



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 138 OF 2018

RAJNIKANT HARJIVANDAS SANGRAJKA.....1ST PLAINTIFF

NANVENDU RAMNIKAL SANGHRAJKA.....2ND PLAINTIFF

VERSUS

KIATU & ALLIED PRODUCTS LIMITED.....1ST DEFENDANT

REGISTRAR OF TITLES.....2ND DEFENDANT

RULING

1. In the Notice of Motion dated 10th December, 2019, the 1st Defendant has prayed for the following orders:

a. That this Honourable Court be pleased to arrest and/or stay the Judgment on the main suit scheduled to be delivered on 6th March, 2020 pending hearing and determination of this Application.

b. That this Honourable Court be pleased to review, vary and/or set aside the proceedings of 9th October, 2019 and all consequential orders, proceedings and the matter be re-opened for hearing “de novo”.

c. That the 1st Defendant’s Defence dated 13th April, 2015 be deemed as duly filed and served upon payment of the requisite court fees.

d. That the costs of this Application be in the cause.

2. The Application is supported by the Affidavit of the 1st Defendant’s Director who has deponed that the 1st Defendant’s previous Advocates, Philip Muoka & Co. Advocates, filed an Application dated 13th April, 2015 seeking the setting aside of the interlocutory Judgment entered against the 1st Defendant and leave to file a Defence out of time.

3. According to the 1st Defendant’s Application, by a Ruling delivered on 24th November, 2017, the court allowed the 1st Defendant’s Application; that the 1st Defendant lost communication with its then Advocates and that upon its present Advocates perusing the court file, they found the previous advocate had filed an Application dated 12th October, 2018 seeking leave to cease acting for the 1st Defendant.

4. The 1st Defendant’s Director deponed that the matter proceeded ex-parte without the 1st Defendant’s knowledge despite the 1st Defendant having instructed the firm of Kithinji Marete and Company Advocates to represent it; that the 1st Defendant has since instructed the firm of M.K. Chebii & Co. Advocates to act for it and that the 1st Defendant has a meritorious Defence to the Plaintiff’s claim because the 1st Defendant has never sold the suit property to the Plaintiffs.

5. The 1st Defendant’s Director deponed that the 1st Defendant has never instructed the law firm of Kimani Kairu & Co. Advocates to lift the caveat he registered on the suit property on 13th August, 1990 and that in any event, the shares of her late husband in the 1st Defendant remained protected under Section 45 of the Law of Succession Act.

6. The 1st Defendant’s Director finally deponed that pleadings have not closed because the 2nd Defendant has never entered appearance and no request for interlocutory Judgment was entered against the said 2nd Defendant. It is the 1st Defendant’s case that the court should set aside the ex-parte hearing of 9th October, 2019 and all consequential proceedings and accord the 1st Defendant an opportunity to be heard on merit.

7. The Plaintiffs filed Grounds of Opposition and a Replying Affidavit. In the Grounds of Opposition, the Plaintiffs averred that the Application is yet another attempt by the 1st Defendant to cause unreasonable delay in the determination and conclusion of the suit; that they are the *bona fide* Purchasers of L.R. No. 337/660, Athi River and that the 1st Defendant was granted leave to file a Defence on 24th April, 2017 but failed to do so.
8. In his Replying Affidavit, the 1st Plaintiff deponed that on 15th September, 1988, the Plaintiffs entered into an Agreement of Sale with the 1st Defendant or nominees of Rasi Properties Limited over L.R. No. 337/660, Athi River (*the suit property*); that on 16th December, 1994, a transfer was duly executed by both parties and that the Plaintiffs were informed by Ms. Kathima in the year 2011 that they had obtained the title document fraudulently.
9. The 1st Plaintiff deponed that despite being granted leave to file a Defence out of time, the 1st Defendant has failed to do so; that pre-trial directions were made in the presence of the 1st Defendant's Advocates and that when the matter came up for hearing on 9th October, 2019, the 1st Defendant's advocate sought for adjournment, which application was declined by the court.
10. The 1st Plaintiff finally deponed that the deliberate failure by the 2nd Defendant to participate in the suit cannot be a ground for seeking to nullify the ensuing proceedings; that the draft Defence annexed on the Motion does not raise any triable issues to warrant the grant of the orders sought and that the 1st Defendant has not challenged the resolution of the 1st Defendant's Board which authorized the sale of the suit property.
11. The parties' advocates appeared before me on 27th January, 2020 and made oral submissions. I have considered the said oral submissions.
12. This suit was commenced by way of a Plaint dated 9th April, 2014. In the Plaint, the Plaintiffs have averred they purchased the suit property from the 1st Defendant on 15th September, 1988; that the 2nd Defendant caused the land register to be altered to reflect the revocation of the transaction dated 15th September, 1988 thus reverting the title of the suit property to the 1st Defendant and that a declaration that the revocation of the transfer to the Plaintiffs by way of a letter by one Mr. B. L. Limo is illegal, null and void.
13. The Plaint and Summons to Enter Appearance were served on the Defendants by way of advertisement in the Daily Newspaper of The Record shows that by way of a Notice of Motion dated 13th April, 2015, the 1st Defendant sought to set aside the interlocutory Judgment that was entered against it, and to be allowed to file its Defence out of time. In her Ruling dated 24th November, 2017, Gitumbi J. allowed the Application as prayed.
14. From the Ruling of the court, the 1st Defendant was allowed to file its Defence out of time. Although the court did not prescribe the time within which to file the Defence, it follows that the Defence was to be filed within fifteen (15) days from the date of the Ruling, which is the period indicated in the Summons to Enter Appearance.
15. The 1st Defendant never filed its Defence as directed by the court on 24th November, 2017. When the matter came up for pre-trial directions on 27th November, 2018, the Defendants' advocates were not in court. When the matter came up for hearing on 9th October, 2019, the 1st Defendant's advocate applied for the adjournment of the matter because he had just come on record. While declining the Application for adjournment, this court stated as follows:
- “This is a 2014 matter. The Defendants have had since April [2019] when they were served with a hearing notice. They cannot purport to appoint another advocate on the date of the hearing. The 1st Plaintiff is in court and is elderly and frail. I decline to adjourn the matter. The matter shall proceed for hearing at 11.30a.m”***
16. When the matter came up for hearing at 11.30a.m, neither the 1st Defendant nor its advocate was in court. The Plaintiffs testified on that date and closed their case.
17. The 1st Defendant's Director has blamed her previous advocate for not filing the Defence as directed by the court on 24th November, 2017. Indeed, by 9th October, 2019, when the matter came up for hearing, no Defence had been filed by the Defendants.
18. The 1st Defendant's Director deponed that 1st Defendant lost communication with its then Advocate, whereafter it instructed another firm of advocates, Messrs. Philip Muoka Advocates. Again, it is the 1st Defendant's case that the communication with the said advocates also broke down. The 1st Defendant hired a third set of advocates, Mugambi and Company advocates, whom they fired and hired the firm of Kithinji Marete and Company Advocates. That firm of Advocates was also fired by the 1st Defendant because the advocate did not appear in court on 9th October, 2019.
19. The chronology of events as summarized above clearly points to a Defendant who has not been keen in defending the suit. Indeed, having been given an opportunity to file a Defence out of time in the year 2017, it was upon the 1st Defendant to make a follow-up with his advocate to ascertain the filing of the said Defence. However, the 1st Defendant never did so “*due to a breakdown of communication*” with his former advocate.
20. This suit was filed in the year 2014. The 1st Defendant was allowed to file a Defence out of time in the year 2017, which Defence was never filed. That being the case, and having considered the 1st Defendant's dispositions, I find that no plausible reason has been given as to why the proceedings of this court should be set aside.

21. Indeed, the issue of whether the 1st Defendant's Defence raises triable issues was considered by the court in the Ruling of 24th November, 2017, and allowed the 1st Defendant to file its Defence out of time. That being the case, this court cannot revisit the issue of whether the Defence by the 1st Defendant raises a triable issue or not.

22. As was held in the case of *Said Sweilem Gheithan Saanun vs. Commissioner of Lands and Others (2015) eKLR*, it cannot be fashionable for parties to blame their advocates and claim that mistakes made by their advocates, who they have themselves appointed cannot be visited upon them. It is even worse when a litigant states that the failure to abide by the order of the court was because there was a breakdown of communication between himself and his advocate.

23. In fact, as early as 1988, the court in *Ketteman vs. Hansel Properties Limited (1988) 4 ALL E.R 769* held as follows:

“Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their heads...”

24. The 1st Defendant, has alleged that the suit was not ready for hearing because there was no interlocutory judgement as against the 2nd Defendant. The notion that interlocutory judgements should be entered against Defendants who have failed to file their defences in land matters is erroneous. Indeed, Under order 10 Rule 4 and 6, Interlocutory Judgement can only be entered in a claim in respect of a liquidated claim or for detention of goods, and not for recovery of land.

25. The 1st Defendant, together with its advocates, did not conduct the business of this matter efficiently. The justice of this case demands that the proceedings herein remain intact, and Judgment be delivered accordingly.

26. For the reasons I have given above, I dismiss the 1st Defendant's Application dated 10th December, 2019 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 6TH DAY OF MARCH, 2020.

O.A. ANGOTE

JUDGE