

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL SUIT NO. 4 OF 2017

BETWEEN

JAMARAT APARTMENTS LIMITED.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF VIHIGA.....DEFENDANT

RULING

1. What is for determination is the Motion dated 19th March 2018. It seeks several orders: leave for a law firm to come on record for the defendant in place of the defendant's County Attorney, stay of execution of the judgement entered on 13th June 2017 pending *inter partes* hearing of the application, the setting aside of the judgement of 13th June 2017, and the defendant to be allowed to file its defence and the suit be heard on its merits.

2. When the matter came up for *inter partes* hearing on 18th April 2018 the parties recorded a consent on the application. Prayer 2 of the application was allowed, meaning that the firm of M. Nanda & Co. Advocates could come on record in the place of Alex Amasakha, the County Attorney. Prayer 3 of the application was also granted, which meant that there was stay of execution of the judgement of 13th June 2018 pending *inter partes* hearing of the application. Although Prayer 4 of the application was not specifically mentioned in the consent, the parties agreed that the defendant's statement of defence dated 19th March 2018 was to be deemed as duly filed and served. That effectively took care of Prayer 4 of the application, which sought leave for the defendant to file defence and for the suit to proceed on merits.

3. In my view, the consent recorded on 18th April 2018 effectively disposed of the application dated 19th March 2018. Once the defendant's defence was admitted and deemed as duly filed and served, there was nothing left outstanding. The only aspect of Prayer 4 that was not addressed was the one seeking the setting aside of the judgement of 13th June 2017. However, that judgement became untenable the moment the statement of defence was admitted, for the two, the judgement and the statement of defence, cannot logically sit pretty on the same record. One has to give way to the other, and it is the defence that has to give the way. It would be illogical to have a judgement and a defence on record in the same matter.

4. I shall accordingly set aside the judgment of 13th June 2017 and all the consequential orders. The suit shall proceed to be determined on its merits. Costs shall be in the cause. Should any party be dissatisfied with the outcome of these proceedings, there is leave to appeal against the same at the Court of Appeal within twenty-eight (28) days.

DATED, SIGNED and DELIVERED at KAKAMEGA this 3RD DAY OF DECEMBER, 2018

W. MUSYOKA

JUDGE