



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 500 OF 2014

ANNE WANJIKU GATHONI ALIAS ANNE

WANJIKU LIDONDE.....PLAINTIFF/RESPONDENT

VERSUS

MONICA MWIKALI MWANZIA.....DEFENDANT/APPLICANT

RULING

1. This is the Notice of Motion dated 21st April 2017 brought under Section 1,1A, 1B and 3A of the Civil Procedure Act Cap 21. Laws of Kenya, Order 10 Rule 10, Order 51 rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the law.

2. It seeks orders

(1) Spent

(2) Spent

(3) That this honorable court be pleased to set aside the interlocutory judgment entered by the Deputy Registrar on 23rd September 2015 and consequently, the defendant be granted leave to file and serve the defence and counterclaim annexed hereto.

(4) Any other orders and/or directions as this honourable court deems fit and just to grant.

(5) That the costs of this application be in the cause.

3. The grounds are on the face of the application and are set out in paragraphs 1 to 8.

4. The application is supported by the affidavit of Monica Mwikali Mwanzia, the defendant/applicant herein sworn on the 21st April 2017.

5. The application is opposed. There is a replying affidavit sworn by Anne Wanjiku Gathoni alias Anne Wanjiku Lidonde the plaintiff/respondent herein sworn in the 11th May 2017.

6. On the 19th July 2017 the court directed that the Notice of Motion be canvassed by way of written submissions.

The defendants/applicants submissions

7. It is not in dispute that the applicant and the respondent entered into a sale agreement for the sale of the suit property namely LR NO. Ngong/Ngong/21441. By an agreement dated 17th January 2014. He parties entered into a new sale agreement for the sale of the same subject matter. The new agreement provide that are entire purchase price was to be paid on an before the completion date in exchange for the completion documents. The plaintiff/respondent willfully failed and/or neglected to hand over the documents to the defendant/applicant to warrant the payment of the balance of Kshs 4,500,000.

8. The defendant/applicant has a good tenable defence and counter claim with very high chances of success. She stands to suffer irreparable harm if the interlocutory judgment is not set aside. The defendant/applicant has been in possession of the suit property upon payment of the deposit. The plaintiff/respondent breached the sale agreement by failing to avail the completion documents as provided for in the sale

agreement.

9. The plaintiff/respondent did not make a liquidated demand and/or together with any other claim. Therefore the cause of action did not warrant the grant of interlocutory judgment as provided from the Civil Procedure Rules. They have put forward the case of **Meir vs Nairobi City Council & Others Milimani HCC Commercial Case No. 131 of 2003** quoted with the approval in the case of **W. M. Muiruri w/a Senior Deputy Registrar High Court of Kenya vs V.O.P Ngonge t/a O.P Ngoge & Associates Advocate [2008] eKLR; Mint Holdings Ltd & Another vs Trust Bank Ltd [2000] eKLR.**

10. The interlocutory judgment was irregular and the court ought to set it aside *ex justitiae debito* and on its own motion. They have also put forward the cases of **Unilever Kenya Ltd vs Procter & Gamble International Operations SA & Procter & Another [2015] eKLR; Robertson Insurance Brokers Ltd vs Kipnetich K. Bett & Another [2003] eKLR.** Formal proof proceedings follow where a regular or valid interlocutory judgment has been entered under Order 10 rule 4(2) and 6 of the Civil Procedure Rules. She prays that the interlocutory judgment be set aside and she be given a chance to present her defence and counterclaim.

The Plaintiff's/Respondent's Submissions

11. The interlocutory judgment is not irregular and should not be set aside. Nothing lawful or reasonable has been provided by the defendant/applicant to warrant the setting aside of the interlocutory judgment. The defendant/applicant has taken three years to put in her defence. The defendant/applicant failed to pay the balance of the purchase price before the completion dated as per the agreement. The plaintiff/respondent had no choice but to rescind the agreement through a letter dated 28th October 2013 and refunded the deposit to the defendant. The defendant/respondent has refused to vacate the suit property which she moved to occupy after service of the court orders on 26th April 2014. She has put forward the cases of **Sagoo vs Dourado [1983] KLR 365-366; William Kazungu Karisa vs Cosmas Angore Chanjera [2006] e KLR at page 3.**

12. The defence is a sham and does not rise triable issues as the plaintiff/respondent owes the defendant/applicant nothing. The application has been brought after along delay. She has also put forward the case of **Gurdev Singh Birdi & Marinder Singh Gatora & Others vs Abubakar Madhbuti CA Civil Appeal No 65 of 1996** and **National Bank of Kenya Limited vs Pipeplastic Samkolit (K) Limited & Another [2002] 2 EA 503.** She prays the application be dismissed with costs.

13. I have considered the notice of motion, the affidavit in support and the annexures. I have also considered the replying affidavit, the annexures, the written submissions of counsel and the authorities cited. The issues for determination are:-

(i) Whether the plaintiff/respondent's cause of action warrants the grant of interlocutory judgment.

(ii) Whether the Deputy Registrar had jurisdiction to enter interlocutory judgment against the defendant/applicant herein.

14. I have gone through the court record. By a plaint dated 24th April 2014 the plaintiff prays for judgment against the defendant for:-

“(a) Kenya shillings six hundred and fifty thousand (Kshs 650,000) being ten percent 10% as liquidated damages due to the plaintiff for the defendant's default.

(b) Declaration that the plaintiff is the legal owner of the suit property being Ngong/Ngong/21441.

(c) Permanent injunction against the defendants restraining them from entering, trespassing, residing, cultivating and/or dealing in any way with the plaintiff's said suit property.

(d) Eviction order against the defendant's evicting her, her husband/representative Mr. Mwanzia Musyoka their servants, agents and/or employees from the plaintiff's suit property.

(e) Damages for trespass and destruction of the plaintiff's property.

(f) Costs and interest of this suit.

(g) Such other or further relief as this honourable court may deem fit to grant.”

15. Order 10 rule 4(2) of the Civil Procedure Rules 2010 provides that;

“Where the plaintiff makes a liquidated demand together with some other claim and the defendant fails or all defendants fail to appear as aforesaid the court shall on request in form no. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub rule (1) but the award of costs shall await judgment upon such other claim”.

Under Order 10 rule 4(6) of the Civil Procedure Rules 2010 the plaintiff is required to set down the suit for assessment by court, of the damages or the value of the goods and damages as the case may be. From the above provisions it is clear that this was not a claim where interlocutory judgment could be entered. The plaintiff/respondent in her application dated 9th May 2014 sought declaratory orders and injunctive reliefs. I rely on the cited case of **Meir vs Nairobi City Council & Others Milimani HCCC Commercial Case No131 of 2003** quoted with the approval in the case of **W. M. Muiruri w/a Senior Deputy Registrar High Court of Kenya vs V.O.P Ngonge t/a O.P Ngoge & Associates Advocate [2008] Eklr** where Justice Waweru held:-

“The plaint in the present suit does not make a liquidated demand only. It does not make a liquidated demand together with some other claim. The plaint is not drawn with a claim for pecuniary damages only/or for the detention of goods with or without a claim for pecuniary damages. It is therefore as plain as daylight that interlocutory judgment was not available and nor should it have been entered by the Deputy Registrar”.

It was also held in **Mint Holding Limited & Another vs Trust Bank Ltd [2000] Eklr** that :-

“The orders sought by the appellants in their plaint did not entitle them to an interlocutory judgment in any event. As pointed out, there was no liquidated demand. Judgment could only have been entered upon formal proof. The entry of such an interlocutory was irregular under Order IX A (now order 10) of the Civil Procedure Rules does not cater for the entering of interlocutory judgment when the nature of reliefs sought require formal proof”.

16. Under Order 10 Rule 11 of the Civil procedure Rules the court has desecration to set aside and/or vary a default judgment upon such terms as it deems just and fair.

17. Article 50 (1) of the Constitution guarantees every person a right to be heard. I find that the defendant/applicant deserves a chance to prosecute her defence. I have seen the draft defence and counter claim and find that the same raises triable issues. The plaintiff/respondent and the defendant/applicant entered into a new sale agreement dated 17th January 2014.

18. There is no doubt that the defendant/applicant is in occupation of the suit property. I have considered the circumstances prevailing herein and I find that the deputy registrar had no jurisdiction to enter an interlocutory judgment against the defendant/applicant herein.

19. In conclusion, I find merit in this application and I grant the orders sought namely;-

(a) That the interlocutory judgment entered by the Deputy Registrar on 23rd September 2015 be and is hereby set aside.

(b) Consequently, the defendant is hereby granted leave to file and serve the defence and counterclaim annexed hereto within twenty one (21) days from the date hereof with corresponding leave to the plaintiff to file and serve a reply to defence and counterclaim if need be.

(c) That costs of this application be borne by the defendant/applicant.

It is so ordered.

Dated, signed and delivered in Nairobi on this 25TH day of MARCH 2019.

L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the Defendant

.....Court Assistant