



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 108 OF 2010

DANIELE TERZI

ERICA LUGU.....PLAINTIFFS/RESPONDENTS

=VERSUS=

FRED LWANDE.....DEFENDANT/APPLICANT

R U L I N G

Introduction

1. What is before me is the Defendant's Application dated 30th August, 2013 seeking for the following orders;-

(a) THAT the Ex-parte proceedings of this court on 28th June 2014 and the consequential judgment and decree of this court passed on 31st July 2013 be set aside and the Defendant be granted leave to file his Defence and the case be heard de novo inter partes.

(b) THAT an order of inhibition do issue inhibiting the registration of any dealings on Land Portion No.2740 (Original NO.14/30) Malindi registered in Volume No. LT 21 Folio 622 No.4909 pending the hearing and determination of this case.

(c) THAT the suit property herein being all that house and land portion no.2740 (original No.514/30)Malindi registered in Volume No. LT 21 Folio 622 File No. 4909 and all furnitures and artifacts contained in the said house be restituted to the Defendant pending the hearing and determination of this suit

The Defendant's/Applicant's case

1. The Applicant has deponed that he owned the suit property jointly with his wife. However, when their marriage broke down, his former wife sold the suit property without her consent and he sued her in Malindi HCC No. 72 of 2010. In the said suit, she obtained a court order preserving the status quo in respect to the suit property.
2. It is the Applicant's case that he came to know about the existence of this suit when the summons to Enter Appearance and the Plaint were fixed on the gate of the suit premises on 30th November, 2010 whereupon he instructed the firm of Antony Okuto & Co. Advocates to enter appearance. It

- is the Defendants deposition that all along, he believed that the firm of Antony Okuto had filed the Defence which was not the case.
3. It is the Applicant's contention that he was informed by his then advocate in the year 2012 that the Plaintiff had abandoned the suit. However, he later learnt that what his advocate had told him about the Plaintiff abandoning the suit was not true, then his advocates filed an Application to cease acting for him and that it is a lie that he never gave his advocate instructions to defend the claim.
 4. The Defendant stated further that his former advocate did not serve him with the Application to cease from acting for him; that his house is not situated opposite Stephanie Hotel as indicated in the affidavit of service and that the advertisement in the newspaper for the hearing notice of 27th June 2013 was not prominently displayed.
 5. The Applicant finally deponed that he has a reasonable Defence; that the failure to file the Defence was occasioned by his former advocate on record and that the Judgement and Decree of this Court made on 31st July, 2013 should be set aside and he should be allowed unconditional leave to file his Defence.

Plaintiffs`/Respondents` case

6. The 1st Respondent filed a Replying Affidavit on 24th October 2013 and deponed that the Defendant's advocate withdrew from acting for him for lack of instructions and that the reason of serving the Defendant with a hearing notice by way of substituted service was because he kept the gate permanently locked.
7. It was the Respondent's deposition that the Defendant never filed a defence despite having been served with summons to Enter Appearance and that his advocate was never served with an Application for the stay of this suit as alleged.
8. The parties agreed to file written submissions. The Defendant's/Applicant's advocate filed his submissions on 9th December, 2013 while the Plaintiff/Respondent's advocate filed his submissions on the 11th February 2014. I have considered the submissions and the authorities.

Analysis and findings

9. The Plaintiffs, a husband and wife, commenced this suit by way of a Plaint dated 26th August, 2010.
10. In the Plaint, the Plaintiffs averred that they were the registered proprietors of the land known as number 2740 Malindi together with all the buildings thereon having purchased the same for valuable consideration. The suit against the Defendant was for vacant possession of the suit property.
11. The firm of Antony Okuto & Company Advocates entered appearance for the Defendant on 1st December 2010. However a Defence was never filed.
12. The parties argued the Plaintiff's Application for injunction and on 8th June, 2012, a Ruling was delivered by Omondi J. The court ordered that the existing status quo should be maintained until the matter was heard and determined.
13. The Plaintiff's advocate then filed his list of witnesses and documents and fixed the matter for hearing for 24th February, 2013. On the said date, none of the parties were in court and the matter was stood over generally.
14. The matter was again fixed for hearing on 30th April 2013 on which day the Defendant's advocate informed the court that he had filed an application to cease acting for the Defendant. The Defendant's advocate informed the court that he had not served the Application because he could not trace the Defendant's whereabouts.
15. The Application by the Defendant's advocate was then slated for hearing on 20th April, 2013 on which day the Defendant's advocate stated that he had managed to serve the Defendant with the Application to cease acting. In the Affidavit in support of the Application, the Defendant's advocates stated that ever since the Defendant instructed the law firm, he had made it difficult for the firm to act for him and had persistently neglected to give the firm instructions.

16. The Defendant's advocate process server filed an affidavit of service on 20th May, 2013 and deponed on how he served the Defendant with Application. The process server deponed as follows:-

“THAT from 14th May, 2013 to 16th May, 2013 I have been visiting the residence of the Defendant at Malindi Casuarina opposite Stephanie hotel with the intention to find the Defendant so that I can serve him with the Chamber Summons and not being able to find him I fixed the copies of the Chamber Summons on the outdoor or some other conspicuous part of the house in which the Defendant ordinarily reside or carries on business or personally works for which I retained.....”

17. I was satisfied with the mode of service of the Defendant's advocate Application to cease acting for the Defendant and allowed the Application.
18. On the same day, the Plaintiff's advocate made an oral application to serve the defendant with a hearing notice by way of advertisement in the daily newspaper which Application the court allowed after fixing the matter for hearing on 27th June, 2013.
19. The matter could not be reached on 27th June 2013 although the Defendant was not in court even after being served with a hearing notice by way of advertisement in the Daily nation newspaper of 29th May, 2010. I adjourned the matter to the following day for hearing. On the said day, the matter proceeded for hearing ex-parte.
20. Although this matter was filed in the year 2010, the Defendant or his advocate never filed a Defence by the time the matter proceeded for hearing on 28th June, 2013.
21. The Defendant has not deponed that he was not served with the summons to Enter Appearance. Indeed, the Defendant instructed his advocate to Enter Appearance upon being served with the summons. The Summons were served on the Defendant by affixing them on the gate of the Defendant's residence in Casurina, Malindi.
22. I do not accept the Defendant's contention that it was his advocate who did not file a Defence within the stipulated time although he had instructed him to do so. The Defendant's advocate filed an affidavit stating that the Defendant refused to give the law firm instructions. The suit was against the Defendant and it was incumbent for him to ascertain that a Defence was on record. The events leading to the disqualification of the Defendants counsel shows that the Defendant ignored this matter to the extent that he neglected to give his advocate instructions to file a defence. The Defendant sat pretty immediately he was granted the order of status quo in 2012.
23. Although the Defendant has denied that he was served with the Application by his advocate to cease acting for him, I have noted that the Defendant was served with the Application in the same manner he was served with the Summons in Casurina, Malindi.
24. The Defendant did not call the process server who served for the purposed of cross examining him. Indeed, the process server stated that he knew the Defendant and his place of residence having served him with other documents and should have been cross examined on the contents of his affidavit. In the circumstances, I am convinced that the Defendant was served with his advocate's Application to cease acting for him which he ignored.
25. The Defendant/Applicant has referred this court to another matter being HCCC No.72 of 2010 which involved the same suit property. It was his contention that he had instructed his advocate to stay this particular matter pending the hearing of HCCC NO.72 of 2010, which instructions his advocate did not comply with.
26. The Applicant/Defendant herein is the Plaintiff in HCCC No.72 of 2010. He sued his former wife together with the 1st Plaintiff herein alleging that he had acquired beneficial interest in the suit property notwithstanding that his former wife was the registered owner. The Plaintiff sought for the quashing of the sale of the suit property by his former wife to the 2nd Defendant (the Plaintiff herein).
27. The Applicant/Defendant was represented by the firm of Kamau Kuria & Kiraitu advocates in HCCC No.72 of 2010. Again, the Applicant herein was granted the orders of status quo allowing him to continue staying in the house notwithstanding the fact that his former wife had already sold to the 2nd Defendant (the Plaintiff in this suit) the suit property.
28. After obtaining the order of status quo in the year 2011, the Applicant again did not prosecute his

- suit neither were the two suits consolidated. It was not until 16th May, 2013 that the 1st Defendant's advocate in HCCC No.72 of 2010 moved this court for the purpose of having the matter heard. Although the Plaintiff's advocates were served with the hearing notice of 22nd August 2013, neither the Plaintiff (the Applicant) nor his advocate appeared in court. I dismissed the suit for non-attendance.
29. It cannot therefore be a coincidence that the Applicant has never participated in the hearing of the two suits due to his advocates mistakes or omissions. The chronology of events in the two files shows that the Applicant had no interest in the two suits and he never gave his advocates instructions to proceed with them.
30. For that reason, I am not inclined to exercise my discretion in his favour to set aside the ex-parte proceedings and Judgement in this matter. The Defendant's/Applicant's conduct are of a person who had deliberately sought to delay justice **(See Shah vs Mobogo (1967)EA116).**
31. Even if I was to exercise my discretion in his favour, I am required to ascertain if indeed the Applicant's Defence raises triable issues **(See Tree Shede Motors Limited vs D.T.Dobie & Another(1995-1998) EA317).**
32. The Defendant/Applicant annexed on his Application the certificate of Postal Search as on 16th July 2010 which shows that the suit property was registered in the name Mirjam Sorbi, his alleged wife. I say alleged wife because in the Defence by the said Mirjam Sorbi in HCCC NO. 72 of 2010, Ms Sorbi averred that she was never married to the Applicant.
33. In his draft defence and counter-claim, the Applicant has stated that he did not consent to the sale of his interest in the suit property to the Plaintiffs and that Mrs. Sorbi who sold the property to the Plaintiffs held the suit property in "trust" for the Defendant and could therefore not transact on the suit property without the consent of the Defendant.
34. The concept of constructive trust may be used to defeat the claim of a title holder. However, the Applicant has not annexed any document to show that he was ever married to Ms Sorbi or that he substantially contributed to the purchase of the suit property. In view of the fact that the suit property was registered in the name of Ms Sorbi who sold it to the Plaintiffs herein, I find and hold that the Defendant's/Applicant's Defence and counter claim does not raise any triable issue.
35. In the circumstances and for the reasons I have given above, I dismiss the Applicant's Application dated 30th August, 2013 with costs.

Dated and Delivered in Malindi this 14th Day of **March 2014**

O. A. Angote

Judge