



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL CASE NO. 497 OF 2013

PENELOPE WINTER.....PLAINTIFF

VERSUS

DUCHESS PARK LIMITED.....FIRST DEFENDANT

VILLA CARE LIMITED.....SECOND DEFENDANT

RULING

By an application dated the 1st April 2014 the 2nd defendant applicant seeks to have the interlocutory judgment entered against it on the 21st of March 2014 set aside together with all consequential orders.

It also seeks to have the defense filed on the 25th February 2014 to be deemed as properly filed. The application is brought under Order 7 Order 10 Rule (6) and 11 and Order 51 rule 10 of the Civil Procedure Act 2010 section 1A, 3A of the Civil Procedure Rule. It is premised on 4 grounds on the face of the application and is supported by the affidavit of Mr. Daniel Ojijo one of the directors of the 2nd defendant company.

The application was opposed. The plaintiff/respondent filed a replying affidavit sworn by Mr. Mohammed Murtaza Sevany counsel who is in the conduct of the suit.

I have read the said affidavits. There is no dispute that the plaintiff filed suit on the 26/11/13. The applicant does not dispute service. The applicant states it was served sometimes in February 2014 and that on the 25th February 2014 they filed a memorandum of appearance and a defense on the same date. As submitted and averred by Mr. Sevany there are 2 Memorandum of Appearance filed on the 25/2/2014 dated 20/2/14. The firm of M/s Kamau Muthoni Advocates filed both on behalf of the 1st and 2nd defendants on the 25/2/2014. There is however no difference filed on record. The applicant has annexed a defense filed in court on the 25/2/2014. The applicant avers that when they filed the defense they did not immediately serve it on the Respondent as they were awaiting instructions from the 1st defendant who is in charge of the project. It is averred that there is a possibility that the defense was titled differently and that it might have ended upon on wrong file. I note that the annexed defense does not bear a different title but bears a court stamp of 25/2/2014 which has been challenged by the Respondent's Counsel as not being the same as the one in the memorandum of appearance filed on the 25/2/14.

The applicant states that the failure to filed defense was not anything of their doing since they field the defense as required under the Civil Procedure Rule 2010. The applicant avers further that the plaintiff is bound by the letter of offer that she signed and that the project has already stated and the house, are near

completion which fact the plaintiff has failed to disclose. That they therefore seek leave to serve the defense out of time as it has triable issues and that the interlocutory judgment be set aside. The applicant avers that the plaintiff shall not be prejudiced if the said judgment is set aside.

In the replying affidavit the respondent states that Mr. Daniel Ojijo is not a legal practitioner and cannot vouch or state the matters deponed as being from his personal knowledge; that the said Mr. Ojijo has not disclosed the source of information regarding the filing of appearance and purported defense and that his affidavit offends Order 19 Rule 3 of the Civil Procedure Act. Counsel stated that before the plaintiff sought to have entered judgment against the 2nd defendant set aside he did a search on the file and noted that there were memorandum of appearances dated 25/2/14 filed by Mr. Kamau Muthoni Advocates on the 25/2/2014. That having confirmed that there was no defense the plaintiff requested for interlocutory judgment. Counsel pointed out that the stamp on the defense is totally different from the 2 stamps on the memorandum of appearance and that during his search it was revealed the sum of Kshs.150/- paid by the firm of Mr. Kamau Muthoni Advocates was for payment of the 2 memorandum of appearance and there is no receipt for the defense; that no such receipt has been annexed by the applicant.

The respondent deponed further that the applicants have not explained why they did not serve the defense with the prescribed time and they are in contravention of order 6 rule 2 (3) Order 7 Rule (1) and Order 10 (3) of the Civil Procedure Rule. On the purported defense file it is averred that it has no merit and that the issue of the presence of triable issues is not sufficient ground to set aside the interlocutory judgment entered in the suit and that the 2nd defendant applicant is guilty of failing to state the true and complete facts and the reasons justifying setting aside of the interlocutory judgment.

It further averred that the 2 appearances and defenses purportedly filed on the 25/2/2014 are both defective and ought to be struck out as they do not meet the requirement of the Civil Procedure Rule 2010; that the purported defense is a sham, frivolous and designed to delay the plaintiff fruit of her judgment. The applicant filed a supplementary affidavit in response for the replying affidavit.

At the hearing of this application counsels reiterated the contents of the affidavit. Mr. Ndolo stated further that in the supplementary affidavit filed in court on the 5/6/14 Mr. Ojijo has disclosed his source of information as Muthoni Kamau who is an in house counsel with the company and that a defense was filed on the 25/2/2014 and a receipt No 5901047 issued by the registry.

Mr. Sevany challenged the memorandum of appearance and purported defense; he drew the courts attentions to the fact that the appearance had the words Environment and Land Division cancelled yet in the purported defense filed on the same day ELC is not cancelled. He also urged the court to look at the 2 stamps; that the stamp in the memorandum of appearance read "High Court of Nairobi" and the one in the printed defense reads High Court of Kenya Central Registry and that the defense cannot be filed if the witness's statements and the list of documents/exhibit is not attached. He also drew the court's attention in the serial numbers of the 2 receipts from the memorandum of appearance and defense; that one is No. 59010104 and the one for the defense is 5901047 which is 3 receipts later and that the defense filed on the 25/2/2014 only referred to one defendant all through and not 2 defendants. On the issue of contract raised counsel referred to section 2 of the Law of contract Act that states that a contract is only enforceable if it is signed by both parties and that what they have is a letter of offer. Counsel submitted that the defendants have been lax in the matter that here are no triable issues and that the defendants have taken their money and they have not been given the flat. In reply Mr. Ndolo stated that on the issue of misrepresentation they filed a notice of change on the 1/4/14, that Order 11 does not go into the issues of filing and that the plaintiff is bound by the letter of offer they signed.

I have considered all that is deponed in the affidavits. I have also perused the court file and I note the following, there are 2 memorandum of appearance filed on the 25/2/2014 by the firm of Kamau Muthoni dated 20/2/2014. The words "Environment and Land Division" are cancelled. These words are not cancelled in the purported defense. I also note that the receipts of the 2 memorandum of appearance filed on the 25/2/14 bears serial no. 5901044 and the attached to the supplementary affidavit bears receipt No.5901047 and is for Kshs. 150/-. My query is if the documents were filed the same day why were 2 different receipts issued. I also note that the 2 stamps bear different inscriptions as pointed out by Mr.

Sevany. Did the defendants really file on defense as alleged? There was no affidavit from any of the officers in the court registry to support what the applicant's avers that they filed the defense and that it could have been misplaced in another file. From my observation it could be that they were filed in a different file as the title of the pleadings bear the heading ELC. Although this court has been urged to reject the defendant's application I note that there could have been a defense filed, the careless acts of filing and heading of the pleadings in this matter can only be attributed to the former counsel on record M/s Kamau Muthoni. I note that there was a notice of change of advocates filed by the firm of M'Limbiine & Mungai Company Advocates on the 1/4/14. The issue of the stamps could have been clarified by having an officer of the court depone an affidavit to state whether the stamp were fake or real. In the absence of this I will give the applicant the benefit of doubt. On the issue of whether defense has triable issue. There is an issue raised whether the deposit can be refunded. I will therefore give the 2nd defendant a chance to be heard. I set aside the interlocutory judgment entered against the 2nd defendant/applicant on the 21/3/14 together with all consequential orders. However I do so on condition that the 2nd defendant/applicants deposits the sum of Kshs. 3.4 Million in a joint account bank account to be agreed by the parties within the next 30 days in default the defense shall be struck off. The defense filed on the 25/2/14 shall be deemed to be properly filed. The applicant shall serve the said defense on the respondent within 14 days from the dates of the ruling. Costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 3rd Day of **November 2014**.

R. E OUGO

JUDGE

In the presence of:

.....**Plaintiff/ Respondent**

.....**1st Defendant**

.....**2nd Defendant/ Applicant**