



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO 605 OF 2009

ELIJAH KIPNG'ENO ARAP BII.....PLAINITFF

VERSUS

KENYA COMMERCIAL BANK.....1ST DEFENDANT

GEORGE MBURU MWAI.....2ND DEFENDANT

JAYALA INVESTMENTS COMPANY LIMITED.....3RD DEFENDANT

JUSTUS ORIMBA OWINO.....4TH DEFENDANT

RULING

INTRODUCTION

1. A brief background of this matter is that the Plaintiff filed suit against the 1st Defendant. The Plaintiff was dated 17th October 2006. The Plaintiff was amended on 10th April 2006 and filed on 13th April 2006. He sought the following reliefs against the Defendants:-
 - a. **A permanent injunction do issue against the Defendant restraining them (sic), their agents, servants, and all those who claimed through and/or under them jointly and severally from selling, leasing, alienating and/or transferring to the 3rd Party or any other party AND from dealing in any other manner in the properties otherwise known as L.R. No Nairobi/Block 99/ 122 New Runda and L.R. No Nairobi/ Block 32/448 High View Phase III.**
 - b. **A declaration nullifying the variation of contract entered between the Plaintiff and the Defendant on 20/3/1998 and on 23/3/1998 by the third parties in relation to L.R. No Nairobi/Block 99/ 122 New Runda and L.R. No Nairobi/ Block 32/448 High View Phase III and other properties charged to and deposited with the Defendant.**
 - c. **General damages.**
 - d. **Such further or consequential relief as this Honourable Court may deem fit to grant.**
 - e. **Costs of this suit.**
2. The Amended Plaintiff was filed on 25th February 2009. It was dated 24th February 2009. Prayer no (a) hereinabove was deleted while (c), (d) and (e) remained unchanged. The additional prayers are as shown herein below:-
 - a. **A declaration nullifying the variation of the terms of the credit facilities specified in the credit contract entered between the Plaintiff and the Defendant on 20/3/1998 and on**

- 23/3/1998 by the 1st Defendant on the basis of decisions of 3rd parties who were not party to the contractin relation to L.R. No Nairobi/Block 99/ 122 New Runda and L.R. No Nairobi/Block 32/448 High View Phase III and other properties charged to and deposited with the Defendant.**
- b. A declaration that the said sale and/or transfer by the 1st Defendant and its agents to the 2nd, 3rd and 4th Defendants is null and void and should be cancelled from the lands register in the Ministry of Lands.**
 - c. A declaration that the 1st Defendant takes responsibility for the credit facilities, the repayment of which it frustrated on the basis of the said illegal and invalid 3rd Party decisions by making it difficult for the Plaintiff to continue repayment.**
3. The 1st and 2nd Defendants duly filed their respective Statements of Defence. However, interlocutory judgment was entered against the 3rd and 4th Defendants on 13th September 2010 when they defaulted in entering appearance and filing their Statements of Defence. It was this interlocutory judgment that the said 3rd and 4th Defendants sought to set aside when they filed their Chamber Summons application dated 5th October 2010 and filed on 6th October 2010.
 4. The said application was purportedly served upon the Plaintiff and an Affidavit of Service filed by John Eric Odongo Mac'yieko on 16th October 2012. When the matter came up for hearing on the same date, except the advocates for the 3rd and 4th Defendant herein, none of the other parties or their advocates attended court. As the matter was unopposed, Mutava J allowed the 3rd and 4th Defendants' said application effectively giving them an opportunity to file their Statement of Defence dated 30th October 2012 on 31st October 2012.

THE PLAINTIFF'S CASE

5. The Plaintiff's Notice of Motion application dated and filed on 1st April 2014 now sought orders for the setting aside and/or vacation of the orders that were issued by Mutava J allowing the 3rd and 4th Defendants' Chamber Summons application dated 5th October 2012 on the basis that the Hearing Notice was not served upon the parties and further that the process server who was said to have effected services was not a licensed process server in the year 2012. He annexed a copy of a letter dated 27th January 2014 from the Process Servers Committee evidencing this fact.
6. In his written submissions dated 5th June 2014 and filed on 6th June 2014, the Plaintiff submitted that the 3rd and 4th Defendants had not annexed any evidence to support their averment that they had served him with a Hearing Notice for their Chamber Summons application dated 5th October 2012. He argued that the said Defendants had misled the court into believing that service had been effected. It was his further argument that a person who was not a licensed process server could not effect service.

THE 3RD AND 4TH DEFENDANTS' CASE

7. In the Replying Affidavit sworn by Justus Owino Orimba on his own behalf and that of the 3rd Defendant on 15th May 2014 and filed on the same date, the 3rd and 4th Defendants stated that they were wrongly enjoined in the suit herein as they had purchased the suit premises for value from an auction.
8. They contended that the Plaintiff's present application was otherwise an abuse of the court process and that he was engaging in side shows instead of concentrating with the hearing of the main suit. It was their contention that nothing would have been easier than for the Plaintiff to have sought a prayer for the cross-examination of the Process Server.
9. They stated that they filed a Statement of Defence which raised serious issues that ought to be canvassed during full trial and that the order of Mutava J could only be appealed as this court had the same concurrent jurisdiction as his court.
10. They urged the court not to have undue regard to the procedural technicalities because the

overriding objective of the Civil Procedure Act was to facilitate just, expeditious and affordable resolution of disputes and not to cloud issues or impair the administration of justice.

11. In their written submissions dated and filed on 3rd June 2014, the 3rd and 4th Defendants reiterated that the Plaintiff's present application was a waste of judicial time as he would suffer no prejudice if the matter proceeded to full trial. They also accused the Plaintiff of indolence for having failed to file its application since 16th October 2012 when the orders were issued by Mutava J.
12. It was therefore their averment that the Plaintiff's application was defective as the same had been supported by an affidavit of N.O. Sumba despite him not having disclosed if he had any authority to swear the said affidavit on the Plaintiff's behalf.

LEGAL ANALYSIS

13. The court has carefully considered the written and oral submissions by both the Plaintiff and the 3rd and 4th Defendants.
14. The court wishes to state right at the outset that the issue of the Supporting Affidavit is not one that this court would want to consider as being sufficient to strike out the Plaintiff's application. Article 159 (2)(d) of the Constitution of Kenya, 2010 indeed mandates this court to administer justice without having undue regard to procedural technicalities with a view to determining disputes before it on merit.
15. The deponent was the Plaintiff's advocates on record and he was deposing to matters that were well within his knowledge, information and belief. As he was acting for and on behalf of the Plaintiff, it is obvious that he had implied authority to act for the Plaintiff. The court will therefore say no more about this issue as it is inclined on determining this matter on its own merits.
16. The 3rd and 4th Defendants' Chamber Summons dated 5th October 2012 proceeded *ex parte*. Although this court has equal and concurrent jurisdiction as that of Mutava J, nothing prevents it from reviewing *ex parte* orders to ensure that the ends of justice are met. This power is set out in Order 51 Rule 15 of the Civil Procedure Rules, 2010 which clearly stipulates as follows:-

“The court may set aside an order made *ex parte*.”

17. A perusal of the Affidavit of Service that was sworn by the Process Server shows that there was no evidence of what court process was served upon the Plaintiff. It was not sufficient for the said Process Server to have stated that he served the Plaintiff's advocates secretary who accepted service but declined to stamp his copy or that he tendered a copy of the Hearing Notice upon Njoroge & Kwach Advocates and he was now returning it to the court as duly served. He ought to have attached to his Affidavit of Service a copy of the document that he served upon the Plaintiff.
18. While this court is not sitting on appeal, it respectfully finds that the said Affidavit did not evidence proper service upon the parties to the suit. However, the learned judge cannot be faulted for having accepted the same as he had the discretion to find that there had been proper service based on the material that had been placed before him. In any event, he was not aware of the background of the said Process Server, which information this court now has had the benefit of knowing.
19. The court has noted all the submissions by the 3rd and 4th Defendants but it will ignore the extraneous issues that were raised therein such as being purchasers of valuable consideration as it risks delving into the merits of this case at an interlocutory stage. It will therefore only address itself to those issues that appertained to the service of the Hearing Notice upon the Plaintiff.
20. It is not sufficient for the 3rd and 4th Defendants to have argued that the Plaintiff ought to have made a prayer for cross-examination of the said Process Server as he was clearly not licensed to effect service in the year 2012. Such cross-examination would merely have been an academic exercise and a waste of judicial time as the bottom line was that the Process Server was not licensed to effect service in the year 2012 as a result of which all subsequent process by the court and the 3rd and 4th Defendants was clearly null and void *ab initio*.
21. The overriding objective of facilitating expeditious disposal of disputes should not be used as excuse to regularise a nullity and an action that was clearly illegal and bordered on criminal intent. The said Process Server swore an affidavit on oath and was therefore guilty of perjury. His actions

- cannot be justified and for that reason, his Affidavit of Service sworn and filed on 16th October 2012 is hereby expunged from the court record.
22. In the same vein, the orders of Mutava J are hereby set aside and/or vacated. The effect of this is that the 3rd and 4th Defendants' Statement of Defence dated 30th October 2012 and filed on 31st October 2012, not having been properly on record *ab initio*, the same is similarly struck out and expunged from the court record. The status of this matter is that the interlocutory judgment is still in place unless set aside by the court upon application by the 3rd and 4th Defendants.
23. As seen hereinabove, the court set out the prayers in the Plaintiff's Re-amended Plaintiff as interlocutory judgment was entered herein. The regularity or otherwise of the entry of the said judgment is not something that this court can address at this juncture.
24. It is for that reason that the court finds the 3rd and 4th Defendants' Chamber Summons application dated 5th October 2012 would be the proper forum to address the same. Indeed, the said 3rd and 4th Defendants had premised their said application on several grounds one of which was that the judgment was irregular, unlawful and in contravention of the provisions of the Civil Procedure Rules.

DISPOSITION

25. The upshot of this court's ruling is that the Plaintiff's Notice of Motion application dated and filed on 1st April 2014 is hereby allowed in terms of Prayer No (1) therein. Costs of the said application will be in the cause.
26. The 3rd and 4th Defendants are at liberty to fix a mutually convenient date at the registry for the hearing of their Chamber Summons application dated 5th October 2012 and filed on 6th October 2012 for re-determination by the court.
27. It is so ordered.

DATED and DELIVERED at NAIROBI this 18th day of September 2014

J. KAMAU

JUDGE