



Diana Masie Osano Odera t/a Odera and Associates Advocates v Migdad & 3 others (Civil Case E188 of 2019) [2021] KEHC 244 (KLR) (Commercial and Tax) (18 November 2021) (Ruling)

Neutral citation: [2021] KEHC 244 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E188 OF 2019
WA OKWANY, J
NOVEMBER 18, 2021**

BETWEEN

**DIANA MASIE OSANO ODERO T/A ODERO AND ASSOCIATES
ADVOCATES PLAINTIFF**

AND

**DAWID ABDULRAHMAN AND SAAD MIGDAD 1ST DEFENDANT
FIVE STAR CONSTRUCTION LIMITED 2ND DEFENDANT
JAMES WAMWATI MAMBO (SUING AS THE ADMINISTRATORS OF THE
ESTATE OF GEORGE MAMBO 3RD DEFENDANT
JOEL KENG'ETHE IKURO 4TH DEFENDANT**

RULING

1. This ruling is in respect to the application dated 20th January 2021 wherein the intended 3rd and 4th defendants seek the following orders:
 1. Spent.
 2. Spent.
 3. That this Honourable court be pleased to set aside and/or vary the judgment in default entered on 15th October 2020 for the plaintiff against the defendants in default of filing a reply together with any consequential decree as the court may deem fit and just.



4. That the Honourable court be pleased to grant stay of the taxation of the party-to-party Bill of Costs dated 17th November 2020 pending the hearing of the application herein and the one dated 25th September 2020.
 5. That this Honourable court be pleased to deem the Defendant's replying affidavit dated 2nd September 2019, filed with court on the 4th September 2019 and served upon the plaintiff on the 4th of September 2019 as proper reply on record.
 6. That this Honourable court be pleased to consolidate the application herein with the applications dated 25th September 2020 and 24th September 2020 to be heard and determined as the court may deem it expedient.
 7. That this Honourable court be pleased to issue an injunction restraining the plaintiff whether by themselves or through their agents, servants, employees, anyone claiming through or deriving authority from them from removing from the 1st and/or 2nd defendant's premises and selling any property pending the hearing and determination of the application herein and the one dated 25th September 2020.
 8. That this Honourable court be pleased to issue an injunction restraining the plaintiff whether by the themselves or through their agents, servants, employees, anyone claiming through or deriving authority from them from selling or in any way interfering with the subject property LR. No. 36/111/215 pending the hearing and determination of the application herein and the one dated 25th September 2020.
 9. That the Honourable court be pleased to reinstate this Originating Summons for full hearing.
 10. That in the alternative this Honourable court be pleased to consolidate this suit with Nairobi ELC Case Number 36 of 2017 and transfer this file to the Environment and Land Court.
 11. The costs of this application be in the cause.
 12. Any other orders this Honourable Court deems just, fair and in the interest of justice to provide.
2. The application is supported by the affidavit of the 2nd defendant's Director Mr. Omar Elmi Quire and is premised on the grounds that: -
1. That there is an existing suit and a valid court order in ELC 36 of 2017 touching on the subject property (LR. No. 36/111/215 situate in Eastleigh, Nairobi).
 2. That the plaintiff misled the Honourable court to issue them *ex parte* judgment seeking payment of balance of purchase price for LR. NO. 36/111/215 claiming that no reply to their originating summons was file and thereafter proceeded with the above suit for formal proof on the 25th day of June 2020.



3. That this is not the first time the plaintiff managed to deceive the court into prematurely granting interlocutory judgment. The first interlocutory judgment and partial decree were both set aside.
4. That the Honourable Court issued judgment in default despite the fact that there was a duly filed replying affidavit in record dated 2nd September 2019, filed with the court on the 4th of September 2019 and served upon the plaintiff on the same day.
5. That the matter came up for judgment in default on the 15th of October 2020 and the same was pronounced in favour of the plaintiff relating to the payment of purchase price for LR. No. 36/111/215 despite the existence of ELC 36 of 2017 and confirmed orders touching on the same subject property.
6. That the defendants did not receive any notice for the formal proof hearing or the judgment and only found out the developments in the case from the judiciary's e-filing portal.
7. That the plaintiff had irregularly proceeded to extract a decree prior to the issuing of a physical copy of the judgment and served it upon the 1st and 2nd defendants despite there being a 30 days stay of any activities on the judgment or decree.
8. That there is a confirmed court order in Nairobi ELC Case Number 36 of 2017 restraining the plaintiff's client whether through themselves or others acting through them from selling LR. No. 36/111/215 (the suit property subject of this suit) or otherwise interfering with it pending the hearing and determination of this suit.
9. That it is important to safeguard LR No. 36/111/215 (the subject property of this suit) as the plaintiff wishes to proceed to dispose off the subject property illegally and contrary to the Honourable Court's order in Nairobi ELC Case Number 36 of 2017.
10. That the plaintiffs in Nairobi ELC Case Number 36 of 2017 have since filed an application, through the Law Firm of Chege Kibathi and Company Advocates, to be enjoined in this suit which application is still pending.
11. That despite there being an injunction in Nairobi ELC Case Number 36 of 2017 against Plaintiff's client, Mr. Willie Mahugu Ndabi and any person claiming through him, the plaintiff an advocate of the High Court of Kenya proceeded to purport to sell suit property that did not belong to his client and now wished to benefit from that blatant contempt of court.
12. That it is clear from the proceedings thus far that the plaintiff herein is uneasy with a full hearing of their Originating Summons and has unlawfully obtained interlocutory judgment in default based on technicalities.
13. That in essence the plaintiff and its client have been attempting and, to a large part, succeeding in using the court to perpetuate an illegality.
14. That it is in the interest of justice that this application and the one dated 25th September 2020 be allowed and a full hearing be convened.



15. That further if the plaintiff is allowed to rampage and attach the defendants' properties then this application and the one dated 25th September 2020 will be rendered nugatory and void.
 16. That if the judgment in default is not set aside and stay is not granted then it shall have ramifications not only in this sui, but also on Nairobi ELC Case Number 36 of 2017.
3. The respondent/plaintiff opposed the application through the Notice of Preliminary Objection dated 25th January 2021 wherein they list the following grounds: -
1. There are identical applications seeking similar orders over the same subject matter pending before Honourable Justice W. Okwany thus sub-judice.
 2. There are directions given by the said judge on 3rd December 2020 which are yet to be complied with coming up for mention to confirm compliance on 9th day of February 2021.
 3. The orders sought cannot be granted by a court of concurrent jurisdiction.
 4. That at law, the honourable court is barred by law from a merit based engagement since on a matter that has been decided through a judgment entered on the 15th October 2020 as a decree issued thereof which subsists.
 5. That the application called upon the Honourable court to sit on appeal over the decision of a court of concurrent jurisdiction which cannot stand as it is bad in law and an abuse of court process.
 6. That the principle of finality binds the court to decisions which are final and conclusive and cannot be set aside or varied by a court of concurrent jurisdiction.
4. Parties canvassed the application by way of written submissions which I have carefully considered. The main issue for determination is whether the applicants have made out a case for the granting of the orders sought in the application.

Setting aside of the default judgment.

5. Order 10 Rule (2) of the Civil Procedure Rules provide for Affidavit of Service upon non-appearance as follows: -
- Where any defendant fails to appear and the plaintiff wishes to proceed against such defendant, he shall file an affidavit of service of summons unless the summons has been served by the process server appointed by the Court.
6. Order 10 Rule 11 provides for setting aside of judgment entered under Order 10.
7. A perusal of the court file shows that after the filing of the Originating Summons dated 13th June 2019 default judgment was entered against the defendants on 15th July 2019. The matter was thereafter listed for formal proof but through the application dated 1st August 2019, the defendants successfully obtained an order to set aside the default judgment. The court then granted the defendants 7 days, from the date of the ruling (29th April 2020), to file and serve their defence. It would then appear that the defendants did not file or serve the defence as ordered by the court and that on 17th June 2020, the



court once again entered default judgment against the defendants after which the matter proceeded for formal proof. The judgment that was subsequently entered for the plaintiff on 15th October 2020 is subject of the instant application to set aside the judgment.

8. The defendants, on the other hand, argued that the default judgment is irregular as they had filed and served a response to the Originating Summons through a replying affidavit dated 2nd September 2019.
9. I have perused the 2nd defendant's Directors replying affidavit dated 2nd September 2019 and filed in court on 4th September 2019. It is clear from the introductory paragraph of the said replying affidavit that it is a response to the plaintiff's Originating Summons. I note that the default judgment was recorded on 17th June 2020 on the basis that there was no defence to the Originating Summons. Having regard to the clear evidence that the defendants had already filed a response to the Originating Summons on 4th September 2019. I find that the default judgment recorded on 17th June 2020 was irregular and that the defendants have made out a case for the granting of the orders to set aside the default judgment.
10. It is however not clear to this court why the defendants, whose counsel was present in court on 29th April 2020 when the ruling setting aside the initial default judgment was read, did not bring the existence of replying affidavit to the attention of the court. I note that at the hearing of the application dated 1st August 2019, the defendants only stated that they had entered appearance to the Originating Summons and did not state that they had also filed a response.
11. My take is that the defendants' actions portray them as litigants who are not very keen or vigilant in prosecuting their defence as can be seen from the half-hearted, haphazard and lackluster manner in which they have handled the case. The defendants have shown that they have the tendency to sit back and wait in the wings for the plaintiff to move the case to a different level before pouncing back through applications that have the effect of taking the court back to the starting point.
12. My above findings on the defendants' conduct notwithstanding, I find that this is a proper case for the granting of orders to set aside the default judgment, but on condition that the defendants pay the plaintiff's thrown away costs considering that the suit had progressed and judgment delivered in the plaintiff's favour.
13. My findings on the prayer to set aside the default judgment settles the other prayers for stay of taxation of party to party costs, reinstatement of the Originating Summons, order to deem the replying affidavit dated 2nd September 2019 as duly filed and to consolidate the applications dated 25th September 2020 and 24th November 2020.
14. Prayers No. 7 and 8 of the application have similarly been spent as they were for orders of injunction to restrain the plaintiff from selling the suit property No. 36/111/2015 pending the hearing and determination of the applications.

Consolidation of the Originating Summons with Nairobi ELC Case No. 36 of 2017.

15. The defendants sought an order to consolidate this case with ELC Case No. 36 of 2017 (ELC matter) on the basis that the two suits are related as they concern the same subject matter. The plaintiff, on the other hand, stated that she is not a party to the ELC matter and does not have an interest in the orders sought therein. The plaintiff maintained that this suit is concluded and that all they seek is to be paid the balance of the purchase price.



16. A perusal of the Originating Summons (OS) indicates that the plaintiff seeks the following orders: -

1. That an account be taken and the defendants be ordered to pay the amount still outstanding in the sale transaction of Land Reference Number 36/111/215 Eastleigh, Nairobi and interests thereon at a rate of 15.5% per annum from 19th February 2018 until payment in full in terms of the 1st defendant's professional undertaking given to the plaintiff.
2. That the 2nd defendant be restrained from charging, transferring, mortgaging and or dealing with the property in any manner whatsoever pending the hearing and determination of these summons.
3. Any other relief as court may deem just and fair to award as the circumstances of the case shall demand.
4. That costs and interests of this suit be awarded to the plaintiff.

17. A perusal of the pleadings in ELC No. 36 of 2017, on the other hand, shows that it is a case pitting the intended interested Parties herein as the plaintiffs against the defendants Simon Munyi Theuri, Willie Mahugu Ndambi and the Registrar of Titles. The prayers sought in the said case are as follows: -

- i. A declaration that Land Reference No. 36/111/215 belongs to and is registered in favour of George Mambo by dint of the Indenture dated 11th May 1971 and registered in Volume N. 31 Folio 43/14
- ii. An order compelling the 3rd defendant to rectify their records by cancelling the entry made in Volume N. 31 Folio 43/14 removing the names of Simon Munyi Theuri and in its place insert the name George Mambo as the owner of the property.
- iii. An order compelling the 3rd defendant to rectify their records by cancelling the entry made in Volume N. 116 Folio 287/15 thereby permanently removing the name of Willie Mahugu Ndambi as owner of the suit property.
- iv. A mandatory and permanent injunction to issue restraining the defendants by themselves, their agents and/or servants from entering into or trespassing onto, or wasting, destroying, alienating, selling, interfering or otherwise disposing off the suit property.
- v. Costs of this suit.
- vi. Any other or further relief that the Honourable court may deem just and expedient to grant.

18. From the prayers sought in the suit herein and the ELC matter, it is clear that the common denominator and subject matter in both suits is Land Reference No. 36/111/215 (the Suit Land). While the Plaintiff in the OS seeks the payment of the amount still outstanding in the sale transaction of the suit land, the plaintiffs in the ELC matter seek a declaration that the suit land belongs to them and is registered in favour of one George Mambo.

19. I find that it is crystal clear that the OS and the ELC matter are closely related as they concern the same subject matter. It is also instructive to note that while the plaintiff in the OS seeks payment in respect to the sale transaction over the suit land, the applicants herein maintain that the court issued



an order of injunction in the ELC matter to stop the sale. To my mind and if the position advanced by the applicants regarding the existence of injunctive orders is true, then it means that the alleged sale of the suit land is a contested issue that can only be ventilated at a full trial. The plaintiffs in the ELC matter have also applied to be enjoined in the OS as intended 3rd and 4th defendants respectively. The question which then arises is whether the two suits should be consolidated.

20. In *Law Society of Kenya vs the Centre for Human Rights* SC Petition No. 14 of 2013 it was held that: -

“The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it.”

21. In *Prem Lala Nabata & Another vs Chandī Prasad Sikaria*, (2007) 2, the Supreme Court of India stated as follows: -

“it cannot be disputed that the Court has power to consolidate suits in appropriate cases. Consolidation is a process by which two or more causes or matters are by order of the Court combined or united and treated as one cause or matter. The main purpose of consolidation is therefore to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or cause pending in the Court and it appears to the Court that some common questions of law or fact arises in both or all the suits or that the rights to relief claimed in the suits are in respect of or arise out of the same transaction or series of transactions; or that for some other reason, it is desirable to make an order consolidating the suits.”

22. As I have already noted in this ruling, the subject matter in both suits is the same and some of the parties cut across the suits. Even though the plaintiff states that it has no interest in the ELC matter, I find that the two cases are intertwined in respect to the suit land and that one cannot be divorced from the other. It is my considered view that it will serve the interest of justice to consolidate the suits so that they can be heard in the same forum. This will save the time and resources that would have been spent in pursuing the different suits. The consolidation will also guard against the possibility of the two courts granting conflicting orders over the same subject matter.

23. Having regard to the findings and observations that I have made in this ruling, I issue the following final orders: -

- i. That the default judgment entered for the plaintiff against the defendant on 15th October 2020 together with the consequential orders is hereby set aside.
- ii. The Defendant’s replying affidavit dated 2nd September 2019, filed with court on the 4th September 2019 and served upon the plaintiff on the 4th of September 2019 is hereby deemed as proper reply on record.
- iii. That the Originating Summons is hereby reinstated for full hearing.
- iv. That this suit be consolidated with Nairobi ELC Case Number 36 of 2017 and be transferred to the Environment and Land Court for hearing and determination.



- v. That thrown away costs be paid to the plaintiff/respondent.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 18TH DAY OF NOVEMBER 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Mohammed for the 1st and 2nd Defendant.

Ms Nasambu for the Plaintiff/Decree Holder

Court Assistant: Margaret

