



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC NO. 100 OF 2015

1. ADEN ISMAIL HASSAN
2. MUGWERU JOSEPH MWEA
3. ALFONCE KYALO MUNYANGI
4. DOUGLAS MWAFUNGO DZOMBO
5. HISH BUNO KARANE.....PLAINTIFFS/RESPONDENTS

=VERSUS=

1. MOHAMED AMADA ISAAC
2. AMIDA ISAACK NIZAMDIN
3. OMAR ISAACK NIZAMDIN.....DEFENDANTS/APPLICANTS

R U L I N G

1. On 9th July, 2015, this court allowed the Plaintiff's Application dated 25th June, 2015.
2. The 2nd and 3rd Defendants have now filed an Application dated 10th August, 2015, in which they are seeking for the following orders:-
 - (a) That this Honourable Court be pleased to discharge and set aside the injunctive orders given herein on 9th July, 2015.
 - (b) That the 2nd and 3rd Defendants be granted leave to file their response to the Plaintiff's Notice of Motion Application dated 25th June, 2015.
 - (c) That this Honourable Court be pleased to make any other or such further orders as it may deem fit and just to make.
 - (d) That costs of this Application be provided for.
3. The Application is grounded on the facts that the Applicants have never been served with

- Summons to Enter Appearance; that the injunctive orders that were issued by the court against the 2nd and 3rd Defendants are irregular since there was no service and that the Plaintiffs are strangers to the 2nd and 3rd Defendants since they have never engaged them.
4. According to the Defendants, the orders of 9th July, 2015 against them were obtained without full disclosure of material facts on the part of the Plaintiff and that the same should be discharged.
 5. The 2nd and 3rd Defendants stated that none of them stay at “Uwanja wa Ndege” and that they do not run a school at Uwanja wa Ndege as indicated in the process-server's affidavit.
 6. The 2nd and 3rd Defendants deponed that they were not parties to the alleged agreement that was signed on 14th August, 2014 on which basis the Plaintiff's obtained the ex-parte orders.
 7. In response, the 5th Plaintiff/Respondent deponed that the 1st, 2nd and 3rd Defendants were served with the order of 26th June, 2015 together with the Notice of Motion dated 25th June, 2015 on 29th, June, 2015; that their advocate was also served with the first order and the Application on 30th June, 2015 and that the 3rd Defendant was present when the impugned agreement was signed on 14th August, 2014.
 8. The 1st Defendant has also filed an Application dated 4th September, 2015 in which he is seeking orders similar to the orders that are being sought by the 2nd and 3rd Defendants.
 9. The 1st Defendant has denied that he was ever served with the Summons to enter appearance or any other pleadings by the Plaintiff and that in any event the agreement between the Plaintiff and the 1st Defendant had lapsed by the time the suit property was sold.
 10. I have considered the submissions on record.
 11. The Defendants are seeking for an order setting aside my orders of 9th July, 2015 on the ground that they were never served with the Application dated 25th June, 2015.
 12. The Defendants' Applications are also grounded on the fact that the orders of this court are final in nature and that in any event, the agreement that the Plaintiffs are relying on is not binding.
 13. The Affidavit of Service of Mr. Gordhon Odhiambo shows that he served the 1st, 2nd and 3rd Defendants at the “Defendants' school situated at Mariakani Uwanja wa Ndege” on 29th June, 2015 at 2 pm.
 14. According to the process-server, the Defendants were pointed out to him by the 5th Plaintiff.
 15. The 1st and 2nd Defendants have denied that they own a school situated at Uwanja wa Ndege. The Defendants have also denied that they live at a place known as Uwanja wa Ndege.
 16. The Defendants in this matter did not seek the leave of the court to cross-examine the process server on his deposition that he served all of them at a school.
 17. Indeed, the 2nd Defendant has admitted that he runs a business at Mariakani Township. The 2nd Defendant has not stated the type of business that he runs in Mariakani.
 18. Considering that the Defendants have not denied that they do not know the person who pointed the process-server out to them, I am convinced that the three Defendants were served with Application dated 25th June, 2015. That may explain why they did not seek the leave of the court to cross-examine the process-server.
 19. It is trite that if there is no proper service of pleadings, the resulting Judgment or order will be an irregular one which the court must set aside *ex debito justitiae*.
 20. However, where a party has been served with court process, the court has the discretion to set aside the ensuing Judgment or order if it is convinced that the Applicant has raised a triable issue.
 21. The Defendants have argued that the orders that the Plaintiffs obtained in this matter are final in nature thus denying the Defendants a chance to ventilate their case when the matter comes up for hearing.
 22. The 1st Defendant has further submitted that in any event, the agreement dated 14th August, 2014 had lapsed by the time the suit property was sold.
 23. It is true, as submitted by the Defendants' counsel, that the orders of 9th July, 2015 conclusively dealt with the suit.
 24. According to the order, this court compelled the Defendants to pay to the Applicants their 10% commission of the purchase price “pending the hearing and determination of the suit.”
 25. I have perused the Plaint. The Plaint is seeking for a permanent injunction compelling the

- Defendants to pay the Plaintiffs their 10% commission as agreed in an agreement dated 14th August, 2014.
26. It is therefore obvious that there was nothing that was to proceed to trial after the court issued the order of 9th July, 2015 notwithstanding the fact that the Plaintiff still had the burden of proving that the Defendants had breached the agreement of 14th, August, 2014.
27. The fact that the prayers in the Application are final in nature, in a matter which, according to the Defendants, is not a straight forward matter in my view is a triable issue.
28. The 2nd and 3rd Defendants have also argued that they never signed the agreement of 14th August, 2014 and therefore cannot be bound by it.
29. I have perused the agreement of 14th August, 2014. The agreement was signed by the Plaintiff and the 1st Defendant.
30. Having not signed the agreement, it will be improper to condemn the 2nd and 3rd Defendants without hearing them considering that the order of the court of 9th July, 2015 is grounded on the said agreement.
31. The last triable issue that the 1st Defendant has raised is whether by the time the sale of the suit property took place, the agreement between the Plaintiffs and the 1st Defendant had lapsed.
32. I say so because the agreement of 14th August, 2014 specifically stated that the 1st Defendant, through the firm of Marende Birir & Co. Advocates, was to pay the Plaintiffs 10% of the purchase of the sale of the suit property “if the agents deliver their buyer within a period of thirty (30) days from the date hereof.”
33. Whether indeed the Plaintiffs “delivered” a buyer within 30 days as per the agreement is a triable issue that should be heard inter-partes.
34. In the circumstances, and for the reasons I have given, I allow the Defendants' Application dated 10th August, 2015 and 4th September, 2015 in the following terms:-

(a) The orders of this court of 9th July, 2015 be and are hereby set aside.

(b) The Defendants be at liberty to defend the Plaintiff's Application dated 25th June, 2015

(c) Each party bear his own costs.

Dated, signed and delivered in Malindi this 20th day of May, 2016.

O. A. Angote

Judge