

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

CIVIL CASE 234 OF 2007

PAUL KIRANTO OLE YIALLE.....PLAINTIFF

VERSUS

JONATHAN MUREME MUNTET.....1ST DEFENDANT

LUCY MUNTET.....2ND DEFENDANT

OLORU NTETE.....3RD DEFENDANT

RULING

In their Chamber Summons dated 18th June 2008 and brought under **Order 9A Rule 10** of the **Civil Procedure Rules** as well as **Section 3A** of the **Civil Procedure Act**, the defendants seek the setting aside of the ex-parte judgment entered herein together with the resultant decree and the execution proceedings thereon. The application is based on the grounds that the judgment was irregularly entered in that as this was not a liquidated claim final judgment should not have been entered without a formal proof; that the defendants had not been served and that the defendants have an impregnable defence to the plaintiff's claim. The application is opposed by the plaintiff who asserts that judgment was regularly entered on the alternative liquidated claim after the defendant had been served and failed to enter appearance or file a defence.

In their submissions, counsel for both the parties reiterated the averments in their respective clients' affidavits and each urged me to rule in his respective client's favour. While Mr. Githui for the defendants submitted that the claim in which the ex-parte judgment was entered was not a liquidated one, Miss Muturi for the plaintiff contended that it was and that the defendants were properly served but failed to enter appearance and/or file defence.

There are two issues for determination in this application. The first one is whether or not the plaintiff's alternative claim on which the ex-parte judgment was entered was a liquidated claim. If it was not then I have no discretion but to set aside the ex-parte judgment *ex debito justitiae*. The second one is whether or not the defendants were served with the summons to enter appearance and if they were whether or not I should exercise my discretion in their favour by setting aside the ex-parte judgment entered against them.

This is a claim based on breach of contract. The plaintiff claims in his plaint that by an agreement in writing dated 27th June 2006, he bought ALL THAT piece of land situate in Narok District and known as **Title Number Cis-Mara/Naitoipaki/1706 (Olokurto)** (the suit piece of land) for Kshs.300,000/- of which he paid Kshs.107,900/- and took possession of the land. After doing some work on it, the first and second defendants, in breach of the agreement, sold the land to the third defendant. He therefore prays for a perpetual injunction to restrain the defendants by themselves, their servants and/or agents from trespassing, remaining on, constructing, cultivating or in any manner dealing with that piece of land; general damages for trespass and mesne profits and **"IN THE ALTERNATIVE a refund of the sum of Kshs.259,900/- being the deposit paid towards the consideration and cost for bush clearing plus penalty for breach together with interest thereon from the date of filing suit until payment in full."**

The first issue therefore is whether or not this alternative claim is a liquidated one. My answer to that is that it is not. A liquidated claim is a claim for an amount previously agreed on by the parties or that which can be precisely determined by operation of law or by the terms of the parties' agreement. The

sum of Kshs.259,900/- is neither a sum that was previously agreed on by the parties nor a sum that can be determined by operation of law or from the terms of the parties' agreement. It follows therefore that the ex-parte judgment entered herein against the defendants without a formal proof was irregular and I agree with Mr. Githui for the defendants that I have discretion in the matter but to set it aside *ex debito justitiae* - **Remco Ltd. Vs. Mystery Jadva Parbat & Co. Ltd. [2002] 1 EA 23.**

That basically disposes of this application but I would like to add that given the fact that the judgment was entered even against the second and third defendants who were, contrary to Ms Muturi's contention, not parties to the agreement and in view of the draft defence exhibited in the replying affidavit, I would still set the judgment aside on the merits of the application.

I therefore set aside the ex-parte judgment entered herein against the defendants together with the consequent decree and the execution proceedings thereon. The defendants shall have the costs to this application.

DATED and delivered at Nakuru this 3rd day of July 2008.

D. K. MARAGA

JUDGE