



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO. 51 OF 2013

SELINE AKOTH OYIENGO.....PLAINTIFF

VERSUS

GEORGE OCHIENG OWINO.....1ST DEFENDANT

WATER SERVICES BOARD.....2ND DEFENDANT

RULING

1. The 2nd Defendant filed the notice of motion dated 3rd October 2018 seeking for stay of execution of decree issued on the 26th October 2015, and certificate of costs of Kshs. 86,869/=, pending the hearing and determination of the suit; setting aside of the interlocutory judgment delivered on the 26th October 2015 against the 2nd Defendant, and costs. The application is based on the seven (7) grounds on its face and supported by the affidavit of Phyllis Chepkemboi, “*legal Officer of the organization*” on the 3rd September 2018. The application is filed through by M/s Sala & Mudany Advocates signing off as Advocates for the “*Plaintiff*”.

2. The application is opposed by the Plaintiff vide the replying affidavit sworn on the 17th December 2018.

3. The application came up for hearing on the 30th January 2019 when Counsel agreed to file and exchange written submissions. The learned Counsel for the 2nd Defendant and Plaintiff filed the submissions dated the 24th February 2019 and 25th February 2019 respectively. The Learned Counsel for the 2nd Defendant filed a response to the Plaintiff’s submissions dated the 12th June 2019.

4. The following are the issues for the court’s determinations;

a) Whether the 2nd Defendant has made a reasonable case for the stay of execution and setting aside orders to issue.

b) Who pays the costs.

5. The Court has considered the grounds on the motion, the affidavit evidence, submissions, the record and come to the following findings;

a) That the record shows that these proceedings were commenced through the plaint dated the 28th February 2013, and filed on the 25th March 2013. That the summons were served and M/s Ogejo, Orlando & Company Advocates, entered appearance for the 2nd Defendant through their memo dated the 13th May 2013, and filed on the 14th May 2013.

b) That the Plaintiff requested for interlocutory judgment vide their letter dated the 19th August 2013 and filed in court on the 20th August 2013 for failure by the Defendants “to enter appearance and/or statement of defence within the stipulated period of time.” The interlocutory judgement was entered on the 21st August 2013 by the Deputy Registrar, and when the matter come up for formal proof on the 20th February 2014, the interlocutory judgment of 21st August 2013, was set aside by consent of Counsel for the Plaintiff and 2nd Defendant to enable filing of statement of defence by the 2nd Defendant.

c) That when the matter came up for mention on the 25th March 2014, the Counsel informed the court that the 2nd Defendant had not filed any defence and requested for a hearing date. The matter was fixed for hearing on the 16th June 2014. The hearing did not take place on that date. The matter was then fixed for hearing on the 22nd October 2014, when the testimony of the Plaintiff was taken. The Plaintiff closed her case and after filing submissions, the court delivered its judgment in her favour on the 26th October 2015. That judgment was not an interlocutory judgment.

d) That the Plaintiff then filed her bill of costs dated the 10th April 2017, on the 11th April 2017. The Counsel for the 2nd Defendant was served with the notice of taxation for hearing of 12th July 2017. That the Deputy Registrar taxed the bill in her ruling of 27th July 2017.

e) That M/s Sala & Mudany Advocates filed their notice of change of Advocates, to act for the 2nd defendant in place of M/s Ogejo, Olendo & Company Advocates, dated the 1st October 2018, and on the 3rd October filed the application subject matter of this ruling.

f) That the Plaintiff's Counsel has submitted that M/s Sala & Mudany Advocates are not properly on record, and that the court cannot therefore grant the prayers sought in the application. The Learned Counsel referred to the provision of **Order 9 Rule 9 of the Civil Procedure Rules** which provides as follows;

“9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-

(a) upon an application with notice to all parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

That among the six (6) prayers in the 2nd Defendant's motion, there is none seeking to grant M/s Sala & Mudany Advocates leave to come on record for the 2nd Defendant in place of M/s Ogenju, Olendo Advocates. That there is also no consent between M/s Ogenju, Olendo Advocates and M/s Sala & Mudany Advocates allowing the latter to come on record for the 2nd Defendant that has been attached to the supporting affidavit, or separately filed before or contemporaneously with the filing of the notice of change of Advocate dated the 1st October 2018. That further, the 2nd Defendant's submission dated 12th June 2019, though headed as a **“Response to the Respondent's submissions”** did not address itself to whether Counsel was properly on record for the 2nd Defendant. That accordingly, the court finds and holds that the notice of motion dated the 3rd October 2018, was filed through Counsel who is not properly on record for the 2nd Defendant and should be struck out with cost.

g) That whereas there is no dispute that the court has jurisdiction to entertain and allow applications for stay of executions and set aside previous orders in appropriate cases, the court has noted that there is no prayer in the motion dated the 3rd October 2018 for leave to file defence out of time, and for suit to be heard on merit. The prayers sought are only to stay the execution and setting aside the “Interlocutory Judgment delivered on the 26th October 2015”. That even if the prayers were to be granted, the suit would still remain without any statement of defence. That the purposes of granting the prayers in the application would be lost and in vain.

h) That this suit does not have on record any interlocutory judgment. This is because the only interlocutory judgment entered on the 21st August 2013, which is the only one ever entered in the matter, was subsequently set aside by consent on the 20th February 2014. That the judgment delivered on the 26th October 2015 was after the hearing of the 22nd October 2014, when the Plaintiff testified as PW1.

i) That as the proceedings took place without the Defendants participating, or filing their defence, it is clear however that the 2nd Defendant was aware of the suit and failed to file their defence, despite being given leave to do so out of time. That the 2nd Defendant had therefore a duty to convince this court that they had a reasonable defence to the Plaintiff's claim that, if allowed to defend the suit, would raise triable issues. That it therefore behoved of the 2nd Defendant to exhibit before this court the nature of their intended defence by, for example, annexing a draft defence to their application. That without exhibiting such a draft defence, the court has no way of fathoming the nature of the intended defence so as to determine whether or not it is likely to raise triable issue.

6. That for reasons set out above, the court finds no merit in the 2nd Defendant's motion dated the 3rd October 2018 and it is struck out with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 10TH DAY OF JULY 2019.

In the presence of:

Plaintiff Absent

Defendants Absent

Counsel

M/s Jemtai for Sala for 2nd Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE