



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**E.L.C. CASE NO. 1047 OF 2013**

**DEBORAH ACHIENG ADUDA.....1<sup>ST</sup> PLAINTIFF**

**RENE JOHN DIERKX.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**FLORENCE SEYANOI KIBERA also known as**

**DOROTHY SEYANOI MOSCHION.....DEFENDANT**

**RULING**

The Defendant seeks to set aside the judgment delivered on 27/9/2017 as well as stay of execution of the decree issued on 24/11/2017 through the application dated 27/12/2017. The application indicates that it is made on the grounds that upon service of summons, the Defendant entered appearance and filed defence and participated in these proceedings until 2016 when the advocate who was handling the brief left the firm of Lumumba Mumma and Kaluma Advocates and carried the Defendant's file away. As a result of this, Mr. Kaluma had to file a suit in the High Court against Mr. Thomas Otieno K'Bahati seeking the return of the file to his firm. The Defendant's advocate avers that he did not attend court on 24/7/2017 when the Plaintiffs' suit was heard *ex-parte* because he wrongly recorded in the diary that the hearing date was slated for 24/7/2018 after being served with the hearing notice. The Defendant faults the Plaintiff for failing to serve submissions on her advocates. Judgement was delivered on 27/9/2017. The Defendant maintains that she learnt of the judgement on 22/12/2017 when a copy of the decree was left at her residence.

The Defendant asserts that she has a good defence and that it was the Plaintiffs who breached the sale agreement and failed to complete the sale by not remitting the purchase price in accordance with the agreement. The Defendant argues that the Plaintiffs' breach led to the rescission of the agreement and forfeiture of the deposit paid under the agreement. She faults the court for issuing the decree for specific performance urging that it was erroneously issued. She also faults the court for granting the Plaintiff title before payment of the purchase price yet the title is charged to Co-operative Bank of Kenya Limited. The Defendant states that she will suffer irreparable damage if the orders sought are not granted and maintains that the Plaintiff will not suffer any prejudice since hearing both parties in the dispute will enable the court arrive at a conclusive determination on the merits.

The application is supported by the Defendant's affidavit to which copies of the pleadings and application filed in **HCCC Commercial and Admiralty Division Civil Suit No. 455 of 2016 (O.S.)** are attached. The affidavit in support of that suit lists this file amongst the clients' files which Mr. Kaluma's firm

sought to retrieve from the associate who had left that firm. The Defendant depones that she was not aware of the hearing date and only learnt about it after the decree had been issued. She referred to the clauses in the agreement extensively in her quest to demonstrate that the Plaintiffs were in breach of the sale agreement.

The 1<sup>st</sup> Plaintiff swore the Replying Affidavit in opposition to the application. She depones that jurisdiction to set aside judgment is discretionary and is only exercised where the Defendant has offered a plausible explanation for the failure to attend court and file defence. She depones that the failure to file a defence demonstrates the Defendant's lack of interest in the suit. Further, that the Defendant and her advocates had a history of failing or neglecting to attend court whenever this matter came up. She relied on copies of her advocate's letter dated 14/2/2017 which invited the Defendant's advocate to fix a suitable hearing date and the hearing notice dated 21/2/2017. Both the hearing notice and letter were received and stamped by Miyare and Company Advocates. Another hearing notice dated 23/5/2017 which was served following the adjournment of the hearing to 24/7/2017 was also received and stamped by Kaluma and Miyare Company Advocates. The firm of K'Bahati and Company Advocates filed a Notice of Change of Advocates on 12/9/2013 intimating that it was taking over conduct of this matter for the Defendant from the firm of Lumumba, Mumma & Kaluma Advocates. A Notice of Change of Advocates was filed and served on the Plaintiffs' advocates on 22/5/2015 by K'Bahati and Company Advocates. On 5/10/2016 another Notice of Appointment of Advocates was filed in court confirming that the Defendant had appointed Kaluma and Miyare Advocates to act for her in the suit.

The Plaintiff states that they took great troubles and went to great expense to travel to Kenya from the Netherlands where they reside to attend court during the hearing of this suit on 24/7/2017 and that it would be greatly prejudicial and expensive if the court were to reverse its decision yet they have been diligent in having the suit prosecuted as the Defendant showed contempt for the court and its processes. The Plaintiffs maintain that it was the duty of the Defendant to peruse the court file and ascertain the position. She avers that the Plaintiffs are both ready and willing to fulfil their obligations under the decree by paying the balance of the purchase price as ordered by the court.

On the issue of the pending loan, the 1<sup>st</sup> Plaintiff avers that that fact is immaterial and should have been in the defence had the Defendant filed one. She avers that since they are willing to pay the balance of the purchase price, the amount they pay can be used to offset the loan secured against the Suit Property for the title to be issued to the Plaintiffs.

Counsels made oral submissions. Mr. Kaluma submitted that the plaintiff sought an equitable remedy which cannot issue in light of the alternative prayer for special damages. He submitted that the Plaintiffs ought to have been given damages since at paragraph 15 of the plaint they claimed they had rescinded the sale agreement. He contended that the Defendant rescinded the agreement on the Plaintiffs' default hence the deposit of the purchase price paid by the Plaintiffs was forfeited pursuant to conditions 7 and 27 of the Law Society Kenya Conditions 1989 Edition which provides for transactions where payment is made by instalments. Mr. Kaluma submitted that parties were in agreement that by the time the suit was filed the agreement had been rescinded and the only dispute before the court was who rescinded the agreement and whether the deposit paid was refundable to the Plaintiffs or it was to be retained by the Defendant. It was his submission that the sale agreement ceased to exist upon the rescission and therefore an order of specific performance or injunction could not issue since the agreement was dead.

He accused the Plaintiffs of failing to disclose all material facts to court. The Defendant does not deny receiving the deposit of Kshs. 10 million and nor does she deny that Clause 2.3 enabled the Plaintiff to pay the purchase price for 10 years. However, counsel contended that the Plaintiffs never paid any other instalments after paying the deposit. He further argued that the value of property in Karen having increased, the Defendant stands to suffer prejudice if the judgement is not set aside. He stated that the Defendant's entire land which measures 10 acres has not been subdivided and that what was being sold to the Plaintiffs is only one acre. He stated that the land remained unsurveyed to date. He confirmed that there were encumbrances registered against the suit land including caveats lodged by third parties restraining dealings or even payment of rates for the entire land. He indicated that the rates and penalties stood at Kshs. 52 million.

In the course of making submissions, parties expressed an interest in exploring an out of court settlement. They sought time to negotiate and agreed to have the orders of stay of execution extended up to 28/2/2018. The court directed that the matter would be mentioned on 28/2/2018 to record a settlement. Mr. Miyare appeared for the Defendant on 28/2/2018 and confirmed that no settlement had been reached. The court gave 23/4/2018 for further hearing of the application for stay of execution.

Parties concluded their submissions on 23/4/2018. Mr. Kaluma supplied a copy of the Law Society of Kenya Conditions of sale of 1989 and drew the court's attention to Clause 4 (7) (d) (ii) on the issue of forfeiture of the deposit and Clauses 5 and 6 on possession before completion. On the issue of the Defendant having leased out the entire land to a third party after executing the sale agreement with the Plaintiffs, he submitted that by leasing out the suit property to a third party, the Defendant's obligations to the Plaintiffs under the contract would not be affected. Further, he urged that in any event, the lease to the third party was bound to end before completion and the land would therefore be available when the Plaintiffs concluded making payment. He stated that following the judgment of this suit, the Plaintiffs were now seeking to excise a different portion of the land from the one which was agreed on. He also challenged service of the summons to enter appearance on the Defendant on the basis that an unnamed daughter is alleged to have been served by the process server. He concluded his submissions by stating that the Defendant had attached a draft defence and a counter claim which evinces a good defence and a good counter claim.

Mr. Oyomba who appeared for the Plaintiffs opposed the application. He submitted that setting aside judgement is a discretionary remedy exercised by the court to ensure that the ends of justice are met and that the circumstances in which the remedy is exercised include where there is a plausible explanation for the default in filing the defence or attending the hearing. He submitted that the Defendant was in default despite being served with the plaint, summons and interlocutory application as confirmed by the affidavit of service filed on 10/9/2013. He stated that proper service was effected at the Defendant's place of residence. The Defendant's daughter intimated to the Process Server that she had authority to accept service on her behalf. He stated that the Defendant's advocate filed the Notice of Appointment of Advocates on 12/9/2013 but failed to enter appearance or file defence.

He submitted that the antecedent conduct of the Defendant demonstrated that she was not keen on attending court. Despite being served the Defendant's advocate did not attend court when the matter came up for pre-trial directions. The Defendant's counsel was invited to take a hearing date on 21/2/2017 but they failed to attend court to take a mutually convenient hearing date. The Plaintiffs' advocate served a hearing notice on the Defendant's advocates. The Defendant did not attend court on 23/5/2017 and the court adjourned the matter to 24/7/2017. Once more the Plaintiff's advocate served a hearing notice on the Defendant's advocate which was received, signed and stamped, a copy of which is on the court record.

He submitted that the Plaintiffs reside in the Netherlands and had been put to great expense when they travelled to Kenya to attend the hearing on 24/7/2017, and that if the judgment is set aside they will suffer prejudice. According to him, the Plaintiffs were to pay the balance of the purchase price upon completion of the transfer to the Plaintiffs. He stated that under the judgment given by the Court, the Defendant was required to comply within 30 days. He explained that the decree took long to be extracted and was issued on 24/11/2017 and served on the Defendant, the Director of Surveys and the Lands Registry.

The Plaintiffs maintain that the Defendant has been represented by three fully fledged law firms. She was first represented by Lumumba & Mumma Advocates before K'Bahati & Company Advocates took over in May 2015. Kaluma & Miyare Advocates were appointed on 12/8/2016 and continued to represent the Defendant. None of these law firms filed a defence. Mr. Oyomba urged the court to consider the difficulties the Plaintiffs have suffered in coming to Kenya for the hearing of the matter and dismiss the application so that the Plaintiffs can enjoy the fruits of their judgment.

In reply, Mr. Kaluma contended that the defence could not be filed without the Defendant being served with the Summons to enter appearance. He reiterated the challenges the law firm faced with respect to the Defendant's file being taken away by the advocate who left his firm. On the expenses for travel, Mr.

Kaluma submitted that they can be dealt with through costs. He maintained that the failure by the Defendant to attend court for the hearing cannot change the law since orders for specific performance cannot issue for a dead agreement which is rescinded. He also argued that an order of specific performance cannot issue where it would be impossible to supervise its performance. He urged that the draft defence and counterclaim attached to the Defendant's supplementary affidavit confirmed that the Defendant has a good defence to the Plaintiff's claim.

The court has considered the application, the affidavits, together with the submissions of counsels for both parties. The application is made under Order 12 Rule 7 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act and Article 50(1) of the Constitution of Kenya.

The court has jurisdiction to set aside an ex-parte judgement. In exercising this discretion, the court takes into consideration factors such as whether there is a defence on the merits that raises triable issues, if there would be any prejudice to the plaintiff and the explanation for the delay. The court's main concern is to do justice to the parties.

In **Shah v Mbogo** [1967] EA 166 the court stated that the discretion to set aside an ex-parte judgement is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.

The Defendant swears in paragraph 3 of the Affidavit in support of the application as follows:

*“THAT upon service of summons, I entered appearance and filed defence, participated in interlocutory processes each time she had notice thereof.”*

This averment contradicts the submissions of her counsel who argued that service of summons to enter appearance was not properly effected upon the Defendant. If the Defendant had filed her defence as she depones in her affidavit and states on the face of her application, it would not be necessary for the attached draft defence to be presented to court. In the Draft Statement of Defence and Counterclaim annexed to the Defendant's Supplementary Affidavit, the Defendant admits entering into the sale agreement with the Plaintiffs for Subplot B consisting of 1 acre of the Defendant's land reference no. 5892/22. She avers that the land was yet to be identified, surveyed and subdivided. Further, she avers that she was at liberty to lease out her entire land until the Plaintiffs paid the full purchase price for the portion they were buying from her. She concedes in the draft defence that the Plaintiffs were to pay by instalment but never paid any instalment after paying the deposit. Instead, she claims the Plaintiffs entered into schemes with third parties to get the land transferred to them including bringing trumped up criminal charges against her, which were intended to coerce her to transfer the Suit property to them. She also avers in the draft defence that the sale was rescinded but that the Plaintiffs registered caveats against the land prohibiting dealings and payment of rates. No evidence was placed before the court to show that the caveat registered by the Plaintiffs against the Defendant's land prohibited payment of rates which are payable to the County Government while the caveat is registered at the Lands Office. The effect of a caveat is strictly speaking to forbid the registration of dealings with the land in question based on the interest claimed by the caveator.

The sale agreement dated 16/2/2012 stated that the purchase price had been agreed at Kshs. 28 Million and that the purchasers had paid a deposit of Kshs. 10 Million. Clause 2.3 and 2.4 of the agreement stated that the balance which was converted to US Dollars 209,302.32 was to be paid into a US Dollar account that the vendor was required to open in equal monthly instalments of USD 1750. Clause 8 stated that the purchasers were to take possession of the land on the execution of the agreement and on payment of the deposit, which the vendor acknowledged receipt of in clause 2.1 of the sale agreement. Clause 10 listed the completion documents which the vendor was to procure and hand over to the purchasers' advocates immediately after execution of the agreement. They included the original title, valid rates and rent clearance certificates, original discharge of charge from the chargee, consent to transfer and certificate of subdivision. Clause 11 stated that conditions 11 to 15 of the LSK Conditions of Sale would apply if there was failure to complete.

In her draft defence the Defendant has not shown that she performed the obligations she was enjoined to discharge under the contract. She has also not demonstrated that the Plaintiffs failed to discharge their responsibilities under the agreement. She admits leasing the entire land to a third party for ten years while arguing that the one-acre portion would have been available to the Plaintiffs after the lease period yet the sale agreement stated that she was to hand over possession of the land to the purchasers on the execution of the agreement and payment of the deposit. The court is not satisfied that the Defendant has a defence that raises triable issues.

The Defendant's advocate submitted that he wrongly diarised the hearing date of 24/7/2017. The photocopy of the advocate's diary attached to the application shows that the suit was entered in the diary for 24/7/2018 and not 2017. No plausible explanation is given for the mix-up in the diaries for 2017 and 2018. If the Defendant's advocate had made diligent effort and confirmed from the registry if the diary for 2017 was closed on 24/5/2017 when the hearing notice was served on them, they would have realised that the diary for 2018 was opened at the end of 2017.

Having previously participated in these proceedings, the Court is inclined to agree with the Plaintiffs that the Defendant has not given a good explanation for failing to file her defence to the Plaintiffs' claim yet she knew of the existence of the suit. The Plaintiffs reside in the Netherlands and were put to great expense when they travelled to Nairobi for the hearing of this matter. They have demonstrated that they will suffer prejudice if the judgement is set aside. The Defendant only urged that costs would adequately compensate the Plaintiffs.

If the Plaintiffs are trying to excise a different portion of the land as the Defendant alleges, then it is incumbent upon the Defendant to point out the correct portion which the Plaintiffs purchased. The sale agreement identified the land as 'Sub-plot B' containing by measurement one (1) acre to be hived from L.R. Number 5892/22. It was the Defendant's duty to subdivide the land and deliver a certificate of subdivision among the completion documents. The land remains undivided in 2018 yet the Defendant undertook to provide the certificate of subdivision immediately after the execution of the sale agreement.

The court dismisses the application dated 27/12/2017 with costs to the Plaintiffs.

**Dated and delivered at Nairobi this 28<sup>th</sup> day of June 2018.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. Arusei holding brief for Mr. Oyomba for the Plaintiffs

Ms. Mutuku holding brief for Mr. Miyare for the Defendant

Mr. V. Owuor- Court Assistant