



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Civil Case 44 of 2012**

**LAWRENCE MMWATA CHORE ..... PLAINTIFF  
V E R S U S**

**DICKSON TEYIE MUTOKA ..... DEFENDANT**

**R U L I N G**

In his Notice of Motion dated 21<sup>st</sup> May 2012 the applicant/defendant is seeking to set aside the ex-parte judgment entered on the 18<sup>th</sup> of April 2012 and all consequential orders arising therefrom. The application is supported by his affidavit sworn on the same date. Mr. Ondieki counsel for the applicant submitted that he was instructed by the defendant to defend this suit. He entered appearance but before he could file the defence he became sick. He was sick for two weeks and by the time he recovered interlocutory judgment had already been entered. Counsel urged the court not to punish the defendant because of the sickness of his counsel. Counsel further submitted that the proposed defence annexed to the supporting affidavit raises triable issues which should be heard on their own merit. Failure to finalize the contractual obligations by the defendant is attributable to the Registrar of Titles and not the defendant. Due to that refusal the defendant filed a judicial review No. 20 of 2012 which is pending in court. No prejudice will befall the plaintiff if the defendant is allowed to defend the suit. The Sale Agreement allowed the plaintiff to take vacant possession which he did. Counsel relied on the case of **TRUST BANK LTD. VS AMALO COMPANY LTD. Kisumu Civil Appeal No. 215 of 2000 [CA] and PHILIP KEIPTO CHEMWELO and MUMIAS SUGAR CO. LTD v AUGUSTINE KUBENDE.**

Mr. Imbenzi, counsel for the plaintiff opposed the application and relied on the replying affidavit of the plaintiff. Counsel submitted that the defendant does not deny that he entered into a sale agreement with the plaintiff. Further, the defendant acknowledges that a sum of Kshs.9 million was paid to him. The plaintiff is not seeking an order of specific performance but he is seeking a refund of his money. Even if the defendant succeeds in his judicial review application, that will not benefit the plaintiff. The defendant has not disclosed where the money is and the draft defence is a total sham and intended to provide a temporary shield to the applicant. The plaintiff is not a party to the judicial review proceedings.

A brief understanding of the dispute herein is that the defendant agreed to sell to the plaintiff plot numbers **KAKAMEGA/MUNICIPALITY/BLOCK II/295** and **296** respectively. Although the Sale Agreement indicates that the sale price was KShs.4 million there is an acknowledgment dated 20<sup>th</sup> June 2011 whereby the defendant received a sum of KShs.9 million being the full purchase price. There are also bank transactions whereby the plaintiff transferred KShs.9 million to the defendant's account. The plaintiff filed this suit on the 20<sup>th</sup> of February 2012 and his main prayer is for a refund of the sum of KShs.9 million together with interest at the rate of 30% per annum. The record shows that the defendant filed his appearance on the 20<sup>th</sup> of March 2012 and failed to file his defence. On the 16<sup>th</sup> of April 2012 the plaintiff requested for judgment for failure by the defendant to file his defence. On the 18<sup>th</sup> of April 2012 interlocutory judgment was entered in favour of the plaintiff. Thereafter the plaintiff filed his bill of costs for taxation.

Under **Order 10 Rule 4** and **10** it is permissible for the court to enter judgment in a liquidated claim where the defendant has failed to file his defence. The applicant herein contends that the failure to file the defence was because of the illness of his counsel. I have read the affidavit in support of the application and other than the draft defence there is no document indicating that counsel for the applicant was taken ill. No medical notes were annexed. A mere statement that counsel for the defendant was ill

cannot be taken to be sufficient. Mr. Ondieki submitted that he was sick for two weeks but the record show that by the time the interlocutory judgment was entered on 18<sup>th</sup> April 2012, a period of almost a month had elapsed. In application of this nature the court has wide discretion to set aside or vary the judgment. However, such discretion should be exercised carefully so as to avoid being unfair to the party who is already having judgment in his favour. Parties are in agreement that the plaintiff paid the defendant a total sum of KShs.9 million being the full purchase price for the above two plots. The transfers could not be registered because the titles were revoked by the Ministry of Lands. In his draft defence (paragraph 4) the defendant contends that that act of revocation is tantamount to force majeure and cannot be visited upon the defendant. He has filed a judicial review application no. 20 of 2012 so that the decision of the Ministry of Lands to revoke the titles can be reversed. Although counsel for the applicant contends that no prejudice will befall the plaintiff, I do find that it will be unfair to set aside the judgment without putting any conditions. The suit might stay in court for some time and the defendant has not made any undertaking that the sale proceeds are still safe.

It is not the intention of the court to shut out a litigant from defending or prosecuting his claim. However, the circumstances of this case require that the sale proceeds be made available while parties are litigating. That being the case I do hereby grant the application to set aside the interlocutory judgment herein on condition that the entire sum of **KShs.9 million** is either deposited in court or in a joint account of the two counsels within **forty five (45)** days. In the event that the defendant fails to deposit the above amount within that period the order setting aside the interlocutory judgment shall be deemed to have been vacated and the plaintiff shall be at liberty to execute. The defendant to file his defence within 14 days hereof but the same shall only be deemed to have been properly filed if the sum of **KShs.9 million** is paid as indicated herein. The defendant shall pay the costs of this application.

**Delivered, dated and signed at Kakamega this 14<sup>th</sup> day of November 2012**

**SAID J. CHITEMBWE**  
**J U D G E**