



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
HIGH COURT CIVIL CASE NO. 81OF 2016

LEONARD KIPNGETICH CHELULE

T/A CHOKA, CHELULE & CO.....PLAINTIFF/RESPONDENT

VERSUS

WILSON KIPKEMBOI KIPKOTI.....1ST DEFENDANT/APPLICANT

JOHN NGATA KARIUKI.....2ND DEFENDANT/APPLICANT

RULING

1. The application dated 9th September, 2016 seeks the following orders.

- “1.This matter be certified as urgent and the same be heard exparte in the first instance.**
- 2. The interlocutory judgment entered against the Defendants and the Decree issued on 26th May, 2016 be set aside.**
- 3. The Defendants be hereby granted leave to file their Defence.**
- 4. The Draft statement of Defence herein be deemed to be properly filed upon leave of this court and payment of requisite court fees.**
- 5. Costs of this Application be provided for.”**

2. According to the supporting affidavit, the Applicants were not served with the summons to enter appearance. It is stated that the Applicants learnt about the suit herein when the 1st Applicant found the Notice of motion dated 1st August, 2016 under his office door. It is contended that the Respondent acted for both the vendors and the purchasers (Applicants herein) in a land sale transaction in respect of land Reference No. KJD/Maihia/1332. That the Respondent therefore violated the principle of Advocate/client confidentiality. The Applicants deny having requested the Respondent to give any professional undertaking in the land sale transaction. That in any event the Respondent could not properly issue any professional undertaking while he was not in funds. It is further stated that the Respondent could not give his professional undertaking to the vendors who were also his clients as professional undertakings are legal instruments entered into between the Advocates. According to the

Applicants, the dispute herein revolves around land and falls within the jurisdiction of the Environment and land court.

3. The application is opposed. The Respondent in his replying affidavit has stated that based on the undertaking in the sale of land transaction, he instituted a suit herein against the Respondent to recover the sum of Kshs.20,600,000/=. It is averred that the Applicants failed to remit the said amount for onward transmission to the sellers of the property. That the Applicants were duly served with the summons to enter appearance together with the plaint. That the 1st Applicant soon after the service called the Respondent in an attempt to enter into negotiations and settle the matter out of court. The Respondent further stated that the subject matter of the suit herein is a debt based on the undertaking he took. The Respondent further stated that one of the parties in the sale transaction sued him and obtained judgment for his share of the money from the sale transaction.

4. The parties canvassed the application by way of written submissions. I have considered the said submissions.

5. On the issue whether this court has jurisdiction to deal with the suit herein, it is noted that the suit revolves around the question of the professional undertaking and the payment of Kshs.20,600,000/= which is pegged on the said professional undertaking. There is no claim in the plaint in respect of the land. Consequently, I hold that the claim falls within the jurisdiction of this court.

6. I have perused the affidavit of service sworn by the court process server, Alex Mukunga Singi on 4th May, 2016. The judgment herein for the sum of Kshs.20,600,000/= was entered on the basis of the said affidavit. The process server has deponed that he knew the Applicants and that he personally served them with the plaint, the supporting documents and summons to enter appearance but that the Applicants declined to sign against the copies. The affidavit of service reflects satisfactory service on the Applicants. The Applicants have however denied that they were served and stated that they would want to have the process server cross- examined. No application was however made for the cross- examination of the process server. There is no denial of the averments made in the replying affidavit and the affidavit of one Abdi Dahir Ahmed that following the service of the summons to enter appearance, the Applicants contacted the Respondent with a view to negotiating an out of court settlement. On a balance of probability, I find that the Applicants were served with the summons to enter appearance.

7. Although one of the prayers in the application seeks orders that the draft defence be deemed to be duly filed, no such defence has been exhibited before this court. Indeed the affidavit in support doesn't mention a draft defence. This court is therefore not in a position to tell if the intended defence raises any triable issues. As stated in the case of **Patel v East Africa Cargo Handling Services Ltd (1974) EA 75** as per Duffus P who held that:

“The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree what where it is a regular judgement as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan, J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

8. The Respondent has exhibited herein the case of **Adan Ali Hassan v Choka Chelule Advocates Milimani Commercial Courts HCCC No.194 of 2014 (OS)**. In the said case, judgment was entered against the Respondent herein on account of the undertaking that is the subject matter of this suit. The Applicants in the case under consideration have not made any comments in respect of the said judgement. Although the Applicants herein are not parties in the said case, the Respondent was found liable to pay part of the money stated in the professional undertaking the subject of this suit.

9. With the foregoing, I find the Application has no merits and dismiss the same with costs.

Dated, signed and delivered at Nairobi this 16th day of March, 2017

B.THURANIRA JADEN

JUDGE