

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI

CIVIL CASE NO.311 OF 2016

PAUL OMAGWA BOSIRE.....1ST PLAINTIFF

JEFFERSON MICHIRA MOGIRE.....2ND PLAINTIFF

VERSUS

NOAH MONERIA KURARRU.....DEFENDANT

RULING

This is a ruling on application dated 20th June 2017 filed by the defendant seeking to set aside Exparte judgment entered on the 13th October 2016 and leave to file defence out of time. Grounds on the face of the application are that the defendant was not served with summons to enter appearance and plaint; that he learnt of this matter when auctioneers carried out his goods pursuant to notification of sale of moveable property dated 14th June 2016; that the defendant/Applicant has a plausible and meritorious defence to the plaintiffs claim which raises triable issues that should be considered on merit. Lastly that the defendant stand to suffer irreparable damage if not given an opportunity to defend himself.

The application is affidavit sworn by Noah Moneria Kurarru the applicant herein. He averred that he was not served with summons to enter appearance and plaint; that he learnt of this matter on 14th June 2017 when Mbusera Auctioneer went to his residence to proclaim and carry away his household goods. He averred that the attached goods do not belong to him and that they are matrimonial items owned by his spouse. He averred that he was not served with summons and seeks leave to cross examine the process server. The applicant averred that the alleged agreement has a clause requiring issuance of termination notice which was not issued making the whole process premature. He annexed that agreement dated 11th August 2014.he added that this is a land dispute which ought to have been filed in the Environment and Land court. He averred that the plaintiff will not suffer prejudice if the orders sought are granted. He concluded that the applicant has approached this court without unreasonable delay.

In response the plaintiff filed replying affidavit sworn by Omwagwa Bosire on 7th July 2017.He averred that the application herein has been filed to delay justice and prevent the plaintiffs from recovering their hard earned money from the defendant who obtained the money pretending to be selling land. He averred that efforts to charge the defendant for obtaining money by false pretence have been impossible due to his influence and being so elusive. He averred that the defendant was served with demand letter at his kiserian offices where the plaintiff had transacted on 27th July 2015.He added that on 31st August 2016 the same process server served that defendant with court summons and plaint; and on 31st August 2016 he was served with notice of entry of judgment at his home by the same process server. He averred that the applicant's goods were proclaimed in the presence of his wife; that the proclamation was to take 7 days but the applicant never took any action but instead secured his premises to prevent the auctioneers from accessing the compound and taking away the proclaimed goods. He averred that after auctioneer informing the applicant's wife that he was going to seek break orders, the applicant issued 3 postdated cheques for the entire sum. He averred that the cheques were dishonored by the bank. He attached two of the cheques to the supporting affidavit. He averred that the auctioneers proceeded to gain access to the premises carted away the proclaimed goods. This application was then filed by the applicant to prevent sale of the goods carted away. He stated that the court should not be used by the indolent to delay justice

and prevent parties from recovering money coned from them. He averred that the parties herein had undertaken to refund the entire amount plus interest of 12% by instalments of kshs 450,000 on 27/3/2015, 350,000 on 30//4/2015 and kshs 341,280 on or before 30/5/2015.He attached a copy of the agreement. He attached cheque no.000399 dated 13th march 2015 of kshs 450,000 being the first instalment; the same was unpaid due to insufficient funds.

I have considered the application herein and response by the respondent. I have also perused annexures to the supporting and replying affidavits. The applicant has alleged that he was not served with summons to enter appearance and the plaint. I have perused the affidavit of service filed in court on 25th August v2016.the process server indicated that on 8th August 2016 he was accompanied by the plaintiff to the defendants premises and that it's the plaintiff who pointed him out to the process server. He added that the defendant also introduced himself to him and that he took the documents but refused to sign.Affidavit of service dated 31st August 2016 show that it is the same process server who effected service of entry of judgment on the defendant personally. Service of entry of judgment has not been denied by the defendant. Both services were affected by the same process server. From perusal of the affidavit of service there is no doubt that service was effected on the defendant. I therefore find that entry of judgment was properly done. I now wish to consider whether the defendant has triable issues to warrant setting aside of the judgment. Defendant has challenged the jurisdiction of the court that this is a land matter. On perusal of pleadings and documents attached, it is evident that the initial agreement was for sale of land which never materialized and thereafter the parties agreed for the defendant do refund money paid by the plaintiff. Agreement for refund on money has been attached. Plaint show claim is for refund of the money following the agreement and understanding on how money was to be refunded. This cannot therefore fall under Environment and Land Court. This court is seized with jurisdiction to hear and determine this matter. Further to that, annexures showed that the defendant had attempted to pay as per the agreement but the cheques were dishonored. From the foregoing I do not see any triable issues to warrant setting aside the regularly entered judgment. The application herein dismissed with costs to the plaintiff.

Dated and Delivered at Nairobi this 22nd day of September 2017

.....

RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:

.....COURT ASSISTANT

.....COUNSEL FOR APPLICANT/DEFFENDANT

.....COUNSEL FORRESPONDENTS/PLAINTIFF