



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC MISC CASE NO.71 OF 2017

DINARA DEVELOPERS LIMITED.....APPLICANT/RESPONDENT

VERSUS

MALCEDIAN PROPERTIES LIMITED....1ST RESPONDENT/APPLICANT

LAND REGISTRAR, THIKA.....2ND RESPONDENT

RULING

The matter for determination is the **Notice of Motion** Application dated **1st November 2018**, by the **1st Respondent/Applicant** seeking for orders that;

- 1. This Honourable Court sets aside the Ruling and Order delivered on 18th May 2018 by Hon. Justice L. Gacheru.***
- 2. This Honourable Court reinstate the Caution registered against the parcel of land Thika Municipality Block 14/96 by the Applicant herein.***
- 3. The Costs of this Application be provided for.***

The Application is premised on the grounds that the **1st Respondent/Applicant** purchased two apartments from the Applicant/ Respondent and paid the purchase price in full. However the Applicant/Respondent has not issued it with any lease as agreed. Further that the **1st Respondent/Applicant** then registered a **caution** which was later lifted without its **Consent** as it was never served with the application or Court Order by the Applicant/Respondent and therefore if the orders are not granted, it will suffer irreparable harm.

In her **Supporting Affidavit, Rosetellar Bukhala**, the Director of the **1st Respondent/Applicant** averred that the Applicant/Respondent purchased apartments **C8 and C9** put up on the suit property. However the Applicant/Respondent failed to issue them with leases and a **caution** was registered on the suit property on the **8th July 2018**, after her application in which she claimed purchasers interest. That when she conducted an official search on the **30th of August 2018**, the results yielded that there was no caution and upon inquiry, it was discovered that there was a **Court Order** dated **18th May 2018** ordering the removal of the Caution.

She averred that she was never served with the Application seeking to remove the caution and the **Affidavit of Service** sworn by one **Mercy K. Mberia** was false. She therefore urged the Court to allow her prayers as sought.

The Application is opposed and the Applicant Respondent through its Director **Andrew Kamau Muhiu**, who swore a **Replying Affidavit** and averred that the Applicant/Respondent is the registered owner of the suit property. Further that the **1st Respondent/Applicant** and the Applicant/Respondent herein entered into a sale agreement for purchase of two apartments which were put up on the suit property. However, the Applicant failed to pay the agreed purchase price or deposit any amount as part payment of the purchase price and therefore the sale agreements became **null** and **void** for lack of consideration.

He further averred that in the month of **August 2017**, he learnt that a caution had been lodged by the Applicant and despite demand being issued to them to withdraw the Caution, they failed to do so. The said Caution was to their detriment as it halted the whole process. It was then that they moved the Court seeking to have the Caution removed and all parties were duly served and an **Affidavit of Service** filed. It was then that this Court delivered a Ruling allowing its Application. It was his contention that the **1st Respondent/Applicant** has not adduced any evidence showing payment of the consideration for the two apartments. That the said apartments have already been sold off and transferred to third parties and that the Application should be dismissed.

The **2nd Respondent Benard K. Leitch** swore a Replying Affidavit on the **28th of November 2018**, and averred that the suit property is

registered in the name of **Dinara properties limited**. That initially there was a caution lodged by the 1st Respondent/Applicant and on 25th **June 2018**, his office received an Order, directing removal of the said Caution. That they registered the Order and removed the Caution. That prior to filing the instant suit, his office had not received an Application for removal of the Caution and the suit proceeded without his input and that it is only fair that all parties be given an opportunity to be heard.

The application was canvassed by way of written submissions to which the Court has now carefully read and considered.

Having considered the pleadings and the written submissions, the Court finds the issues for determination are:-

1. Whether the 1st Respondent/Applicant was properly served with the suit papers.

2. Whether the 1st Respondent/Applicant is entitled to the orders sought.

1. Whether the 1st Respondent/Applicant was properly served with the suit papers.

The basis upon which the 1st Respondent/Applicant herein brought this Application is its allegations that they were never served with the Application for removal of Caution. The Applicant have submitted that the **Affidavit of Service** by the said **Mercy K. Mberia**, does not indicate the time which service was effected and the name of person who identified the Defendants or their offices. It is evident that the first reading of the **Affidavit of Service** convinces anyone that service was effected.

However, 1st Respondent/Applicant has disputed the **Affidavit of Service** and there is therefore need for this Court to interrogate it further. The Applicant has disputed service and has further averred that their offices are not in the place that the said **Mercy K. Mberia Advocate** alleged that is their registered offices. Further this Court having carefully gone through the **Affidavit of Service** notes that though with regards to Service of the Land Registrar the time which service was effected was indicated, the time which the 1st Respondent/Applicant were allegedly served with the Application was never indicated. See **Order 5 Rule 15(1)** which provides:-

“The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The Affidavit of Service shall be in Form No 4 of Appendix A with such variations as circumstances may require.”

Further it has not been stated whether or not the person who effected service knew the person to be served or whether the purpose of her visit was explained to the Receptionist or not. The process server ought to explain the purpose of the visit and effect of the document served so that the person served would be able to sufficiently understand the effect of failing to act upon the served document. The 1st Respondent/Applicant having denied that its offices are located where the person who allegedly served the application had stated as their location, then the burden shifted upon the person who served to prove it. In the absence of the indication of time and the name of the person who pointed out the Applicant's office or identified them, then this Court finds that the Affidavit of service was not proper. See the case of **Said Abdala Azubedi...Vs...Samuel Mbugua Ikumbu [2018] eKLR**, where the Court stated:-

“I do note however that there is no time of service indicated in the affidavit of service. Neither is there any indication as to who pointed out the applicant to the process server so that the process server is sure that the person he is serving is actually the defendant in the case. This is important because nowhere in the affidavit of service does the process server state that he personally knew the Applicant. I am now convinced that the affidavit of service violates the provisions of Order 5 Rule 15 (1).

The Affidavit of Service on record does not state the time that the applicant was served and also does not give the name of the person who identified the applicant. I have already mentioned that the process server does not state in his affidavit that he knew the applicant and it was therefore necessary for him to indicate who informed him that the person served is the defendant in the suit. It could very well be that the person who was served is somebody else and not the Defendant.

On the above grounds alone, without the necessity of going into the other attacks on the affidavit of service, I have no option but to set aside the Affidavit of Service.....”

Taking into account the averments by the 1st Respondent/Applicant and considering the Affidavit of Service, the Court finds that the said Affidavit of Service not proper. Therefore it is doubtful whether the 1st Respondent/Applicant was served with the application for removal of Caution.

2. Whether the Applicant is entitled to the orders sought.

While the Applicant/Respondent has alleged that the 1st Respondent/Applicant does not have any interest in the suit property as they have been unable to show any evidence of payment of the purchase price. However, the Court notes that the instant Application was for setting aside of the Order of the Court issued on 18th **May 2018** for non-service of the said application which led to that Ruling but not the merit of the said application.

Having considered the available evidence, the court finds that there was no proper service and therefore failure to comply with the proper procedure for service means that there can be no regular Order. The Court having found that the Affidavit of Service was defective, then it further finds that all the Orders made pursuant to the said Affidavit of Service are irregular and deserves to be set aside.

The upshot of the foregoing is that the 1st Respondent's/Applicant's application dated **1st November 2018**, is merited and the Court allows the said application entirely with costs to the 1st Respondent/Applicant.

It is so ordered.

Dated, Signed and Delivered at Thika this 29th day of November, 2019.

L. GACHERU

JUDGE

29/11/2019

In the presence of

Mr. Odanga holding brief for Mr. Kori for the Plaintiff/Respondent

M/S Mwangi holding brief for Mr. Murigu for 1st Defendant/Applicant

No appearance for 2nd Respondent

Lucy - Court Assistant.

L. GACHERU

JUDGE

29/11/2019