



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 367 of 2011

BRUCE BOUCHARD **PLAINTIFF**

- VERSUS -

HACIENDA DEVELOPMENT HOLDINGS LIMITED **DEFENDANT**

R U L I N G

1. The **Notice of Motion** application before the court is dated **24th January 2013**. It seeks the following orders:-

- 1) *That this application be certified as urgent and service of the application be dispensed with.*
- 2) *That leave be granted to the firm of Guram & Company Advocates to come on record on behalf of the Defendant/Applicant by filing Notice of Appointment of Advocates and Memorandum of Appearance.*
- 3) *That the Interlocutory Judgement entered in court on 2nd March 2012 in default of entering appearance and filing Defence and all consequential orders be set aside unconditionally.*
- 4) *That the Defendant/Applicant be allowed to file its Defence out of time.*
- 5) *That this Honourable Court be pleased to stay any further proceedings pending hearing and determination of this application.*
- 6) *That this Honourable Court be pleased to grant any further orders it may deem fit and just, in the circumstance.*

The prayers 1 and 2 have already been dispensed with.

2. The application is premised on the grounds set out therein and on the affidavit of **ADAM GEORGE TULLER** dated **24th January 2012** (*should be 2013*) together with several annextures in support thereof.

3. The application is opposed through affidavit of **BRUCE BOUCHARD** dated **13th February 2013** with annextures in support thereof.

4. The brief history of this matter is that on 2nd March 2011, the Plaintiff secured Interlocutory Judgement against the Defendant for failure to enter appearance and file Defence in time or at all. This was after the Plaintiff had successfully on 2nd December 2011 applied to serve the Defendant through a

substituted process. The Plaintiff soon set up the matter for formal proof which proceeded in part on 24th May 2012. In the course of the formal proof Mr. Neville Walusale Amolo, secured the approval of the court and came on record for the Defendant. The formal proof proceedings were adjourned and have since not proceeded.

5. In the cause of time GURAM & CO. ADVOCATES successfully applied to come on record for the Defendant, and with that they filed this application seeking the orders above stated.

6. Several grounds have been offered for the failure to enter appearance and file Defence for the Plaintiff. Those grounds range from the intentional use of wrong mailing address by the Plaintiff to outright fraud on the part of the Plaintiff including allegations that the Interlocutory Judgement was obtained by the Plaintiff by way of false service and false pretence, and that the Plaintiff had concealed and/or did not disclose material facts at the time of applying for the Interlocutory Judgement. There are also allegations of conspiracy between the Plaintiff and his advocates on record to obtain Interlocutory Judgement by fraud, unprofessional and unprocedural ways.

7. All these allegations have been denied by the Plaintiff, who has submitted that they regularly secured the Interlocutory Judgement upon the failure of the Defendant to enter appearance and file Defence in time or at all after being lawfully served pursuant to orders secured from this court.

8. The Plaintiff submitted that the Defendant has no arguable Defence and that the application is an abuse of the process of this court and should be dismissed.

9. I do not intend to write a long Ruling in this matter. The proceedings before the court are not criminal in nature and this court has no capacity to determine criminal intents attributed to the Plaintiff. What is clear however is that there is a doubt as to whether or not the Plaintiff used the proper address in mailing the summons to the Defendant. Furthermore it is arguable from the affidavits that the Plaintiff had reasons to know the physical address of the Defendant which they could have used to directly send the court summons.

10. In the circumstances I am inclined to accept the submissions by the Defendant that the Defendant was not served by the suit papers and was not aware of these proceedings before the said Interlocutory Judgement was entered for the Plaintiff.

11. Of greater importance to me, however, is that the Defendant is now before this court, and this should allow the process to move on its merit. I am cognizant of Article 159 2 (d) which demands of this court to dispense justice with little reliance on procedural technicalities, and I believe the Defendant should be given a chance to defend the suit.

12. I am also satisfied that there is no reason why the Defendant would willfully refuse to enter appearance and file its Defence knowing full well the consequences of such action.

13. In the upshot I allow the Notice of Motion dated 24th January 2013 as prayed. The Defendant should file its defence within 7 (seven) days from the date of this Ruling.

14. The costs of the application shall be for the Plaintiff/Respondent.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 30TH DAY OF MAY 2013

E. K. O. OGOLA

JUDGE

PRESENT:

Kimami for the Plaintiff

Billing for the Defendant

Teresia – Court Clerk