



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 642 OF 2017

CHIRCHIR ARAP KUTO.....PLAINTIFF

VERSUS

NANCY CHEROTICH KOECH.....1ST DEFENDANT

KINYUA KOECH LIMITED.....2ND DEFENDANT

RULING

This suit was initially filed at the Milimani Commercial Courts as **HCCC No. 176 of 2015** and was later transferred to this court. Through the Plaintiff dated 9/4/2015, the Plaintiff sought judgement against the Defendants jointly or severally for a refund of monies he paid towards the purchase of the property known as plot G on L.R No.13875, damages for breach of contract or in the alternative, an order for specific performance of the contract dated 21/2/2000 together with the costs of the suit. The 1st Defendant neither entered appearance nor filed a defence. The 2nd Defendant entered appearance and filed its defence dated 18/5/2015.

Following the 1st Defendant's failure to enter appearance, the Plaintiff requested the court to enter interlocutory judgement against the 1st Defendant under Order 10 Rule 4(2) and 5 of the Civil Procedure Rules. The court entered interlocutory judgement for the Plaintiff. The case was heard by F. Tuiyott J. on 15/6/2017 when it proceeded for formal proof. Tuiyott J. transferred the case to this court on 21/9/2017. The case came up for mention before this court on 15/3/2018 when the 1st Defendant appeared in person and informed the court that she needed time to instruct an advocate. She filed the application dated 20/6/2018 seeking to set aside the interlocutory judgement and all subsequent orders and proceedings made in the suit, and leave to defend the suit.

The application is based on the grounds that the 1st Defendant was never served with summons to enter appearance and was therefore condemned unheard yet she has a good defence which raises serious arguable points of law and facts. The application was supported by the 1st Defendant's affidavit sworn on 20/6/2018. She deponed that sometime in March 2018 she received a notice from the court requiring her to attend court on 15/3/2018 for the mention of this suit. She attended court and requested the court to give her time to engage legal counsel. She attached a copy of the mention notice. She further averred that it came to her attention then that interlocutory judgement had been entered against her in default of appearance on the strength of one Juma Danga's affidavit of service who deponed that he served her through a house servant who was not identified by name. She annexed a copy of the said affidavit. She also deponed that she had a good defence and annexed a copy of her draft defence.

The application was opposed by the Plaintiff through the Grounds of opposition dated 3/7/2018. The Plaintiff contended that the court was satisfied that proper service had been effected on the 1st Defendant when it entered interlocutory judgement and so the issue of due service was settled and cannot now be used as a ground to set aside the interlocutory judgement. The Plaintiff also urged that the application is an abuse of the court process as it was brought after long and inordinate delay. He also argued that the 2nd Defendant had admitted being the 1st Defendant's agent at paragraph 4 of its director's witness statement dated 18/5/2015 hence the 1st Defendant was therefore served through her agent.

The Plaintiff's advocate informed the court on 27/6/2018 that the Plaintiff withdrew the case against the 2nd Defendant.

The court has considered the application, grounds of objection, affidavit, annexures and submissions filed by the parties. The main issue for determination revolves around whether summons to enter appearance were properly served on the 1st Defendant. Since the 1st Defendant disputed service, the sure way to test the veracity of the averments of the affidavit of service sworn on 8/9/2015 was to cross examine the process server, which the 1st Defendant failed to pursue despite indicating at paragraph 11 of her supporting affidavit that she would do so.

The court has looked at the affidavit of service of Juma Danga sworn on 8/9/2015 and confirmed that the process server did not identify the lady servant whom he served at the 1st Defendant's residence. The process server states at Paragraphs 5 and 6 of his affidavit that the lady had no authority to give out the 1st Defendant's telephone number or details of her whereabouts.

The 1st Defendant also faulted the process server for making only two attempts to serve her and not many attempts. The process server stated in the affidavit that the 1st Defendant's house was pointed out to him by the Plaintiff's agent and describes the address of the 1st Defendant at great length including the colour of her gate. The court notes that the 1st Defendant does not deny that that was her physical address. Further, the lady stated to have been served confirmed to the process server that she worked for the 1st Defendant. The 1st Defendant relied on the case of **National Bank of Kenya v Peter Oloo Aringo [2004] eKLR** on the prerequisites for valid service. Looking at the affidavit of service Juma Danga sworn on 8/9/2015, the court is satisfied that the prerequisites for good service were met and proper service was effected on the 1st Defendant. It was not practicable for service to be made on the 1st Defendant in person.

The other issue the court needs to consider in an application to set aside judgement is whether the Defendant has a good defence that raises triable issues. The court has looked at the 1st Defendant's draft defence and the Plaintiff's documents. The 1st Defendant avers in her draft defence that she neither offered to sell the suit land to the Plaintiff nor did she enter into a formal agreement for sale with him. She stated that if the 2nd Defendant who was her agent did so, then it was without her authority. She contended that she only offered to sell two plots to Peter Kiplangat Kogo and that she repudiated that contract and refunded the sum of Kshs. 4 Million he had paid.

The court notes from the Plaintiff's documents that the 1st Defendant wrote to the Plaintiff on 24/12/2002 seeking Kshs. 60,000/= as part payment of L.R. No. 13875 Karen plot and copied the letter to her lawyers M/s Makhandia and Makhandia Advocates. She also wrote to the Plaintiff on 17/10/2003 thanking him for part payment of Kshs. 100,000/= for plot Karen LR 13875 Karen Plains. There are various letters written by M/s Makhandia and Makhandia Advocates to the Plaintiff regarding payment of the consideration for the Karen plot as well as receipts issued by this firm to the Plaintiff acknowledging payments he made. There are several handwritten acknowledgements of payment by the 1st Defendant.

The 1st Defendant mentions in her draft defence that the Plaintiff attempted to trespass onto her land and was resisted, which contradicts fact that the 2nd Defendant mentioned in its letter of 29/11/2001 addressed to the 1st Defendant's advocate that the vendor had allowed occupation or possession of the sub-plots and the purchasers were already using the plots. All these facts show that the 1st Defendant did enter into an agreement with the Plaintiff for the sale of land, received part of the consideration and the draft defence is therefore a mere denial that does not raise triable issues that should go to trial.

The court declines to grant the orders sought in the application dated 20/6/2018. The Plaintiff is awarded the costs of the application.

Dated and delivered in open court at Nairobi this 27th day of May 2019

K. BOR

JUDGE

In the presence of: -

Mr. V. Owuor- Court Assistant

No appearance for the Plaintiff and 1st Defendant