



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 434 OF 2014

NDUNDE INVESTMENTS LIMITED.....PLAINTIFF/DECREE HOLDER

VERSUS

EUGENIE MUTHONI DADET.....DEFENDANT/JUDGMENT/DEBTOR

RULING

1. Through the application dated 18th June 2019, the applicant/defendant seeks orders that: -

1. Spent

2. Spent

3. The honourable court be pleased to stay the execution of the decree herein issued on the 15th February, 2019 by DUNDE INVESTMENTS LIMITED pending the determination of this application.

4. That the honourable court be pleased to set aside the judgment entered against the defendant/judgment debtor on 13th December, 2018.

5. That the defendant/judgment debtor be allowed to file its defence out of the prescribed time.

6. That the honourable court be pleased to issue an inhibition order to be registered against L.R. No. 2/52/1 Wado Apartments Nairobi to protect the said property pending hearing and determination of the suit.

6. That costs of this application be provided for.

2. The application is supported by the applicants affidavit sworn on 18th June 2019 and is premised in the grounds that: -

a) That the Decree Holder's NDUNDE INVESTMENTS LIMITED obtained injunctive orders restraining the defendant/Judgment Debtor from any dealings on L.R. No. 2/52/1 Wado Apartments Nairobi.

b) That an order for specific performance was issued compelling the defendant to complete the Sale Agreement dated 6th October 2011 within the next (30) days.

c) That in the alternative, the defendant to repay the total amount paid to her and or her assigns be the plaintiff in fulfilment of it duties that is Kshs 7,000,000/=.

d) That the plaintiff proceeded to the Land Registry to register the said order against the title.

e) That L.R. No. 2/52/1 Wado Apartments Nairobi is my home where I have lived since I bought it.

f) That the defendant has never changed her physical residential address and was surprised that the plaintiff opted to serve her through daily papers in Tanzania where she worked for a short period of time.

g) That all the while the defendant has been in touch with one of the Directors of plaintiff company, one Joseph Mbai Mbugua

who was a former partner to the defendant and has two children with her.

h) That the defendant/judgment debtor was not served with the plaint and summons to enter appearance personally, but in fact was served dubiously through a newspaper advertisement in a county where she worked for a short time.

3. The respondent opposed the application through the replying affidavit of its Director **Mr. Joseph Mbai Mbugua** who avers that judgment was on 20th February 2017 entered against the defendant for non-appearance after substituted service was procedurally effected upon her through a local daily in Tanzania.

4. He states that the defendant voluntarily entered into a sale agreement with the plaintiff herein and charged the suit property to Equity Bank when she knew the possible consequences. He states that he does not object to the granting of the orders of inhibition sought but adds that the defendant's draft defence contains mere denials, falsehoods and does not raise any triable issues.

5. Through her further affidavit filed on 22nd July 2019, the applicant reiterates that she was not served with Summons to Enter Appearance and Plaint.

6. Parties canvassed the application by way of written submissions which I have carefully considered.

7. The main issue for determination is whether the applicant has made out a case for the setting aside of the ex-parte judgment. The gist of the applicant's case is that she was not served with the Summons to Enter Appearance and that she was therefore unaware of the case against her. On its part, the respondent maintains that it served the applicant, who was then living out of the country, by way of substituted service after it became apparent that it was not possible to serve her with the summons in person.

8. Order 10 Rule 11 of the Civil Procedure Rules (CPR) stipulates as follows:

“11. Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

9. The principles governing the setting aside of ex-parte judgments were set out in the well-known case of **Patel V East Africa Cargo Handling Services Ltd** [1974] EA 75.

10. In **Waweru V Ndiga** [1983] KLR 236 it was held that the court has unfettered discretion to do justice for the parties in applications made under Order 10 rule 11 Civil Procedure Rules. It was further held that it may be just based on the facts of a particular case, to set aside an ex-parte judgment to avoid hardship or injustice arising from inadvertence or even mistake though negligent, but that the discretion should not be exercised to assist anyone to delay the course of justice.

11. In the instant case, I note that the suit was filed on 3rd October 2014 vide a plaint dated 1st October 2014 and summons issued on 13th October 2014. Through an application filed on 12th October 2016, the plaintiff sought orders to extend the validity of Summons to Enter Appearance and/or reissue of summons. The plaintiff also sought leave to effect the service of summons to Enter Appearance upon the defendant out of the jurisdiction of the Republic of Kenya and to serve the said summons by way of substituted service.

12. Through an order issued by this court, differently constituted, on 14th October 2016 the plaintiff's summons were extended for a further 3 months and it was also granted leave to serve the defendant by way of substituted service through advertisement in a National Daily in Tanzania.

13. I have perused the affidavit of service by one **Charles M. Njagi** dated 20th February 2017 and I note that he states that the summons were advertised in the East African Newspaper of 17th to 23rd December 2016. A copy of the said advertisement was attached to the affidavit of service as annexure “CMN3”.

14. A close scrutiny of the order of 14th October 2016 directing the plaintiff to serve summons by way of substituted service shows that the service was to be through an advertisement placed in a National Daily. It is however noteworthy that contrary to the said orders, the service was effected through a weekly newspaper, which the process server states, was East African Newspaper of 17th to 23rd December 2016. In my humble view, the service was therefore not effected in strict compliance with the court's orders on substituted service as there is complete world of difference between daily and weekly newspapers with the preferred mode of service being daily newspapers that are presumed to have wide circulation. I have also perused the defendant's draft defence (annexure marked (Exhibit 5) and I note that it raises triable issues.

15. For the above reasons, I am not persuaded that service of summons was properly effected upon the applicant and the order that commends itself to me is the order to allow the application dated 18th June 2019 in the following terms: -

a) That the judgment entered against the defendant herein on 13th December 2018 together with all consequential orders is hereby set aside.

b) The defendant is hereby allowed to defend the suit.

c) The defendant shall file and serve her defence within 14 days from the date of this ruling.

d) An order of inhibition be registered against LR. No. 2/52/1 Wado Apartments Nairobi pending hearing and determination of the suit.

e) The costs of this application shall abide the outcome of the main suit.

Dated, signed and delivered via Microsoft Teams at Nairobi this 12th day of November 2020 in view of the declaration of measures restricting court operations due to Coved -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:

Miss Gatuhi for Njagi for Respondent/Respondent.

Miss Akedi for the Defendant/Applicant.

Court Assistant: Silvia