIEF JUSTICE DIRECTIONSO F 17TH APRIL 2020)

M.W. MUIGAI

JUDGE