



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 207 OF 2017

NASSAU LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

HILLINGDON LIMITED.....DEFENDANT/APPLICANT

RULING

1. By this Notice of Motion dated 21st October 2020, Hillingdon Ltd (the Defendant/Applicant) prays for Orders against Nassau Limited (the Plaintiff/Respondent) listed as follows: -

5. That pending the hearing and determination of this suit, the Plaintiff/Respondent be restrained, either by himself or by his agents, servants, employees, assigns or any person claiming through them from executing, in any manner whatsoever, the *exparte* Judgment against the Defendant/Applicant in default of appearance and defence;

6.

7. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue an order of injunction restraining the Plaintiff/Respondent, either by himself or by his agents, servants, employees, assigns or any person claiming through them from advertising, offering for sale, auctioning and/or transferring the title in the Defendant/Applicant's property known as Block E Apartments No. E5, E6, E7 & E8 on the Ground Floor and Block F Apartments No. F1 & F2 on the Ground and First Floor, F3 on the First Floor & F4 & 5 on the Second Floor together with the roof terrace on top of Block E & F numbered E26, E27 & F5;

8.....

9. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue an order reinstating to the Defendant/Applicant the possession of the suit premises known as Block E Apartments Nos. E5, E6, E7 & E8 on the Ground Floor, E14 & E15 on the 1st Floor and E20 & E21 on the Second Floor and Block F Apartments No. F1 & F2 on the Ground and First Floor, F3 on the First Floor & F4 & F5 on the Second Floor together with the Roof Terrace on top of Block E & F numbered E26, E27 & F5;

10. That this Honourable Court be pleased to issue an order setting aside the Judgment entered on July 11, 2019 in favour of the Plaintiff against the Defendant upon such terms as it seems just;

11. That the Defendant be given leave to file a defence; and

12. that in the alternative, the draft defence attached hereto be deemed as filed upon payment of appropriate Court fees.

2. The application which is supported by an affidavit sworn by the Defendant's director David Nzombo is premised on the grounds that: -

i. The Defendant has learnt of the *exparte* Judgment against itself, which Judgment was entered in its absence and in circumstances which remain unknown to itself;

ii. The Plaintiff has commenced the execution of the decree of this Court issued on 17th July 2019;

iii. David Dadi, a director of the Defendant, was assaulted and ejected from the 13 apartments forming part of Blue Marlin

Resort (the suit premises) on 16th October 2020 and it is only then that they knew of the existence of the current suit;

- iv. The Plaintiff has forcefully broken into the suit premises, and taken away the personal items, financial records and tools of trade of the Defendant;
- v. The Defendant is in distraught as they are unable to conduct business and has lost its valuables;
- vi. The Defendant needs access to the suit premises as it is the sole income source of the Defendant which is also where several agents of the Defendant reside;
- vii. The Defendant remains apprehensive that if the execution of the ex-parte Judgment is not stayed and set aside in totality, the Plaintiff will proceed to sell the suit premises in complete and utter violation of the Defendant's right to property;
- viii. The Defendant is a sub-lessee for a period of 999 years, and the Plaintiff will not suffer any prejudice if the order sought herein are granted;
- ix. The Plaintiff is claiming for Kshs 2,071,090/- as service charge which amount is disputed by the Defendant;
- x. As a show of good faith the Defendant is willing to deposit the disputed sum of Kshs 2,071,090/- into Court while this matter proceeds;
- xi. The consideration for the sub-lease is £ 100,000/- as of 2010, which sum demonstrates the extent of the harm that is currently being occasioned on the Defendant;
- xii. In any case, this Honourable Court lacks jurisdiction *ratione materiae* to deal with the matter in light of the fact that the subject lease has an arbitration clause, being Clause 5.2 which required any dispute arising to be referred as a matter of right and priority to an arbitrator;
- xiii. Further thereto, the Defendant intends to file a concurrent application in this suit for the referral of the matter to arbitration as per Clause 5.2 of the Sublease Agreement;
- xiv. More so, and in the alternative, the Defendant remains willing and ready to defend the suit and proceed with the hearing of this matter on its merits and already has a cogent defence which raises issues;
- xv. The Defendant prays that the orders sought herein be granted as: -
 - a. The Defendant was never served with any of the Court pleadings;
 - b. The Defendant has a good and arguable defence;
 - c. The Defendant has a prima facie case with a high probability of success as it disputes the sum demanded by the Plaintiff;
 - d. The Defendant is going to suffer irreparable harm which cannot be compensated by way of damages as the Plaintiff has taken over possession of the suit premises;
 - e. The Defendant holds a sub-lease of 999 years, and the balance of convenience lies in favour of the Defendant;
 - f. The Defendant is willing to deposit the disputed sum of Kshs 2,071,090/- in Court or in a joint interest bearing account as a show of good faith;
 - g. It was for good reason that the Defendant failed to appear and defend the suit.
- xvi. It is in the interest of justice that this Honourable Court exercises its discretion in the setting aside of the Judgment in the supreme and overall interest of justice;
- xvii. More so, allowing the Judgment to stand would impose an unfair and most disproportionate burden on the Defendant which it may not be able to bear; and
- xviii. The application herein is meritorious and has been brought without unreasonable delay.

3. The application is opposed by the Plaintiff. In a Replying Affidavit sworn by its director Ruggero Sciommeri on 29th October 2020 and lodged herein on 5th November 2020, the Plaintiff avers that the deponent of the affidavit in support of the Defendant's application David Dadi Dzombo is not a director of the Defendant company and that the application is frivolous and filed in abuse of the Court process.

4. The Plaintiff avers that it did file this suit in October 2017 and that summons were on 24th October, 2011 issued for the Defendant to enter

appearance. After several attempts to serve the same upon the Defendant who has no known physical office and/or address failed, the Plaintiff filed an application dated 31st October 2017 seeking orders to serve the summons by way of substituted service. That application was allowed by the Court on 6th December 2017.

5. The Plaintiff further avers that pursuant to the orders granted by the Court on 6th December 2017, they served the Summons to Enter Appearance as well as other documents upon the Defendant through an advertisement published in the Standard Newspaper on 18th December 2017. The Defendant failed to enter appearance within the 30 days as required and on 30th April 2018, the Plaintiff made an application to the Court requesting for Judgment against the Defendant.

6. The Plaintiff asserts that subsequently on 19th July 2018, this matter proceeded for formal proof and Judgment was thereafter delivered on 11th July 2019 allowing the Plaintiff's claim with costs. It is therefore the Plaintiff's case that it obtained the Judgment against the Defendant procedurally and lawfully.

7. The Plaintiff avers that the Defendant's present application has been overtaken by events as the decree dated 11th July 2019 has been perfected and/or acted on to finality as the Plaintiff registered the subject decree at the Lands Registry in Mombasa on 27th May 2020 and the subject apartments have since been transferred and registered in the name of Somak Limited which is not a party in this application.

8. The Plaintiff further asserts that there is no material placed before this Court to warrant vacating its Judgment as the Defendant has failed to clearly demonstrate any vitiating factors to warrant the exercise of the Court's discretion.

9. The Plaintiff further asserts that it has never engaged a management company in the name of Blue Marlin Sporting Resort Ltd to manage its condominium and the Plaintiff is thus not aware of any payment made to them as per the receipts exhibited by the Defendant. It is the Plaintiff's case that its Management Company Messrs Kingsbury Real Estate Ltd has not received the alleged payment from the Defendant and did not issue any of the receipts.

10. The Plaintiff contends that in any event, the sum of Kshs 2,071,090/- being offered by the Defendant as security is inconsequential as nearly three years after that sum was claimed in 2017, the Defendant has not made any payments towards the service charge. It is also the Plaintiff's case that the draft defence annexed to the application raises no triable issues.

11. I have given full consideration to the Defendant's application and the response thereto by the Plaintiff. I have equally given full consideration to the rival submissions and authorities to which I was referred by the Learned Advocates for the parties.

12. The Defendant herein urges this Court to grant a series of orders the principal one being that this Court sets aside the Judgment entered herein on 11th July 2019 in favour of the Plaintiff together with the consequential decree and orders and that subsequently, the Defendant be reinstated to the suit property herein.

13. It was not contested that the Plaintiff is the registered lessee from the Government of Kenya for a term of 99 years from 1st January 1996 of all that parcel of land measuring approximately 2.05 Ha or thereabouts situated in Malindi and more particularly known as Portion No. 603 Malindi. The Plaintiff has apparently developed upon the said parcel of land a hotel and residential premises christened the Blue Marlin Resort which Resort comprises of inter alia, several apartments, a reception, offices, swimming pools, parking bays and other such like amenities.

14. It is not in dispute that on 14th October 2020, the Plaintiff entered into an agreement wherein it did sub-let 13 of the said apartments as described in schedule 1 of the sub-lease to the Defendant for a term described therein as 999 years effective 1st October 2008 at a consideration of Euros 100,000/-. The said agreement required the Defendant at Clause 2.1 thereof to pay all outstanding service charges accrued on each of the apartments as computed annually.

15. By the suit instituted herein on 19th October 2017, the Plaintiff asserted that in breach of the said agreement and despite several reminders, the Defendant had neglected, refused and/or failed to clear arrears of service charges amounting to Kshs 2,071,090/- which amount was outstanding for the period ranging from 31st October 2014 to 27th April 2017. The said suit proceeded to hearing in the absence of the Defendant and by the impugned decision delivered herein on 11th July 2019, the Court granted the following orders in favour of the Plaintiff: -

a. A declaration that the Defendant is in breach of the Sub-Lease Agreement for non-payment of the service charges amounting to Kshs 2,071,090/- in respect of Apartments F1, F2, F3, F4 and F5 in Block F and Apartments E5, E6, E14, E15, E20 and E21 in Block E (of the Blue Marlin Resort);

b. An order directing the Defendant to surrender to the Plaintiff all the Apartments situate on the residential premises known as the Blue Marlin Resort; and

c. Costs of the suit with interest.

16. It is the Defendant's case that it was unaware of the Court proceedings instituted against itself until sometime on 16th October 2020 when one of its directors by the name David Dadi Nzombo was assaulted and ejected from the suit premises by unknown individuals who claimed to be executing a Court order. The Defendant asserts that it was never served with summons to enter appearance or the notice of entry of Judgment.

17. The principles for the setting aside of an *ex parte* Judgment were long considered by the predecessor Court of Appeal for East Africa in *Mbogo –vs- Shah (1968) EA 93, 95* where the Court observed as follows: -

“Two questions arise on this appeal. The first is the circumstances which would justify a Judge granting an application made under Order 9 Rule 10, to set aside a Judgment entered *ex parte*; the second is the circumstances in which this Court, as a Court of Appeal would interfere with the exercise of the discretion of a Judge made on any such application.

Dealing with the first question, it is quite clear that the Judge has discretion under Order 9 Rule 10, but of course he has to exercise that discretion judicially. In *Kimani –vs- McConnell (1966) EA 547*, HARRIS J, dealing with the question as to the circumstances to be borne in mind by a Judge on an application under that rule said this (*ibid* at 555G): -

“.....in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the Judgment, if necessary, upon terms to be imposed.”

18. As it were, the object of the discretion to set aside is 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 (*see Shah –vs- Mbogo (1967) EA 116*).

19. The circumstances leading to the entry of Judgment against the Defendant can be gleaned from the Court record. Some 12 days after the institution of this suit, the Plaintiff filed a Notice of Motion application dated 31st October 2017 seeking orders that service be effected upon the Defendant by way of substituted service. The said application which was allowed by this Court on 6th December 2017 was supported by an Affidavit sworn by Mr. Maurice Kilonzo, the Learned Advocate for the Plaintiff in which Counsel swears at paragraphs 4 to 8 thereof as follows: -

“4. That Summons to enter appearance, Plaintiff, list of documents, list of witnesses and the witness statements were filed in Court on the 19th October 2017 against the Defendant/Respondent on a claim for a breach of a sub-lease Agreement for non-payment of the service charges amounting to Kenya Shillings Two Million Seventy-One Thousand and Ninety (Kshs 2,071,090.00/-);

5. That I have personally made efforts and/or attempts to locate the Defendants, its Company Directors and Company Secretary on several occasions but all my efforts have been rendered futile;

6. That the Company directors and Company Secretary are not personally known to us, hence effecting personal service to the aforesaid persons has therefore been impossible;

7. That the Defendants have since closed and/or ceased to carry on business in their registered offices which were situated in the Plaintiff’s premises being Land Portion Number 603 (Original No. M. 6/22) Malindi, hence efforts to effect service has been futile; and

8. That in the circumstances, I beseech the Court to order that the service upon the Defendant be by way of substituted service by advertisement of the suit in one or two of the widely circulated Newspapers in Kenya or by sending the Summons and all the pleadings herein by registered post to the last known address of the Defendant as required by the law, so that the process of setting the suit down for hearing can commence.”

20. Consequently, upon the grant of the said orders, the Plaintiff caused to be published the said Court Orders in the Standard Newspaper of Monday 18th December 2018. While the Court had required the Defendant to enter appearance within 30 days of the advertisement, the Defendant neither entered appearance nor filed a Statement of Defence and the matter thereafter proceeded to hearing by way of formal proof.

21. In the Supporting Affidavit to the Defendant’s application herein, the deponent David Dadi Dzombo who describes himself as the Defendant’s Manager since 2010 and a Director since 2018 disputes the Plaintiff’s assertion that the Defendant could not be found for service and avers at paragraphs 11 to 17 thereof as follows: -

“11. That I have never been served with any Court processes and I only became aware of the existence of this matter when I was forcefully ejected from the suit premises.

12. That I was never served with any summons or the notice of entry of Judgment.

13. That the Plaintiff/Respondent has never effected service on the Defendant/Applicant despite having full and apparent knowledge of the Defendant’s physical and postal address;

14. That on December 18, 2017, my Co-director Roberto Mariani was in Italy, where he resides, hence unaware of the existence of the service vide newspaper;

15. That ever since the sublease was granted, I have been present on the suit premises, therefore there should have been no reason for the need of substituted service;

16. That the Defendant's Directors have been in the dark about these proceedings in this suit; and

17. That had we been served and notified, or even had knowledge whatsoever about the existence of this suit, the Defendant/Applicant would not have hesitated to counter all the misleading allegations by the Plaintiff which gravely affect our property interests within the legal timelines."

22. This Court was however left in serious doubt as to whether or not the said David Dadi Dzombo is a director of the Defendant company with authority to speak on its behalf. I say so because in its Replying Affidavit to the application, the Plaintiff has produced the records relating to the Defendant Company held at the Companies Registry as at 27th October 2020, a week after this application was filed and the said David Dadi Dzombo is not one of them.

23. In his Supplementary Affidavit filed herein on 9th November 2020, the said David Dadi Dzombo now contends that he was appointed a director on 14th February 2019 and not 2018 as stated in his Supporting Affidavit. David also dismisses the fact that the records at the Company Registry does not reflect his name as one of the directors as inconsequential and avers that what matters is that they have complied with the Defendant Company's Articles of Association.

24. That position is of course problematic given that the Plaintiff could not have had notice of his directorship of the Company. Whatever the case, it was evident that as at the time the Plaintiff applied to have the Defendant served by way of substituted service, there was justification for such service as the only director other than David was said to be away and the only company secretary was apparently appointed much later at the same time with David, if he is to be believed, on 14th February 2019.

25. Whatever the case, the Defendant has not explained why its Manager who avers he was in the suit premises at all times did not notice or respond to the advertisement if he was an authorized officer as implied in both the Supporting and Supplementary Affidavits. In this respect, I think it should be noted that substituted service where properly done is as effective as any other mode of service and hence the provision of Order 5 Rule 17(2) of the Civil Procedure Rules which provides that: -

"(2) Substituted service under an order of the Court shall be as effectual as if it had been made on the defendant personally."

26. That being the case, this Court was satisfied that the Defendant was duly served by way of substituted service as per the advertisement carried out in the newspaper as aforesaid. Indeed, while the Defendant purports that its director Roberto Mariani was in Italy on 18th December 2017 when the advertisement was carried out, there was no documentary support availed in support of that position. Neither is there any mention made of the whereabouts of the other two shareholders named as Marco Lelli and Aster Facility Management Ltd which appear on the records of the Company Registry as at 27th October 2020 aforesaid. Indeed, contrary to his assertion that the said Roberto Mariani resides in Italy, it is apparent that he was in the Country in the course of these proceedings and was able, together with the shareholder Marco Lelli to execute the resolution appointing David as a director of the Company on 14th February 2019, some five (5) months before Judgment was delivered herein

27. As it were, the Defendant by this application is seeking an equitable remedy. As the principle goes, he who comes to equity must come with clean hands. In this respect, this Court notes that while the Defendant is accused of failing to remit service charge for the period ranging from 31st October 2014 to 27th April 2017, the Defendant has not provided any evidence of payments made to the Plaintiff in regard to what was outstanding. Neither is there any evidence that it has paid any service charge in the period after the suit was filed.

28. While the Plaintiff's actions herein may appear to be harsh in terms of the long period in which the sub-lease was to run, a perusal of Clause 5 thereof reveals that the parties had agreed to terminate the same through recourse to the Court where any monies and payments owing had not been paid for a period of thirty days. The Defendant has not produced any evidence demonstrating compliance with the demands made by the Plaintiff for service charge in terms of Clause 2.1 of the Sub-Lease Agreement.

29. In addition, it was evident to me that the orders sought herein were clearly untenable in the circumstances. At paragraph 18 of the Replying Affidavit of the Plaintiff's director Ruggero Sciommeri, he states as follows; -

"18. That the Plaintiff has since transferred the subject apartments to another company being SOMAK LIMITED which is not a party in this application. The said SOMAK LIMITED is now the registered owner of the suit apartments. I annex a bundle of copies of the transfer lease dated 17th September 2020 and mark it as R5- 18."

30. Surprisingly the Defendant acknowledges this position at paragraph 8 of the Supplementary Affidavit filed on 9th November 2020 and asserts as follows: -

"8. That in response to paragraphs 16, 17 and 18 of the Replying Affidavit which is denied, I aver that: -

a. The Application is not overtaken by events as this Honourable Court has it within its power to remedy any injustice occasioned on the Defendant/Applicant;

b. The alleged leases issued by the Plaintiff/Respondent were CONVENIENTLY registered on October 16, 2020, being the date when the Plaintiff/Respondent ejected the Defendant/Applicant from the suit premises;

c. Any harm to the third parties can be compensated by way of damages payable by the Plaintiff.

d.

31. While it is indeed true that this Court has repository power to remedy any injustice, it was clear that the registration of the said Somak Ltd as the proprietor of the suit premises was done a few days before this suit was instituted. The Defendant does not state when it learned of the said registration and/or why the said Somak Ltd was not enjoined in these proceedings. Given the uncontroverted evidence that the suit properties are no longer in the Plaintiff's name but in the name of a third party to the knowledge of the Applicant, it was clear to me that the orders sought especially for reinstatement would be prejudicial to a party who for reasons only known to the Defendant has not been enjoined in these proceedings.

32. In the premises, I did not find any merit in the Motion dated 21st October 2020. I dismiss the same with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 28TH DAY OF MAY, 2021

J.O. OLOLA

JUDGE