



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 348 OF 2009

SIMKAN INVESTMENTS LTD
..... PLAINTIFF

=VERSUS=

- 1. ALI SALIM TOZA**
- 2. JUMA SALIM TOZA**
- 3. THE REGISTRAR OF TITLES AND**
- 4. THE ATTORNEY**

GENERAL DEFENDANTS

RULING

In the plaint filed on 8/10/2009, the plaintiff, Simkan Investments Limited, seeks the following reliefs:-

- (a) A declaration that the transfer to **Ali Salim Toza and Juma Salim Toza** (hereinafter the 1st and 2nd respondents) of LR No. **14897 C.R. 19582** Tiwi Beach area, Kwale District (hereinafter **“the suit property”**) effected on 2/4/2009 is fraudulent, illegal, null and void.
- (b) An order directed at the 3rd defendant to withdraw from the register by cancellation of the transfer effected in favour of the 1st and 2nd respondents over the suit property.
- (c) An order of eviction against the 1st and 2nd respondents.
- (d) A permanent injunction directed at the 1st and 2nd respondents, from among other things dealing in any manner with the suit properties.
- (e) General damages and Aggravated damages against the 1st and 2nd respondents.
- (f) Costs and interest.
- (g) Further or other relief the court may deem fit to grant.

Simultaneously with the plaint, the plaintiff lodged a chamber summons in which it sought primarily a temporary injunction restraining the 1st and 2nd respondents, among others, from selling, leasing, subdividing, offering as security, taking possession of or otherwise dealing with the suit property pending the hearing and determination of the application/and the Suit and a mandatory injunction directed at the Registrar of Titles (**hereinafter “the 3rd respondent”**) to cancel the registration of the 1st and 2nd Respondents as the registered owners of the suit property.

On the same date (8/10/2009) the application was placed before **Ibrahim J**, who certified the same urgent

and granted an interim injunction pending the hearing of the application *inter partes* and directed that the hearing of the application be within 14 days of his order.

On 12/10/2009, the plaintiff fixed the application for hearing on 21/10/2009. The application was on the latter date placed before me for hearing *inter partes*. However, neither the 1st and 2nd defendants nor their counsel attended. The application therefore proceeded *ex parte* and I allowed the same in terms of prayers 2 and 3 thereof and thus provoked the present application by which the 1st and 2nd respondents seek the following main orders:-

(i) That the orders made on 8/10/2009, be maintained and the status quo be as ordered then until the hearing and determination of the suit.

(ii) That the court reviews the orders made on 21/10/2009 as the respondents were never served with a hearing notice for the application dated 5/10/2009.

The main grounds for the application are that the respondents' were never served with a hearing notice for the said application and that unless the orders made on 13/10/2009 are set aside the 1st and 2nd respondents will suffer loss and irreparable damages. The application is supported by an affidavit sworn by the 2nd respondent. The affidavit is a mere elaboration of the two main grounds of the application.

The application is opposed and there is a replying affidavit of **Raj Devan**, the plaintiff's Managing Director. In the affidavit, it is deponed, *inter alia*, that the temporary orders sought have been overtaken by events since the 3rd respondent has already effected the orders directed at him; that the effect of setting aside the orders of 21/10/2009 would be to reinstate the 1st and 2nd respondents on the suit title and thereby rubber stamp the fraudulent activities of the 1st and 2nd respondents who are facing criminal proceedings on account of their fraudulent acts; that the 1st and 2nd respondents were indeed served with the application on which the hearing date was indicated; that the grounds of the application and the supporting affidavit refer to an order made on 13/10/2009 which is not the date of the impugned order and that the 1st and 2nd respondents have not responded to the application which application is incompetent.

When the application came up before me for hearing on 11/3/2010, counsel agreed to file written submission which was in place by 2/9/2010. The submissions elaborated the parties stand-points taken in their respective affidavits.

I have considered the application, the affidavits, the annexures and the submissions of counsel. Having done so, I take the following view of the matter. With regard to service of the application, the same is admitted by the 1st and 2nd respondents. However, they contend that the application which was served upon them did not have a date of hearing. The plaintiff on its part maintains that the 1st and 2nd respondents were indeed served with the said application with a hearing date duly endorsed thereon. The Process Server swore that he served the 1st and 2nd respondents through their wives with Summons to Enter Appearance, together with the plaint, a Court Order issued on 12/10/2009, the said chamber summons and a bundle of annexures. A copy of the chamber summons exhibited by the plaintiff clearly indicates that the summons had been fixed for hearing on 21/10/2009. The plaintiff's Managing Director has further deponed that, the copy of the chamber summons exhibited by the 2nd respondent is not the copy served, but the one retained by the court at the time of filing. The said Managing Director has gone ahead and termed the annexing of the wrong copy of the summons as mischievous and an attempt to mislead the court "**as is reminiscent of it's conduct**". The 1st and 2nd respondents did not challenge the serious allegations made against them by the plaintiff's Managing Director. They could have done so by a further or supplementary affidavit. They did not. In the premises, I accept the plaintiff's position that the 1st and 2nd respondents were served with the chamber summons dated 8/10/2009 with the hearing date of 21/10/2009 duly endorsed thereon. I am fortified in this view by the record of this file. When the 1st and 2nd respondents were served, they initially instructed M/s Opolu & Co. Advocates who on 27/10/2009, a mere 6 days after the order sought to be set aside was made,

wrote to the Deputy Registrar of this court stating, among other things, that the 1st and 2nd respondents had been served with a copy of the plaint together with summons and a copy of the order dated 9/10/2009 but that the application which gave rise to the said order had not been served upon them. In the same letter, the said advocates referred to an *ex parte* hearing of the said application on 21/10/2009. They were apprehensive that the orders made then would be registered. M/s Opolu & Company Advocates then delivered the 1st and 2nd respondent's defence on 19/11/2009 in which they claim the same suit property.

In the present application, the 1st and 2nd respondents appear to change their position. They now admit having been served with the said chamber summons but deny that the hearing date of 21/10/2009 was endorsed thereon. This application was lodged on 3/2/2010, about four months, after the 1st and 2nd respondents became aware of the orders made on 21/10/2009.

In those premises, I find and hold that the 1st and 2nd respondents were duly served with the application dated 8/10/2009 which application had the hearing date of 21/10/2009 duly endorsed thereon. Notwithstanding that the 1st and 2nd respondents were served, the court still has a discretion to set aside a default order. However, the discretion is exercised on such terms as are just and is intended to avoid injustice or hardship resulting from accident inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

In considering exercising the discretion, the court considers among other things, the facts and circumstances both prior and subsequent and all the respective merits of the parties together with any material factor which appears to have entered into the passing of the Judgment or order which would not or might not have been present had the Judgment or order not been *ex-parte*. The question whether the respondent can reasonably be compensated by costs for any delay occasioned should be considered always remembering that to deny a party a hearing should be the last resort of a court. The above are settled principles when considering whether to set aside a default Judgment. The same principles are relevant in considering setting aside a default order.

The 1st and 2nd respondents, as already stated, have a defence and counter - claim in place. The counter-claim is significant to this application, because in it, the 1st and 2nd respondents recognize the plaintiff's title to the suit property and seek to have the same cancelled and registered in their names by reason of adverse possession. The 1st and 2nd respondents therefore clearly acknowledge that the plaintiff is the registered proprietor of the suit property. In the premises, if this application is allowed, the 1st and 2nd respondents' counter-claim would have been thereby summarily determined without a hearing of the same. Another way of putting it is that declining this application, will not deny the 1st and 2nd respondents a hearing on their claims. The counter claim is yet to be heard and the 1st and 2nd respondents cannot therefore suffer irreparable loss or damages.

In the premises, the 1st and 2nd respondents' application dated 3/2/2010 is declined. The plaintiff should have the costs of the application.
It is so ordered.

DATED THIS DAY OF 2010.

**F. AZANGALALA
JUDGE**

DELIVERED AT MOMBASA THIS 26TH DAY OF NOVEMBER 2010.

**J.B.OJWANG
JUDGE**

Read at Mombasa in the presence of:-