



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (NAIROBI LAW COURTS)

ENVIRONMENTAL & LAND CASE 405 OF 2010

NAHASHON MACHARIA.....PLAINTIFF/RESPONDENT

VERSUS

CHARLES SHIKANGA.....DEFENDANT/APPLICANT

RULING

1. The matter coming up before me for a ruling is a Notice of Motion dated **24th June, 2011** brought under certificate of urgency under Section 3 3A and 63 (e) of the Civil Procedure Act, Order 10 Rule II, Order 22 Rule 25 and Order 51 Rule 1 of the Civil Procedure Rules. (***Hereinafter referred to as the "Application"***). The orders sought in the Application are as follows:-

1. An order of stay of execution of the judgment of this Court made on 24th March, 2011 pending the hearing and final determination of this application.
2. An order to set aside the interlocutory judgment made on 24th March, 2011 (hereinafter referred to as the "Judgment")
3. The grant of leave to the Defendant/Applicant to enter appearance and defend the case herein.
4. Costs.

The Application is premised upon the Supporting Affidavit of Charles Sakanga in which he swore that there is an arguable application for setting aside the judgment which may be rendered nugatory unless execution of the judgment is stayed pending the hearing and determination of this application. He further averred that the suit was heard and determined on the basis of an affidavit thereby denying him an opportunity to defend the suit. He proceeded to annex his defence which he averred should be considered. He swore that he did not delay in seeking the Courts intervention.

2. The Application is contested. The Plaintiff/Respondent filed their Replying Affidavit sworn by **NAHASHON MACHARIA** on 26th October, 2011 in which he swore as follows:-

- That despite having been duly served with the Plaint and summons to Enter Appearance on 2nd September, 2010, the Defendant/Applicant failed to enter appearance within the stipulated time frame

thereby resulting in the entry of the interlocutory judgment against him on 23rd September, 2010. There was shown to the Court an Affidavit of service to this effect.

- Further to that, the Defendant/Applicant was duly served with the Judgment and the decree on 30th March, 2011 and an affidavit of service was produced in Court evidencing this service.
- That in compliance with the orders of the Court the Plaintiff/Respondent deposited Kshs 690,000/= with the Deputy Registrar of the High Court.
- That despite being having been served with copies of the Judgment and decree the Defendant/Applicant failed to comply within the 21 days stipulated by the Court leading to his requesting the City Council of Nairobi to effect the transfer in his name.
- That the result was that the suit property was transferred into his name thus the Defendant/Applicant's application has been overtaken by events.
- That it is evident that the Defendant was all along afforded an opportunity to be heard which he deliberately ignored.
- That the Defendant/Applicant's Statement of Defence annexed to his application is full of meredentials and falsehoods.

3. Both sides filed their written submissions herein which I have duly read and taken into consideration.
4. The Statement of Defence annexed to the application mainly stipulates that the Defendant/Respondent was forced to agree to the terms of the Sale Agreement under intense coercion as the Plaintiff threatened to have him arrested over previous financial assistance the Plaintiff had earlier given the Defendant. He also responded that his attempts to obtain the necessary approvals and documentation from the City Council were frustrated and therefore beyond his control. He further stated that the agreement for sale is utiated by duress and coercion.
5. On the prayer for orders for stay of execution, I find that the same has been overtaken by events as the Interlocutory Judgment has been satisfied with the transfer of the suit property into the name of the Plaintiff/Respondent herein.
6. We now turn to the request to set aside the Judgment. The Principles to be followed in an application to set aside Judgment were set out in **PATEL VERSUS E.A. CARGO HANDLING SERVICES LIMITED (1974) E.A 75 atp.76** where **DUFFUS P.** said:-

“I also agree with this broad statement of the principles should be followed. The main concern of the Court is to do justice to the parties, and the Court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here the Court will not usually set aside the Judgment unless it is satisfied that there is a defence on the merits. In this respect, defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan 5, put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

Hence in this present case, I am to consider whether the defence annexed to the application ought to go for trial. Having studied the statement of Defence annexed to the Application, I do not find any triable issue necessitating the same to proceed to full trial. The same is characterized by mere denials. Accordingly, I decline to award an order to set aside the Judgment. It therefore follows that no leave is granted to the Defendant/Applicant to enter appearance and defend this case.

7. In light of the foregoing, I hereby dismiss the Application with costs to the Plaintiff/Respondent.

SIGNED & DELIVERED THIS 8TH DAY OF MARCH 2013.

MARY M. GITUMBI

JUDGE