



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. E407 OF 2018

JOHN WACHIRA WANGOMBE.....1ST PLAINTIFF

JANET WANGECHI KAMAU.....2ND PLAINTIFF

-VERSUS-

DOUGLAS MUTHAURA ABUURU.....1ST DEFENDANT

CHRISTINE T. MUTHAURA.....2ND DEFENDANT

RULING

1. This ruling relates to the application dated 7th February 2019 in which the defendants/applicants seek the following orders.

1. Spent

2. That pending the hearing of this application inter partes until further orders of the court there be and is hereby issues a stay of execution of the default judgment entered herein on 28th January 2019, and any consequential orders or courses taken thereon.

3. That the default judgment entered herein on 28th January 2019 be and hereby set aside.

4. That leave is hereby granted to the defendant to file statements of defence and counterclaim in the suit.

5. The costs of this application be provided for.

2. The application is supported by the 2nd defendant's affidavit sworn on 7th February and is premised on the grounds that the delay in filing the defence and counterclaim was occasioned by logistical lapses on the part of the 1st defendant in remitting the verifying affidavit as he works outside the country. The applicants further states that they are keen to defend the suit and that no prejudice will be occasioned to the plaintiff if the application is allowed.

3. At the hearing of the application, Mr. Oduor, learned counsel for the applicant submitted that upon receipt of summons to enter appearance on 7th December 2018, the defendants entered appearance in the suit in 13th December 2018 but that no sooner had the defence and counterclaim been filed than judgment was entered on 28th January 2019.

4. It was submitted that the applicants have a formidable defence and counterclaim to the suit which they should in line with the provisions of Articles 47, 48 and 50 of the Constitution be allowed pursue.

5. Counsel further submitted that even though the suit is for a claim of kshs 34,200,000/- the amount that the defendants actually owe is kshs 14,600,000= and that only a hearing of the case would reveal how the said amount was arrived at.

6. The respondents opposed the application through the 1st plaintiff's replying affidavit dated 18th February 2019 wherein he avers that summons to enter appearance and plaint were duly served on the defendants who then filed a memorandum of appearance but failed to file a

defence within the stipulated time thereby leaving the plaintiffs with no option but to apply for and obtain judgment in default of appearance.

7. He further states that no plausible reasons have been advanced to the delay in filing of the defence and that the draft statements of defence does not raise any triable issues as it consists of admission of the plaintiffs claim.

8. At the hearing of the application, Mr Wambua, learned counsel for the plaintiffs, submitted that in view of the applicants express admission that they owe the plaintiffs kshs 24,600,000, this court should, in the event it deems it necessary to allow the application, order the applicants to pay to the plaintiffs the sum of kshs 24,600,000/= as a condition for the setting aside and that the balance thereof be deposited in court.

9. I have considered the instant application and the respondents response thereto. I consider the sole issue for determination to be whether the defendants/ applicants are entitled to the orders sought in the application. I note that the following facts are not disputed by the parties:

a. That on 3rd June 2016 the plaintiffs and the defendants entered into an agreement in which the plaintiffs agreed to purchase property known as Mandara Villa No. 2 erected on LR No. 28481 (hereinafter, " the suit property") at an agreed price of kshs 78,000,000/=.

b. That the plaintiffs paid the sum of kshs 34,209,000/= to the defendants as part payment of the agreed purchase price.

c. That defendants later rescinded the said sale agreement after which the plaintiffs sought a refund of the purchase price by filing the present suit.

d. That the defendants were duly served with the plaint and summons to enter appearance and that they (defendants) filed a memorandum of appearance on 13th December 2018 but did not file a defence in time thereby resulting in the entry of default judgment against them on 28th January 2019 which judgment precipitated the instant application.

10. This court has now been called upon to determine whether, from the above undisputed facts and the arguments advanced by the parties' respective advocates, the orders sought in the application should be granted. In this case there is no doubt that the interlocutory judgment entered on 28th January 2019 was regular.

11. The defendants explained the reasons for the delay in filing the defence and I find that the said reasons are plausible considering the fact that there was proof that the 1st defendant was out of the country at the time, in which case, it is possible that the signing of the verifying affidavit may have been the cause of the delay in filing the defence. This court also notes that the delay in filing the defence was not inordinate as it was for a period of 8 days only. I find that in the circumstances of this case, the delay is excusable.

12. It did not however escape the attention of the court that in as much as the defendants herein are asking for an opportunity to file and pursue their defence and counterclaim, a substantial part of the plaintiff's claim to the tune of ksh 24,600,000 was expressly admitted both in the draft defence and during submissions to the application.

13. Paragraphs 4(g) and 4(1) of the draft defence are worded as follows:

"In accordance with the agreement for extension of the Completion Date, the plaintiff made further deposits on the purchase price as follows: Kshs 6,000,000 on 9th October 2017, Kshs 3,700,000.00 on 9th October 2017, kshs 1,500,000.00 on 11th October 2017 and kshs 2,000,000.00 on 9th October 2017, Kshs bringing the total purchase price deposited to kshs 34,200,000.00"

"To the demand, the defendants replied confirming that in accordance with Clause 12(2) of the Agreement of the parties, the defendants were ready to refund the sum of kshs 24,600,000.00 which was net of the deductions to which the defendants as vendors were entitled, including 10% of the purchase price."

14. Having regard to the admission by the defendants that the defendant were ready to refund the sum of kshs 24,600,000/= I find that the justice of this case would require me to grant the orders sought in the instant application, but on condition that the defendants pay the total undisputed sum of kshs 24,600,00 so that only the disputed balance of kshs 9,600,000 and the applicable interest can be the subject of the determination of the hearing in this court.

15. For the above reasons, I allow the instant application in the following terms:

a. Application dated 7th February 2019 is hereby allowed but on condition that the defendants refund the sum of kshs 24,600,000 to the plaintiffs within 30 days from the date of this order.

b. In default of the order in (a) above, the judgment entered against the defendants herein on 28th January 2019 shall be/stand reinstated.

c. Upon complying with order in (a) above, the defendants shall file and serve their defence within 15 days from the date of compliance.

d. Mention on 25th June 2019 to confirm compliance and for further orders.

Dated, signed and delivered in open court at Nairobi this 29th day of May 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Muniyoro for plaintiff.

Mr. Mukuha for Bwire fir the defendant

Court Assistant – Margaret