



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MILIMANI**

**ELC NO. 528 OF 2018**

**ECONOMIC CO-OPERATIVE SOCIETY LIMITED.....PLAINTIFF**

**=VERSUS=**

**MAJEED M. JASHO Trading as “ LAS AIR FLIGHT” .....DEFENDANT**

**RULING**

1. This is a Ruling in respect of a Notice of Motion dated 2<sup>nd</sup> February 2017. The application seeks the following orders:-

***1. Spent***

***2. That this Honourable Court be pleased to set aside judgement entered against the defendant in this suit on 12<sup>th</sup> May 2015 and thus allow the Defendant to defend the suit unconditionally.***

***3. That this Honourable Court be pleased to grant any other order suitable in the circumstances.***

***4. That the costs of this application be in the cause.***

2. The Defendant/Applicant was a tenant of the Plaintiff /Respondent in premises erected on **LR No.290/774** along Monrovia Street in Nairobi. Due to persistent default in rent payment, the Respondent issued a notice to terminate tenancy under Section 4(2) of the Landlord Tenant (Shops, Hotels and Catering Establishments) Act Cap 301 Laws of Kenya. The Applicant did not file any reference challenging the termination.

3. Upon expiry of the notice, the Respondent filed this suit which sought among other reliefs vacant possession. The Applicant who was duly served with summons to enter appearance neither entered appearance nor filed a defence. The case proceeded for formal proof and judgement in favour of the Respondent was delivered on 12<sup>th</sup> May 2015.

4. The Respondent filed a bill of costs on 19<sup>th</sup> October 2015 but the said bill of costs has never been taxed until the present application was filed on 3<sup>rd</sup> February 2017. The Applicant contends that he was never served with summons to enter appearance and that he did not know that there was a case against him until when he was served with a hearing notice in respect of a bill of costs.

5. The Applicant denies that he signed the summons to enter appearance as alleged by the process server and that the signature appearing on the summons is his. He argues that he has a good defence with triable issues which he should be allowed to ventilate in a hearing.

6. The Applicant's application is opposed by the Respondent through a replying affidavit sworn on 25<sup>th</sup> April 2017. The Respondent contends that this application is only meant to delay the process of execution of the Judgement which it has against the Applicant. The Respondent further argues that the Applicant's draft defence is a sham and that at some stage the Applicant wrote an e-mail to the Respondent seeking to settle the matter. The Respondent further contends that the signature appearing on the served summons is the same as the signature appended on the two affidavits sworn by the Applicant.

7. I have carefully considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the submissions filed by the parties herein. The only issues for determination herein are firstly whether the Applicant was served with summons to enter appearance and secondly, whether the defendant has a defence with triable issues to warrant him to be given leave to defend the suit.

8. On the issue of service of summons to enter appearance, I have looked at the affidavit of service filed by the process server. The process server has described in detail how he was led to where the Applicant was and he received summons and signed at the back of the summons.

The signature appearing at the back of the summons is the same one the Applicant had appended in the affidavit in support of the application and a supplementary affidavit.

9. Besides being served with summons to enter appearance, the Applicant has been served with bill of costs and notices of taxation on a number of occasions. In one such occasion the Applicant had been served with a notice of taxation but on that date the file could not be listed and that is the time the present application was filed. The Applicant cannot therefore argue that he was never served. The Applicant had even been served with notice of termination of tenancy which he did not bother to file a reference at the Tribunal. I therefore find that the Applicant was actually served but he is only out to delay the conclusion of the matter.

10. I have looked at the draft defence annexed to the application by the Applicant. The Applicant is making general denials. He has not stated in which manner he doesn't owe the Respondent any monies. In **Magunga General Stores Vs Pepco Distributors Ltd (1987) & KAR 89**, the Court of Appeal stated that a mere denial is not a sufficient defence and a defendant has to show either by affidavit, oral evidence or otherwise that there is a good defence.

11. In the instant case, the Applicant has merely denied the Respondent's claim. He had the opportunity to show that he should have an opportunity to defend the suit but he failed. What I have seen in this application is an Applicant who is out to defeat the course of justice. In **Mbogo & Another Vs Shah (1968) EA 93 Sir Clement De Lestang V.P** had this to say:-

***“While the Court would exercise discretion to avoid injustice or hardship resulting from inadvertent or excusable mistake or error it would not assist a person who has deliberately sought to obstruct or delay the course of justice”.***

12. The Applicant herein is clearly trying to delay or obstruct the course of justice. I therefore find no merit in the Applicant's application which is hereby dismissed with costs to the Respondent.

It is so ordered.

**Dated, Signed and Delivered at Nairobi on 11<sup>th</sup> this day of December 2019**

**E.O .OBAGA**

**JUDGE**

In the presence of :-

Mr Marete for Mr Mohammed for Plaintiff

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**