



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.44 OF 2012

JOSEPH MUNYAO DISHON (*Suing in his capacity as the personal representative of the estate of the late LILIAN MWIKALI ANDRE*).....PLAINTIFF

=VERSUS=

EMIRICUS HENDRICUS VAN DE WERF.....DEFENDANT

R U L I N G

1. What is before me is the Application by the Defendant dated 20th February, 2015 seeking for the following orders:
 - (a) **That this Honourable court be pleased to grant leave to the Defendant so as to have the firm of ODUOR SIMIYU & COMPANY ADVOCATES come on record in place of J.O. JUMA & COMPANY ADVOCATES.**
 - (b) **That this Honourable Court be pleased to set aside the Judgment entered on 26th September 2014.**
 - (c) **THAT the costs of this Application be provided for.**

The Defendant's/Applicant's case:

2. The Defendant has deponed that on 20th January 2015, he was shocked to learn that this court had entered Judgment in favour of the Plaintiff on 26th September 2014; that he had engaged Mr. Dickson Oruk Advocate as his advocate who came on record using the firm of Ms J.O.Juma & Co. advocates and that unknown to him, the advocate never attended court.
3. According to the Defendant, MS J.O.Juma denied that he was aware of the matter and that in fact Mr. Juma notified all the members of the Law Society of Kenya to be aware of Mr. Oruko's illegal activities.
4. It is the contention by the Defendant that the suit property is the only asset that he has and he entirely depend on it; that the mistake of a counsel should not be visited on him and that he should be given an opportunity to ventilate his case.
5. In the Further Affidavit, the Defendant/Applicant deponed that his company, Big Game Fishing Lodge Malindi Limited purchased the suit property in a public auction conducted by Jogi Auctioneers; that the sale of the property was by auction emanating from an order of the Court in Kisumu HCCC No. 269 of 1997 and that the order has never been set aside.

The Plaintiff's/Respondent's case:

6. In the Grounds of Opposition, the Plaintiff's advocate averred that at all material times, the Defendant was represented; that the actions and non-actions of an advocate as an agent of a client binds the client and that the Defendant appeared and swore an affidavit in an Application dated 3rd December 2013 before a Mr. Dickson Oruko Nyawide Advocate.

Submissions:

7. The Defendant's/Applicant's advocate submitted that the Defendant's Defence raises weighty issues; that denying the Defendant an opportunity to be heard should be the last resort and that in the Further Affidavit, the Defendant has narrated how he acquired the suit property.
8. Counsel submitted that while opposing the Application, the Plaintiff has not shown what prejudice he is likely to suffer if the Judgment is set aside.
9. Counsel relied on numerous authorities which I have considered.
10. The Plaintiff's/Respondent's advocate submitted that there is no Affidavit by the firm of J.O. Juma to support the suggestion that Mr. Oruko had no authority to practice in the name and style of J.O. Juma & Co. Advocates; that if the Defendant was diligent enough, he would have known if he was dealing with a competent person or not and that the Applicant had admitted that the firm of J.O. Juma Advocates was served with a hearing notice.

Analysis and findings:

11. The record in this matter shows that on 20th May 2013, the Plaintiff filed an Amended Plaintiff.
12. On 28th May, 2013, the Defendant appointed the firm of Kabue Thumi & Co. Advocates to act for him.
13. After this court allowed the Plaintiff's Application for a mandatory injunction, the firm of J. O. Juma & Company Advocates filed an Application seeking to stay the Ruling of the court on 4th December 2013.
14. The court dismissed the Application filed by the firm of J.O. Juma & Co. Advocates on 17th February, 2014 for want of prosecution.
15. The court then dealt with the pre-trial questionnaire on 20th March 2014 and fixed the matter for hearing on 4th June 2014.
16. The matter proceeded for hearing on 4th June 2014 after the court was satisfied that indeed the firm of J. O. Juma & Co. Advocates was served with a hearing notice. The stamp showing that the firm of J. O. Juma was served with the hearing notice is indicated on the copy of the hearing notice that was returned to court.
17. Although the Defendant has deponed that he instructed one Dickson Oruko advocate who filed the notice of change of advocates in the name of J. O. Juma & Co. Advocates and who, according to the Defendant, did not have the authority of Mr. Juma to use his firm, the Defendant has not informed this court where he met the said person and whether he ever went to the offices of J. O. Juma & Co. Advocates while giving Mr. Oruko instructions.
18. There is no affidavit from an advocate in the said law firm to corroborate the allegations by the Defendant.
19. When a litigant scouts for a law firm or an advocate to represent him, it is upon him to do due diligence viz-a-viz the competence of such a law firm or advocate. If the litigant picks someone on the streets to represent him without checking with the Law Society of Kenya about the competence of such a person, he will have himself to blame when he is not represented adequately or at all.
20. In any event, the Judgment that was entered into after hearing the Plaintiff was a regular Judgment because the Defendant, after being served with the Summons to Enter Appearance, filed a Defence on 13th June, 2013.
21. Where a Judgment is regular, the same can only be set aside if the Defence or the draft Defence raises triable issues. Indeed, in its Judgment, this court was alive to the Defence that had been filed by the Defendant.

22. Although the Defendant has alleged in the Defence and the Further Affidavit that he purchased the suit property in a public auction pursuant to a court order, no evidence of the existence of the said order was annexed on the Affidavits. In fact, the purported court order which gave rise to the auction was never registered against the suit property making the Defence hollow and baseless.
23. In the circumstances, I find and hold that the Defendant has not shown that he is entitled to the orders of setting aside the Judgment of this court of 26th September 2014.
24. For those reasons, I dismiss with costs the Application dated 20th February 2015 except prayer number 2 allowing the firm of Oduor Simiyu & Co. Advocates to come on record.

Dated and delivered in Malindi this **17th** day of **July** 2015.

O. A. Angote

Judge