



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 3 OF 2011**

**DORCAS KAPITUIYAH CHELANGA.....1<sup>ST</sup> PLAINTIFF**

**CATHERINE SALMA KATANA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**NELSON MWANZIA KIVUVANI.....1<sup>ST</sup> DEFENDANT**

**PRIMELAND HOLDINGS (K)LIMITED...2<sup>ND</sup> DEFENDANT**

**MUNICIPAL COUNCIL OF MAVOKO.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The Application by the 1<sup>st</sup> Defendant is dated 23<sup>rd</sup> May, 2017. In the said Application, the 1<sup>st</sup> Defendant is seeking for the following orders;-

*a. That leave be granted to the firm of King`oo & Associates Advocates to act for the 1<sup>st</sup> Defendant/Applicant in place of Kyalo & Associates Advocates.*

*b. That pending the hearing and determination of this Application, there be a stay of execution of judgment in this matter arising from ex-parte hearing on 28<sup>th</sup> March, 2017 as well as the judgment delivered on 12<sup>th</sup> May, 2017.*

*c. That this Honourable Court be pleased to set aside the ex-parte judgment of 12<sup>th</sup> May, 2017 and all consequential orders thereto.*

*d. That the Applicant be granted unconditional leave to file his statement of Defence in this suit and by way of interpartes hearing on a date to be set by this Court or to be fixed at the registry as may be directed pursuant to requisite invitation by the Plaintiffs' Advocates to the Applicant's Advocates to fix a mutually convenient hearing date.*

*e. That cost of this Application be provided for.*

2. The 1<sup>st</sup> Defendant finally deponed that he has a Defence which raises triable issues and that he should be granted unconditional leave to defend the matter.

3. In reply, the 1<sup>st</sup> Plaintiff deponed that the 1<sup>st</sup> Defendant has not stated the irreparable damage that he is likely to suffer in the event of execution of the judgment; that most of the Plaintiffs have taken possession of the suit land and developed their respective portions and that the 1<sup>st</sup> Defendant was served with the Summons to Enter Appearance on 11<sup>th</sup> April, 2014 but never entered appearance.

4. The 1<sup>st</sup> Plaintiff deponed that the 1<sup>st</sup> Defendant is raising contradictory defences to the Plaintiffs' claim. That the 1<sup>st</sup> Defendant has not exhibited the alleged agreement that he entered into with the 2<sup>nd</sup> Defendant and that the draft Defence is a sham and does not raise any triable issue.

5. The 1<sup>st</sup> Defendant filed a Further Affidavit in which he deponed that the judgment on record was based on uncontroverted evidence; that he did not receive the total consideration from the 2<sup>nd</sup> Defendant to warrant the transfer of the suit land to the Plaintiffs and that it was within his rights to change advocates.

6. The 1<sup>st</sup> Defendant finally deponed that the 2<sup>nd</sup> Defendant only paid him Kshs.2,814,000/- for the suit land and that there is no basis for him to transfer the suit land to the Plaintiffs.

7. The 2<sup>nd</sup> Defendant's Director deponed that the 2<sup>nd</sup> Defendant has all along been ready to settle the balance of the purchase price in exchange of the transfer instruments; that the outstanding balance is Kshs.1,686,000/- and that instead of filing a Defence, the 1<sup>st</sup> Defendant only filed an Affidavit in reply to the Plaintiffs' claim.

8. The 1<sup>st</sup> Defendant's advocate submitted that the 1<sup>st</sup> Defendant was never advised and was unaware of the proceedings in this matter; that although the 1<sup>st</sup> Defendant was to be paid Kshs.6,840,000/- by the 2<sup>nd</sup> Defendant, he was only paid Kshs.2,814,000/- and that the 2<sup>nd</sup> Defendant subdivided the land contrary to the agreement that they had entered into.

9. Counsel submitted that the 2<sup>nd</sup> Defendant entered into sale agreements with the Plaintiffs when the initial sale with the 1<sup>st</sup> Defendant had not been completed and that there was non-disclosure of material facts. Counsel submitted that this court has the discretion to set aside the judgment; that a party should not be penalized for the omissions or commissions of his legal representative and that the court is enjoined by Article 159(2) of the Constitution to deliver substantive justice. Counsel relied on numerous authorities which I have considered.

10. In his submissions, the 2<sup>nd</sup> Defendant's advocate submitted that in the draft Defence, the 1<sup>st</sup> Defendant has admitted that the 2<sup>nd</sup> Defendant had the authority to sell the suit properties; that the 1<sup>st</sup> Defendant has not filed any set off or counter-claim as against the 2<sup>nd</sup> Defendant and that the completion of the agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was based on the production of the Deed Plans for the plots.

11. This suit was commenced by way of a Plaint dated 7<sup>th</sup> January, 2011. In the Plaint, the Plaintiffs averred that the 2<sup>nd</sup> Defendant sold to them portions of L.R. NO.12715/518 as vendor and agent of the 1<sup>st</sup> Defendant. The Plaintiff further averred that the 1<sup>st</sup> Defendant had agreed to purchase from the 2<sup>nd</sup> Defendant a total of 34 plots which were to be excised from the suit land for Kshs.6,840,000/- and upon payment of the deposit, the 2<sup>nd</sup> Defendant was to be allowed to sell to third parties the said plots.

12. The Plaintiffs further pleaded that relying on the agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, they purchased their respective plots and paid the requisite purchase price. The 1<sup>st</sup> Defendant was duly served with the Summons to Enter Appearance together with the Application dated 7<sup>th</sup> January, 2011 seeking for injunctive orders. Indeed, the 1<sup>st</sup> Defendant filed Grounds of Opposition and the Replying Affidavit in opposition to the Plaintiffs' Application. He however never filed a Defence.

13. It is true that where there is a regular ex-parte judgment, the Court has the discretion to set aside such a judgment and allow a party to defend the suit. The way that discretion is to be exercised was summarized in the case of *Shah-vs-Mbogo and Another(1967) EA 116* as follows:-

***“-----applying the principle that the court's discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, in advertence, or excusable mistake or error, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused”***

14. The other consideration that the court ought to take into account before setting aside a regular ex-parte judgment is whether the draft Defence raises triable issues. A triable issue has been defined as an issue that raises a prima facie defence and which should go to trial for adjudication (see *Patel-vs-East Africa Cargo Handling Services Limited (1974) EA 75*).

15. The evidence before me shows that the advocates of the 1<sup>st</sup> Defendant were served with Summons to Enter Appearance on 4<sup>th</sup> April, 2011. Indeed, the said advocates came on record on behalf of the Defendants and caused the 1<sup>st</sup> Defendant to swear an Affidavit in reply to the Plaintiffs' Application for injunctive orders. According to the 1<sup>st</sup> Defendant, it is his advocate who failed to file a Defence on his behalf.

16. The 1<sup>st</sup> Defendant has admitted that he instructed his advocate to take up the brief. According to the 1<sup>st</sup> Defendant, his advocate did not inform him about the progress of the matter. If that is the case, then the 1<sup>st</sup> Defendant's claim should be directed to his advocate for negligence. In the case of *Habo Agencies Ltd vs Wilfred Odhiambo Musingo(2016)eKLR*, it was held as follows:

***“It is not simply enough to accused the advocate for failure to inform as if there is no duty on the client to pursue the matter whereas it is true that in general, mistake of counsel should not be visited upon a client, it is equally true that when counsel or agent is vested with authority to perform some duties and does not perform the duty as directed, the principal bears the consequences”***

Indeed, the entire Affidavit and Further Affidavit of the 1<sup>st</sup> Defendant does not state that the ex-parte proceedings and judgment should be set aside due to an accident, inadvertence or excusable mistake or error on his part or his advocate. The 1<sup>st</sup> Defendant has not stated at all the reasons that led to his advocate not file a defence.

17. In the draft Defence, the 1<sup>st</sup> Defendant has countered the Plaintiffs' claim on the ground that the sale agreement that he entered into with the 2<sup>nd</sup> Defendant was never completed and therefore the 2<sup>nd</sup> Defendant could not have legally sold the suit plots to the Plaintiffs. The 1<sup>st</sup> Defendant has however not annexed the agreement that he entered into with the 2<sup>nd</sup> Defendant. The agreement has however been annexed on the 2<sup>nd</sup> Defendant's Replying Affidavit. The agreement at paragraph 3(f) provides as follows:

***“After signing this agreement and payment of the said deposit, the PURCHASER[the 2<sup>nd</sup> Defendant] shall be at liberty to sell the said sub-plots to raise the balance of the purchase price”***

18. The 1<sup>st</sup> Defendant acknowledged receipt of the deposit of Kshs.800,000/- when he signed the agreement of 31<sup>st</sup> May, 2006. Indeed, the contents of the sale agreement are what led the Plaintiff`s to purchase a portion of L.R.No.12715/518 after the same was subdivided by the 2<sup>nd</sup> Defendant. The Plaintiffs acknowledged the existence of the agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the Plaint when they stated as follows;

***“7. By an agreement dated 31<sup>st</sup> May, 2006, the 1<sup>st</sup> Defendant agreed to sell and the 2<sup>nd</sup> Defendant agreed to purchase 34 plots to be excised from the aforesaid parcel of land at an agreed purchase price of Kshs.6,840,000/-.***

19. It is therefore obvious from the agreement that was entered into between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants that the 2<sup>nd</sup> Defendant could sell the suit property to the third parties. That is what the 2<sup>nd</sup> Defendant did. Consequently, the 1<sup>st</sup> Defendant’s claim in respect of the balance of the purchase can only lie as against the 2<sup>nd</sup> Defendant and not otherwise. The draft Defence by the 1<sup>st</sup> Defendant does not therefore raise any triable issue.

20. For those reasons, the Application dated 23<sup>rd</sup> May, 2017 is dismissed with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 25<sup>TH</sup> DAY OF MAY, 2018.**

**O.A. ANGOTE**

**JUDGE**