REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Suit 237 of 1999

ABDALLA A. BAJABER…..……..……..……PLAINTIFFS

VERSUS

CHEPKWE HOLDINGS LTD &

ENOCK TUITOK ……DEFENDANTS

R U L I N G

This is an application brought by the defendants under Order 9B Rule 8, Order 21 Rules 22, 25 and 54 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It seeks two main orders. First, that there be a stay of execution of the decree of this court and second, that the ex-parte judgment entered herein be set aside. It is based on the grounds that service of the plaintiff's applications dated 23rd September 1999, 11th December 2000 and 16th August 2004 was effected on the defendant's former advocates who have since ceased to act for them. The Application is supported by the affidavit of the second defendant.

The history and the facts of the matter as can be gleaned from the pleadings are these:

That by an agreement dated the 11th November 1998 the first defendant agreed to assign and the plaintiff greed to take the pieces of land known as Plot Nos. 976 and 977 edged red on the Plan Ref M/RIM 201/15B.37/D11.3 comprised in the Letter of Allotment dated 17th June 1998 for shs. 4,000,000/=. By a guarantee also dated 11th November 1998 the second defendant guaranteed the performance by the first defendant of the said contract.

Pursuant to the said Agreement the Plaintiff paid to the first defendant shs. 1,000,000/= but the first defendant, in spite of demand, has failed to perform its part of the agreement provoking the institution of this suit. The plaintiff claims the refund of the said sum of shs. 1,000,000/= plus interest thereon at 20% per annum.

In their joint statement of defence the first defendant admits having entered into the said agreement and receiving shs. 1,000,000/= but pleads frustration by the Lands Office as the reason why it has not performed its part of the bargain. The second defendant makes a general denial of the said guarantee.

Upon being served with the joint statement of defence the Plaintiff through its advocates sought further and better particulars of that defence. When the same were not forthcoming he applied to court to have the defendants compelled to furnish them or in the alternative to have the defence struck out. The defendants did not oppose that application with the result that the court struck out the defence and subsequently judgment was entered for the plaintiff as prayed in the plaint and a decree followed. It is that judgment that the defendants are now seeking to have set aside.

As at the time the plaintiff's application dated 23rd September 1999 was made and heard, M/s Lilan, Koech and Co. Advocates and on whom it was served, were on record for the defendants. We have not been told why they did not oppose the application. The defence was struck out on the 23rd November 2000. This application was not brought until the 3rd August 2005 after execution had issued. The defendants blame both the poor communication between them and their erstwhile advocates and their advocates' poor conduct of this case for the delay.

That is not a reason for setting aside a regularly entered judgment. The defendants have not given the reason for the poor communication between them and their former advocates. They have not shown what action they took to find out what was happening in this case when they realized that the communication between them and their former advocates was poor. They have not said what action they took to have this case conducted properly when they realized that their former advocates were not conducting it properly.

Besides all these the defence itself, which I am bound to consider in an application like this, is a sham. If the first defendant has since 1998 not had the sale cleared by the Lands Office. I do not think it will ever get it cleared. And in that case what is the plaintiff supposed to do? To sit and wait for the defendants indefinitely? The impression I have formed from the conduct of the defendants is that they are not interested in resolving the matter. The defence they filed is, as I have said, a sham intended to delay determination of this suit. This application is part and parcel of that scheme. It is hereby dismissed with costs to the plaintiff.

DATED and delivered this 30th day of November 2005.

D. K. MARAGA

JUDGE