



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL SUIT NO. 243 OF 2017

PAOLO DAFANO.....PLAINTIFF

VERSUS

OLIVA ROCCO.....DEFENDANT

RULING

1. Before me for determination is a Notice of Motion Application dated 27th June 2018. The Defendant Oliva Rocco prays for orders:-

1. That the defendant/applicant be granted leave to file a defence out of time and unconditionally defend this suit.

2. That the costs of this (application) be provided for.

2. The application is supported by an affidavit sworn by the said Oliva Rocco and is premised on the grounds:-

i) That the Defendant had not filed his defence by reason that there was a communication breakdown between him and his lawyer previously on record;

ii) That the applicant had instructed the lawyer previously on record to file a defence, which instructions were inadvertently not complied with;

iii) That the applicant herein has a good defence that raises triable issues best canvassed through trial;

iv) That it is in the interest of justice and fairness that the defendant is granted the opportunity to defend this suit so that this Court may determine the issue in dispute on merit ;and

v) That if the orders sought are not granted then the defendant shall suffer great loss and damage.

3. In a Replying Affidavit sworn by one Grace Laika, a donee of a Power of Attorney from the Plaintiff, the Plaintiff avers that the Defendant's failure to file a defence was not inadvertent but was borne out of the fact that the Defendant had no reasonable defence to file herein. It is the Plaintiff's case that the Defendant was at all material times served and was aware when the matter came up for pre-trial directions.

4. The Plaintiff further avers that he is not party to the problems the Defendant had with his advocate and asserts that the delay caused in the filing of the defence has caused him great prejudice for which reason the application should be disallowed.

5. The Plaintiff contends that a perusal of the proposed defence reveals that the Defendant does not deny the fact that he has not paid for the property in dispute. According to the Plaintiff the Defendant does not assert a right to remain in the property and hence his defence is a sham and will merely delay the determination of the suit.

6. I have considered the application and the response thereto. I have equally considered the oral submissions made before me by the Learned Advocates for the parties; Mr. Mokaya for the Applicant and Mr. Ole Kina for the Respondent.

7. This suit was commenced by way of a Plaint filed herein on 8th December 2017. The Plaintiff's claim is that on or about 23rd May 2015, he offered for sale his property situated in Plot No. 3084 (Original 26/51) CR 20197 situated at Mtangani in Malindi to the defendant for an agreed purchase price of Euros One Hundred and Twenty Eight Thousand (€ 128,000/-) payable as follows:-

a) Euros 10,000/- upon acceptance of the offer;

b) Euros 3000/- upon delivery of the property to be concluded by 6th May 2015 upon exchange of the signed original proposals.

c) The balance of Euros 115,000/- to be paid in monthly instalments as set out in Annex A of the "Offer to Sell."

8. According to the Plaintiff, the Defendant accepted the offer on 31st March 2015. Subsequently, pursuant to a further agreement dated 9th May 2015, the Defendant took possession of the suit premises and lives therein to-date. The Defendant has however since defaulted in paying the purchase price as agreed and has failed to deliver vacant possession thereof.

9. It is apparent that Summons to Enter Appearance were duly served and on 19th December 2017, the Defendant entered appearance through the law firm of M/s Kupalia Fondo Mwangunya & Associates. No defence was however filed and from the application herein, the Defendant blames a communication breakdown with the said law firm for the failure to file the same.

10. The time for filing a defence is prescribed in Order 7 Rule 1 of the Civil Procedure Rules as follows:-

"Defence (Order 7, Rule 1)

Where a defendant has been served with a Summons to appear he shall, unless some other or further order be made by the Court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the Plaintiff within fourteen days from the date of filing the defence and file an affidavit of service."

11. In the matter before me, appearance was filed as we have seen on 19th December 2017. The Defence therefore needed to be filed latest by 27th January 2018 given that time would have ceased to run at some point between 21st December 2017 and 13th January 2018 as per the provisions of Order 50 Rule 4 of the Civil Procedure Rules.

12. I have considered the matter. The claim herein is not a liquidated claim or a claim for general damages. If it were a liquidated claim and no defence is filed, Order 10 Rule 4 would apply and Judgment would be entered on request. If it were a claim for general damages, Order 10 Rule 6 would apply and interlocutory Judgment could be entered. The claim before me being one for land does not qualify for entry of interlocutory Judgment. That must be the reason the Plaintiff did not apply for the same and instead went for pre-trial directions as provided under Order 11 of the Civil Procedure Rules. Notice thereof was served but the defendant made no appearance on 23rd April 2018.

13. The question that arises here is whether, for the reason that there is no stipulation for entry of interlocutory Judgment, the defendant is free to file his defence at any time before the matter is heard. Faced with a similar situation in ***Chairman, Secretary and Treasurer, School Management Committee of Sir Ali Salim Diwani & 2 Others (Malindi ELC Case No. 28 of 2012)*** Angote J., after analyzing the rules, was of the opinion that there is no specific rule dealing with unliquidated claims, particularly matters relating to a defendant to file his defence before the matter proceeds for hearing. The Learned Judge was of the view therefore that filing a late defence is an irregularity which except in very clear cases may be cured.

14. While I agree with the Learned Judge's position in the above case, I think for the good administration of justice and case management, it is incumbent upon parties to file their documents within the time prescribed by the rules. Parties must not take for granted what is prescribed in the rules. Parties must know that if they file their documents late, and in breach of the rules, there would be appropriate sanctions dependent on the circumstances of each case.

15. In the matter before me the Defendant resides in the subject property having taken possession thereof from the Plaintiff on 19th May 2015. From the draft defence filed herein he does not deny that he is in possession pursuant to the Sale Agreement. Indeed he states at paragraph 6 thereof that the Plaintiff is not entitled to vacant possession of the subject property. Yet at paragraph 5 of the draft defence, he admits that he stopped payment of the agreed instalments until the issue of repair of the 'makuti' roof, painting of doors and windows as well as a boundary wall dispute between the Plaintiff and their neighbour is resolved.

16. I have considered the circumstances herein. I think it is not fair that the defendant unilaterally decides to withhold payment for premises which he continues to occupy and at the same time come to Court seeking to be allowed to file his defence many months down the line after the suit has been set down for hearing. The Plaintiff has clearly been prejudiced by the actions of the Defendant. His case will as a result be delayed.

17. In the circumstances, and as I think every person is entitled to a hearing regardless of their apparent iniquities, I will in my discretion grant the Defendant leave to file a defence out of time to enable him defend the suit. That leave will be on condition however, that the Statement of Defence is filed within 14 days from the date hereof and that the Defendant pays 50% of the monthly instalments due to-date to the Plaintiff as per annexure 'A1' attached to the agreement between the parties within 30 days from today. If the said sum is not paid within the prescribed time, the Defence will stand struck out and the Plaintiff's suit will proceed as an undefended claim.

18. It is so ordered.

Dated, signed and delivered at Malindi this 31st day of July, 2018.

J.O. OLOLA

JUDGE