



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. E188 OF 2019**

**DIANA MASIE OSANO**

**ODERO T/A ODERO AND ASSOCIATES ADVOCATES.....PLAINTIFF**

**VERSUS**

**DAWID ABDULRAHMAN AND SAAD MIGDAD T/A ABDULRAHMAN**

**SAAD & COMPANY ADVOCATES.....1<sup>ST</sup> DEFENDANT**

**FIVE STAR CONSTRUCTION LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

**BACKGROUND**

1. Through the originating summons (OS) dated 13<sup>th</sup> June 2019, the plaintiff/respondent herein sued the defendants seeking the following orders:-

***1. That an account be taken and the defendants be ordered to pay the amount still outstanding in the sale transaction of Land Reference Number 36/111/215 Eastleigh, Nairobi and interests thereon at a rate of 15.5% per annum from 19<sup>th</sup> February 2018 until payment in full in terms of the 1<sup>st</sup> defendant's professional undertaking given to the plaintiff.***

***2. That the 2<sup>nd</sup> defendant be restrained from charging, transferring, mortgaging and or dealing with the property in any manner whatsoever pending the hearing and determination of these summons.***

***3. Any other relief as the court may deem just and fair to award as the circumstances of the case shall demand.***

2. A summary of the plaintiff's case is that he acted for a vendor, one **Willie Mahungi Ndambi** in the sale agreement executed on 19<sup>th</sup> February 2018 in sale respect of LR No. 36/111/215 Eastleigh wherein the 1<sup>st</sup> defendant acted for the purchaser, herein the 2<sup>nd</sup> defendant.

3. The plaintiff states that it was agreed that the purchase price would be kshs 45 million out of which 10% deposit of Kshs 4.5 million was paid on 15<sup>th</sup> February 2018 and the balance was to be paid within 90 days.

4. According to the plaintiff, the transfer was completed on 7<sup>th</sup> March 2018 and vacant possession granted to the purchaser on 12<sup>th</sup> September 2018 but that the 1<sup>st</sup> defendant reneged on its undertaking to release the balance of the purchase notwithstanding the fact that he plaintiff has complied with all the conditions of the sale thereby precipitating the filing of the Originating Summons.

5. The Originating Summons was served on the 1<sup>st</sup> and 2<sup>nd</sup> defendants on 21<sup>st</sup> and 22<sup>nd</sup> June 2019 respectively, but it is alleged that they did not enter appearance within the prescribed period and 8<sup>th</sup> July 2019, the plaintiff requested for judgment against the defendant.

6. Default judgment was entered against the defendants on 15<sup>th</sup> July 2019 and the case thereafter fixed for hearing on 19<sup>th</sup> September 2019,

thus triggering the filing of the application that is the subject of this ruling.

**Application.**

7. Through the application dated 1<sup>st</sup> August 2019, the defendants applicants mainly seeks orders to set aside the interlocutory judgment entered on 15<sup>th</sup> July 2019.
8. The application is premised in the grounds that the defendants advocates herein M/S Doli & Associates were duly instructed to enter appearance and to act for the defendants herein but were unable to enter appearance within the stipulated time frame because the court file could not be traced.
9. The defendant contends that even though they managed to enter appearance on 9<sup>th</sup> July 2019, it would appear that their Memorandum of Appearance was not placed in the court file on time or at all thereby leading to the entry of the impugned default judgment. It is the defendant's case that there was oversight on the part of the court's registry staff in failing to place the Memorandum of Appearance in the court file on time or before the entry of the default judgment.
10. The respondent/plaintiff opposed the application through the replying affidavit of **Diana Maisie Osano** who avers that the defendants are not sincere in their claim regarding the alleged missing court file. She further avers that the instant application is intended to frustrate the execution process that the plaintiff has initiated upon obtaining a partial decree.
11. The application was canvassed by way of written submissions which I have carefully considered.
12. The main issue for determination is whether the defendants have made out a case for the granting of the orders to set aside the interlocutory judgment.
13. I have perused the Memorandum of Appearance filed by the defendants herein and I note that it is dated 4<sup>th</sup> July 2019 and filed on 9<sup>th</sup> July 2019. That the Memorandum of appearance was filed on 9<sup>th</sup> July 2019 is further confirmed through the court receipt No. 9573476 dated 9<sup>th</sup> July 2019 in respect to the payment for the Memorandum of Appearance.
14. In view of the fact that an appearance had already been entered by the defendants on 9<sup>th</sup> July 2019, I find that the default judgment was entered in error and is irregular as it was entered at least 6 days after the filing of the Memorandum of Appearance. My take is that the defendant cannot be blamed for the failure, by the court registry staff, to place the Memorandum of Appearance in the court file in time or to draw the attention of the Deputy Registrar to the fact that a Memorandum of Appearance had already been filed.
15. I also note that the plaintiff did not deny that as at the time the default judgment was entered, they had already been served with the Memorandum of Appearance. I find the present application is merited and therefore allow it as prayed with no orders as to costs.
16. I direct that the defence be filed and served within 7 days from today's date.

**Dated, signed and delivered via skype at Nairobi this 29<sup>th</sup> day of April 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Mohamed for 1<sup>st</sup> and 2<sup>nd</sup> defendant

C/A & DR – Hon. Tanui