



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ELC NO. 312 OF 2014**

**JAM.....PLAINTIFF**

**VERSUS**

**BOS.....DEFENDANT**

**RULING**

1. By a Notice of Motion dated 24<sup>th</sup> May 2018 made pursuant to Sections 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act, Order 36 Rule 1(b) and Order 1 Rule 13 of the Civil Procedure Rules, the Plaintiff/Applicant seeks orders:

**a. Spent**

**b. That summary judgment be entered for the plaintiff as prayed for in the plaint; or in the alternative and without prejudice the defence and counter-claim herein dated 12<sup>th</sup> January 2015 be struck out as a matter of course.**

**c. That the court do grant any relief(s) it deems necessary and expedient to meet the ends of justice.**

**d. That costs of the application be provided for.**

2. The application is premised on the grounds on the face of the motion namely;

**i.** That there is no defence and counter (sic) worth the taste and the one filed is a sham.

**ii.** That there is no substratum of the suit as the same is divested from the parties and vested in a third party who is not party to the proceedings.

**iii.** That the consent purportedly entered by the parties has since been set aside by this Honourable Court.

**iv.** That the defendant is acting in a contemptuous manner to the orders of the court made on 10<sup>th</sup> March, 2016 by Lady Justice Omollo.

**v.** That during the defendant's tenure, she squandered all the opportunities by non-payment of rates water and all electrical power supplied till now they remain outstanding.

**vi.** That the delay in making this application is not inordinate in the circumstances.

3. The application is supported by the affidavit of JMA, the applicant sworn on 24<sup>th</sup> May, 2018. The Applicant avers that on 7<sup>th</sup> May 2018 this court made a ruling setting aside a purported consent order ostensibly made between the applicant's erstwhile counsel Mr. Peter Omwenga and the defendant's counsel Mr. Yusuf Abubakar. The Applicant depones that he had purchased a property known as **MSA/KILIMANJRO/[xx]** while he was working in Saudi Arabia and his wife, the defendant was resident within the local jurisdiction and due to the applicant's absence, the said property was registered by her in their joint names. That there was acrimony between them culminating in the defendant filing divorce proceedings before the Kadhi's court culminating in grant of divorce absolute. That the defendant then executed a consent where she transferred her share in **MSA/KILIMANJARO/[xx]** to the applicant alive to Muslim tradition of separate regime of property and that the matter rested there.

4. The applicant further depones that the defendant changed her mind regarding the transfer to the applicant. As a consequence, the applicant filed the present proceedings and the defendant filed a defence and counter-claim which are on record.

5. The applicant states that on 15<sup>th</sup> May 2015 he was arrested at the instigation of his counsel and the defendant and charged with forgery and making false document in Shanzu PMC Criminal Case No.544 of 2015. That the defendant did not show up to testify and the applicant was acquitted. The applicant states that the court had made orders of maintaining rental income in a joint account but the defendant was adamant. The applicant further states that the defendant has no right of audience until she purges the contempt.

6. It is the applicant's contention that the defence and counter-claim have no merit and the same is sham merely calculated to keep all and sundry busy and in abeyance indefinitely. The applicant states that strangely he has learnt that the property known as MSA/KILIMANJARO/[xx] has changed hands to a third party through acts attributed to the defendant. That even then, there is no provision for joint ownership of property between husband and wife in the Islamic world to which both parties subscribe to, and that her chauvinism is concern with Victorian practices which are not applicable in Kenya today.

7. The applicant has annexed copies of the ruling dated 7<sup>th</sup> May 2018, Title Deed for TITLE NUMBER MOMBASA/KILIMANJARO/[xx] in the name of HMS, Judgment in Kadhi's Court Mombasa Civil Case No.95 of 2012, consent in which the defendant allegedly transferred the suit property to the applicant, proceedings in Criminal Case No.544 of 2015 and Order dated 15<sup>th</sup> April 2016.

8. The defendant did not file any response to the application.

9. I have considered the application and the submissions made. It is my considered view that the sole issue for determination is whether on the facts and circumstances of this case the court should enter summary judgment in favour of the plaintiff against the defendant.

10. Article 159 (2)(c) of the Constitution provides that in the exercise of judicial authority, the courts shall ensure that justice is administered without undue delay. In addition, under Section 63(e) of the Civil Procedure Act, the Court may, in order to prevent the ends of justice from being defeated make such interlocutory orders as may appear to the court to be just and convenient. Further, Sections 1A and 1B of the Civil Procedure Act too oblige the court to ensure just, fair, proportionate and expeditious administration of justice to the parties before it.

11. The procedural law under Order 36 Rule 1 of the Civil Procedure Rules on summary judgment provides that:

1. "In all suits where a plaintiff seeks judgment for-

a. A liquidated demand with or without interest; or

b. The recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by Notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for amount claimed, or for recovery of the land and rent or mesne profits"

12. In the case of **ICDC –V- DABER ENTERPRISES LTD (2000) 1 EA75**, the court of Appeal stated that:

*"The purpose of the proceedings in an application for summary judgment is to enable the plaintiff to obtain a quick judgment where there is plainly no defence to the claim. To justify summary judgment, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where if necessary, there has been discovery and oral evidence subject to cross examination. "*

13. In **Dhanjal Investments Ltd –V- Shabaha Investments Ltd, Civil Appeal No.232 of 1997**, the Court of Appeal stated as follows regarding summary judgment:

*"The law on summary judgment procedure has been settled for many years now. It was held as early as in 1952 in the case of Kandlal Restaurant –v- Devshi & Company (1952) EACA 77 and followed by the Court of Appeal for Eastern Africa in the case of Souza Figuerido & Company Ltd –v- Mooring Hotel Ltd (1959) EA 425 that, if the defendant shows a bona fide triable issue, he must be allowed to defend without condition...."*

14. Regarding what constitutes triable issues, in **Kenya Trade Combine Ltd –v- Shah Civil Appeal No.193 of 1999**, the Court of Appeal stated as follows:

*"In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issue which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed."*

15. From the above decisions, it is clear that where there are no triable issues disclosed, the court cannot sustain a defence on record.

16. In the instant case it is not disputed that the defendant has filed a defence. As a matter of fact, the defendant has also filed a counter-claim. In that defence and counter claim the defendant accused the plaintiff of fraud. The defendant has denied signing the alleged sale agreement and accuses the plaintiff of forging her signature in both the sale agreement dated 30<sup>th</sup> July 2008 and the transfer dated 1<sup>st</sup> August 2008.

17. In my humble view, these are triable issues. From the foregoing, I hold the view that the court cannot grant summary judgment to the plaintiff. I am satisfied that there are triable issues which need to be determined by the court at a full trial. In my view, the defendant should be given the opportunity to defend the suit. Entering summary judgment against the defendant when the defence and counter-claim filed

raises triable issues will have the effect of striking out the defence and counter-claim as filed and therefore ousting the defendant from the judgment seat, contrary to the constitutional imperatives on the right to access to justice as contemplated in Article 48 of the Constitution and as a result deny her right to a fair hearing under Article 50 (1) of the Constitution and which right cannot be limited by dint of Article 25 of the Constitution, particularly when it is clearly established that the dispute herein can be determined by application of the law.

**18.** In the end, I find no merit in the application dated 24<sup>th</sup> May 2018 and proceed to dismiss it. As the defendant did not file any response, I order that each party bear their own costs.

**DATED, SIGNED and DELIVERED at MOMBASA this 14<sup>th</sup> day of February 2019.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

No appearance for both parties

Yumna Court Assistant

**C.K. YANO**

**JUDGE**

**14/2/19**