



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 804 OF 2017**

**(Formerly Milimani ELC No. 1402 of 2016)**

**DANIEL TUMBES OLONAPA.....PLAINTIFF**

**VERSUS**

**BRITON(K) LTD.....1<sup>ST</sup> DEFENDANT**

**HASSAN AHAMED MAHAMUD.....2<sup>ND</sup> DEFENDANT**

**ARALE HASSAN AHAMED.....3<sup>RD</sup> DEFENDANT**

**RULING**

What is before Court for determination is the Plaintiff's application dated the 6<sup>th</sup> August, 2018 brought pursuant to Order 10 rule 4 (1), (2), Order 10 rule 10 of the Civil Procedure Rules, Sections 1A, 1B, 3, 3A and 25(b) of the Civil Procedure Act and all other enabling provisions of the law. The Plaintiff seeks the following orders:

1. That this Honourable Court be pleased to enter Judgement in favour of Plaintiff in default of Defence.
2. That the costs of this Application be in the cause.

The application is premised on the summarized grounds that the Plaintiff instituted this suit by filing a Plaint on the 14<sup>th</sup> November, 2016. On 22<sup>nd</sup> May, 2017, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants entered appearance in the matter through messrs Kinyanjui & Njau Advocates and filed a Notice of Appointment of Advocates on 24<sup>th</sup> May, 2017. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have refused and or neglected to file a Defence in this matter despite proper service being effected to all of them. The Plaintiff has made out a clear, unambiguous, unequivocal and plain case of admission of facts by the 1<sup>st</sup> Defendant through its replying affidavit and written submissions filed in court on the 26<sup>th</sup> November, 2016 where it expressly admitted as well as accepted owing the Plaintiff Kenya Shillings Eighty Nine Million and Eighty Thousand (Kshs. 89, 080, 000).

The application is supported by the affidavit of the Plaintiff DANIEL TUMBES OLONAPA where he reiterates his claim above and confirms he was legally registered proprietor of former land parcel number Kajiado/ Loodariak/ 4453 and that on 22<sup>nd</sup> January, 2015, he entered into a Sale Agreement with the 1<sup>st</sup> Defendant for the sale of the said parcel of land at an agreed purchase price of Kshs. 90,000,000. He contends that on 26<sup>th</sup> May, 2017, service of summons to enter appearance were effected upon messrs. Kinyanjui & Njau Advocates who were served on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. He reiterates that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants vide their replying affidavit and written submissions have admitted to the facts of the Plaintiff's claim which the court should take into account.

I note the Defendants failed to file a response to oppose the application despite being granted leave of 21 days on the 25<sup>th</sup> October, 2018, to do so.

The Applicant proceeded to file his submissions that I have considered.

**Analysis and Determination**

Upon consideration of the application dated the 6<sup>th</sup> August, 2018, the supporting affidavit, submissions as well as the pleadings filed by the Defendants herein, the only issue for determination is whether judgement should be entered in favour of Plaintiff in default of Defence.

It is the Plaintiff's contention that the Defendants despite being duly served with summons to enter appearance have failed to file a Defence

within the requisite period and hence judgment should be entered in default of Defence.

Order 7, rule 1 of the Civil Procedure Rules provide that: **'Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.'**

In the current scenario the Court takes judicial notice of the fact that the Defendants were duly served with summons to enter appearance through their advocates messrs Kinyanjui Njau Advocates on 26<sup>th</sup> May, 2017 but to date they have never filed a Defence and have neither divulged the reasons as to their failure to do so.

Further Order 10 rule 9 of the Civil Procedure Rules provides as follows: **' Subject to rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing.'**

Order 10 rule 10 of the Civil Procedure Rules further provides that **'The provisions of rules 4 to 9 inclusive shall apply with any necessary modification where any defendant has failed to file a defence.'**

From the Plaint, the Plaintiff prays for judgement to be entered against the Defendants for:

1. An order of permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants by themselves or their agents and/ or servants from subdividing, alienating, transferring and or interfering or in any way dealing with the resultant subdivisions arising from Land Reference No. Kajiado/ Loodariak/ 4453.
2. An order for cancellation and/ or revocation of Certificate of Title for Land Reference No. Kajiado/ Loodariak/ 4453.
3. In the alternative and without prejudice to the foregoing, an order of Specific performance directing the 1<sup>st</sup> Defendant to pay the entire purchase price as stipulated in clause 1 of sale agreement dated 25<sup>th</sup> January, 2015.
4. Costs and interest from the date of filing the suit at court rates.
5. Any other order the court may deem fit.

I note the Defendants filed a replying affidavit and submissions to the Plaintiff's application dated the 14<sup>th</sup> November, 2016. Through the affidavit of one NICHOLAS SANKOK TEEKA, a Director to the 1<sup>st</sup> Defendant, he confirmed entering into a Sale Agreement dated the 21<sup>st</sup> January, 2015 and that out of the purchase price of Kshs. 90 million, the 1<sup>st</sup> Defendant paid Kshs. 920,000. He claimed the 1<sup>st</sup> Defendant was unable to sell the plots which were a subdivision of the suit land and moved to sell a portion of the land to the 2<sup>nd</sup> Defendant. From the prayers sought in the Plaint there was no claim for the liquidated sum except for an alternative prayer for payment of entire purchase price. I note despite granting the Defendants' leave to file a response to oppose the application they never did so, hence the Plaintiff's averments remain uncontroverted.

From the Sale Agreement, at Clause 12 which is the Default Clause, it states as follows: **' .....Should the purchaser fail to complete this transaction after execution of this Agreement by the parties hereto then the Vendor will give a Twenty One (21) days completion notice requiring the Purchaser to complete this transaction and should he fail to do so he will then forfeit 10% of the deposit of the purchase price herein and upon such refund the Parties Advocates shall upon demand return of Title and other completion documents to the Vendor in the same good condition they were in, when received and should the registration of any document or instrument be registered against the title, the Parties advocate shall procure the cancellation of the registration of the said documents (s) such that the Vendor Title reverts to the original position it was in when received in the Parties Advocates offices. '**

Insofar as the Defendants failed to file their Defence, I opine that this is a claim for unliquidated damages and since it is a land matter, it is essential for the same to be set down for hearing on its merits. I will allow the instant application and enter interlocutory judgement in default of Defence but direct that the matter be set down for formal proof.

The costs of the application is awarded to the Plaintiff.

**Dated signed and delivered in open court at Kajiado this 14th day of March, 2019**

**CHRISTINE OCHIENG**

**JUDGE**