



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
ELC CIVIL SUIT NO. 282 OF 2012

CATHERINE NJERI ZANI.....1ST PLAINTIFF

CYNTHIA CHISINYO ZANI.....2ND PLAINTIFF

-VERSUS-

NICHOLAS STEPHEN ZANI.....1ST DEFENDANT

TERESIA KADZO ZANI.....2ND DEFENDANT

RULING

1. The 1st defendant has moved the Court vide his notice of motion dated 12th June 2015 made under section 1, 1A, 1B, 3 and 3 A and Order 10 Rule 11, Order 36 Rule 7 and Order 51 of the Civil Procedure Act. The 1st defendant/Applicant is asking for an order that an interlocutory judgement entered on 18.4.2013 be set aside and he be granted leave to file his defence.

2. The application is supported by 13 grounds listed on the face of the motion and the affidavit deposed to by Nicholas Stephen Zani. The applicant avers that he was never served with summons to enter appearance and only learnt of the case during the hearing of HCC No 281 of 2012. He immediately instructed Obara & Obara advocates to enter appearance and file a defence.

3. The applicant deposed that the said firm of Obara & Obara advocates filed appearance but by which time interlocutory judgement had been entered. He explained that the affidavit of service filed is full of fraud and lies as he has never met the plaintiff at the offices of Karimbhai or at all. He deposed further that the 2nd defendant had been bedridden for 12 years until her death on November 2014. He urged the Court not to visit on him the mistake of his then counsel in not filing the application to set aside the exparte judgement in time. The applicant urged his application to be allowed as the matter has never proceeded to hearing.

4. The application is opposed by the Plaintiff/Respondent by a replying affidavit sworn by Catherine Njeri Zani. She deposed that this suit is based on a contract of sale of land which was frustrated because the defendants could not provide authentic documentary proof that they owned the suit property. She deposes that the defendants were duly served with summons to enter appearance. Further that the applicants appointed Ms Obara & Obara to act for them after entry of the interlocutory judgement. The Respondent further deposed that the applicants were aware of this suit and hence there is no reason to set

the interlocutory judgement aside.

5. The parties filed their respective submissions which I have had occasion to read and consider. The 1st question for my determination is whether the defendants were served with summons to enter appearance and the pleadings herein as required by law. In the affidavit of service annexed as C213, the process server deposed that he went to the offices of Karimbhai advocates. The process server indicates he served the defendants but they declined to sign.

6. The 1st defendant deposed that the 2nd defendant was bedridden for a period of 12 years before she died. The 2nd defendant is described as the grandmother of the 2nd plaintiff in paragraph 13 of the replying affidavit. There has been no denial by this plaintiff that the 2nd defendant was bedridden. Who then did the process server meet on 6.12.12 at the offices of Karimbhai Advocates. Secondly if the defendants were known to the plaintiffs, why serve them through the assistance of the secretary of karimbhai advocates ?

7. The plaintiffs submitted that once the defendants became aware of this suit, the issue of service cannot be questioned now. The record however shows that by the time Ms Obara & Obara advocates filed notice of appointment on behalf of the defendants, interlocutory judgement had already been entered. The issue of service was therefore still necessary to be proved to have been effected satisfactorily before the judgement was entered. I am not satisfied that the defendants were properly served because the 2nd defendant was immobile at the time she was alleged to have gone to offices of Karimbhai & Co Advocates.

8. The second subject for me to determine is whether the defence filed raises any triable issue for the interlocutory judgement to be set aside. Further it is alleged that both defendants went to Karimbhai advocates offices at the same. Doubt is created whether the 1st defendant was there since no specific details is provided. The plaintiff submits there is no triable issue because the defendant has not produced a copy of the title deed that would constitute prima facie proof of his ownership of the land under the law. The defendant on his part submitted that their defence raises triable issues inter alia that the delay in completing the transaction was contributed to by the plaintiff. He asked the Court to refer to paragraphs 7, 15, 17, 24, 27 of the defence.

9. It is gleaned from the pleadings and the submissions that both parties are blaming each other for breaching the terms of their sale agreement. In order to determine who breached the contract, the parties have to get an opportunity to present their case. In such a circumstance, triable issue is raised. In any event, the purpose of setting aside exparte judgement was settled in the case of Mbogo vs Shah and Patel vs East Africa Cargo Handling Services Ltd; which is to avoid causing injustice to parties. Justice will be served here if all the parties are given an opportunity to present their case.

10. In conclusion, I find merit in the application and allow it in terms of prayer 1 and 2. The Plaintiff prayed for costs to be assessed at Kshs 50,000 because his advocate travelled from Nairobi for the hearing. The defendants on their part submitted the matter would not have proceeded on 16.7.15 as listed because the 2nd defendant passed on. Taking all these matters into account, I hereby award the plaintiff thrown away costs of Kshs 30,000= payable within 45 days of delivery of their ruling to set off any expenses that may have been incurred.

Ruling dated and delivered in Mombasa this 8th day December of 2015

A. OMOLLO

JUDGE