



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.24 OF 2012

1. MUTAHAR AHMED DAHMAN

2. AL AMIN AHMED DAHMAN (*Suing as administrators of the estate of*

Mariam Binti Said*.....**PLAINTIFFS/RESPONDENTS*

=VERSUS=

ATHUMANI SUDI.....DEFENDANT/APPLICANT****

R U L I N G

Introduction:

1. This matter proceeded for formal proof on 18th April 2013. On 12th July 2013, I delivered my Judgment in favor of the Plaintiffs.
2. The Defendant has now filed an Application dated 17th June, 2014 in which he is seeking for the following orders.
 - (a) **That this Honourable court do stay, set aside, and or vary the decree issued by the court on 23rd August 2013.**
 - (b) **THAT this Honourable court do issue an order of temporary injunction restraining the Plaintiff from interfering with the quiet possession of the suit property pending the hearing and determination of the suit.**
 - (c) **THAT the costs of the suit be provided for.**

The Defendant's/Applicant's case:

3. According to the Defendant's Affidavit, the Plaintiff did not disclose to this court that there exists Mombasa HCCC No. 206 of 1999 in which the Plaintiff was barred from increasing rent from Kshs.300 to Kshs.1,000 per month; that it is not true that he has refused to pay the rent and that the Plaintiff has refused to accept the rent of Kshs.1000 per month from him.
4. The Defendant has deponed that he was never served with Summons to Enter Appearance.

The Plaintiff's/Respondent's case:

5. The Plaintiff filed Grounds of Opposition in which he averred that the Defendant was served with the Summons to enter appearance twice before the Deputy Registrar entered interlocutory judgment; that the Defendant has no defence to the claim by the Plaintiff as ground rent has admittedly not been paid and that the Defendant conduct in the whole is undeserving of the exercise of discretion to set aside the judgment and the proceedings.

6. Isaac Muriuki Kinyua, a licensed process server filed an affidavit in reply in which he deponed that he served the Defendant with Summons to Enter Appearance as shown in his affidavit of service.

Cross-examination

7. The Process-servers who allegedly served the Defendant and the Defendant himself were cross-examined by the counsels.

8. Mr. Isaac Muriuki, a licensed process-server, informed the court that he served the Defendant with Summons to Enter Appearance on 30th May 2012 as per the affidavit of service that was filed in court on 2nd July 2012.

9. According to the said affidavit of service, Mr. Muriuki, while accompanied by Mr. Omari, the Plaintiff's representative and tuk tuk rider, whose mission was to point out to him the Defendant, proceeded to Malindi Municipal Council where the Defendant works. Upon arrival at the Municipal Council, they were informed that the Defendant was on leave.

10. The said process-server has deponed in his affidavit that they then visited the Defendant's residential house situated near Mijikenda building in Malindi town and the Defendant was introduced to him by Mr. Omar, whereupon he served him with the Summons to Enter Appearance which he accepted but refused to sign.

11. The process-server reiterated this evidence in court during cross-examination although he was unable to pick out the Defendant who was in court.

12. The second process-server, Thomas Konde, informed the court that he was also instructed to serve the Defendant with the Summons to Enter Appearance which he did on 27th February, 2012 at around 4 pm.

13. According to his evidence and the affidavit of service, he was accompanied by the Plaintiff's relative, Mr. Mohamed, when he visited the Defendant at his residence and found the Defendant's wife in the house.

14. Upon inquiring, the Defendant's wife informed them that the Defendant was at Ibnu Abass Mosque. The two then left and went to the mosque and Mr. Mohamed called the Defendant outside the mosque and pointed him out to him. The said process-server then served the Defendant with Summons to Enter Appearance which he accepted but refused to sign.

15. The process-server pointed out the Defendant who was in court.

16. Mr. Omar Naso Abdalla, a tuk tuk rider, informed the court that he knew both the Plaintiff and Defendant. It was the evidence of Mr. Omar that he takes the Plaintiff's children and the Defendant's grandchildren to school using his tuk tuk.

17. It was the evidence of Mr. Omar that the Plaintiff called him on his cell phone and informed him to take someone to the Municipal Council of Malindi with a view of pointing out the Defendant who was also known to him

18. It was his evidence that they did not find the Defendant at his place of work at the Municipal Council and that is when he took the process-server to the Defendant's house which he knew where it was located.

19. In cross-examination, Mr. Omar stated that he knew the Defendant because he ferries his grandchildren to school using his tuk tuk. The witness pointed out the Defendant who was in court.

20. According to Mr. Omar, he pointed out to the process-server the Defendant and saw them discussing.

21. The Defendant informed the court that he used to work at the Municipal Council of Malindi although he has since retired. It was his evidence in cross-examination that he is a tenant of the Plaintiff and that he used to pay rent of Kshs.300 per month.

22. The Defendant admitted that he knew Mr. Omar, the tuk tuk rider and that he indeed has five grandchildren who go to school within Malindi. He was not sure if it is Mr. Omar who ferries them to school as alleged.

23. The Defendant denied knowledge of the present suit. The Defendant also denied ever seeing the two process-servers in his house.

24. It was the evidence of the Defendant that he only became aware of the suit when he received documents in respect of execution proceedings.

25. In further cross-examination, the Defendant stated that the Plaintiff's mother allowed him to construct on the suit land 28 years ago and that they used to pay a monthly ground rent of Ksh.300 until 1999 when the rent was increased to Kshs.1,000 per month.

26. However, it was his evidence that they refused to pay the said rent and filed a case being Mombasa HCCC No. 206 of 1999 in which they obtained an injunction. According to the Defendant, he paid to the Plaintiff a lump sum amount of Kshs.30,000 for ground rent.

Submissions:

27. The Defendant's/Applicant's counsel submitted that the Defendant's main contention is that he was never served with the pleadings in this matter and that the process-servers contradicted each other.

28. According to counsel, the Application raised triable issues because the Plaintiff arbitrarily increased the rent from Kshs.300 per month to Kshs.1,000 per month.

29. According to counsel, his client had paid a lump sum amount of Kshs.30,000 which would have covered a period of 100 months although the Plaintiff went ahead to issue a receipt of Kshs.2,000 per month. Counsel relied on the case of **Sameer Africa Limited Vs Aggarwal & Sons Ltd (2013) e KLR, Patel Vs East Africa Cargo Handling Service Ltd (1974) EA 75, Maina Vs Mugira (1983) KLR 78 and Mbogo Vs Shah (1968) EA 93** which I have considered.

30. The Plaintiff's/Respondent's counsel submitted that the Defendant's denial that he was served with the Summons to Enter Appearance is hollow and a lie. Counsel submitted that the Defendant did admit that he knew Mr. Omar and that the Defendant did not deny his presence in Malindi on 27th February 2012 and 30th May 2012 or that he was not in Ibnu Abbass mosque at about 4 pm on 27th February 2012 or his house is in the morning of 30th May 2012.

31. The Plaintiff's counsel submitted that on each occasion the Defendant was served with the Summons there was an independent witness who pointed him out and that the process-servers evidence was not shaken during cross-examination.

32. Counsel submitted that indeed the Defendant was served with the Summons to Enter Appearance not once, but twice.

33. The Plaintiff's counsel further submitted that the Defendant had not demonstrated that he has a Defence to the Plaintiff's claim; that the Defendant is in arrears of ground rent irrespective of the rate that he applies and that the court ought not to exercise its discretion in his favour. Counsel relied on the cases of **Patel Vs EA Cargo Handling Services Ltd (1974) 75 and Mbogo Vs Shah (1968) EA 93** which I have considered.

Analysis and findings:

34. The Defendant's Application is premised on the grounds that he was not served with Summons to Enter Appearance and that he has a defence which raises serious triable issues.

35. It is trite law that where a Defendant is not served with Summons to Enter Appearance, any default judgment that is entered is to be set aside by the court *ex debito justitiae*. The Defendant would then be allowed to defend the suit unconditionally.

36. However, where it is shown that the Defendant was served with Summons to Enter Appearance, and where there is default judgment, otherwise known as a regular judgment, the Defendant must show why the discretion of the court to set aside the judgment should be exercised in his favour. The primary consideration in such a situation is whether the Defendant's defence has merits.

37. (See Patel Vs EA Cargo Handling Services [1974] EA 75).

38. How a court is supposed to exercise its discretion in a matter where regular judgment has been entered was stated by **Lord Russel of Killowen in Evans Vs Bartlam [1937] AC 437** as follows:

“The contention no doubt contains the element of truth, that from the nature of the case, no judge could, in exercising the discretion conferred on him by the rule, fail to consider both (a) whether any useful purpose could be served by setting aside the judgment and obviously no useful purpose would be served if there was no possible defence to the action and (b) how it came about that the applicant found himself bound by a judgment, regularly obtained, to which he could have set up some serious defence.”

39. The process server, Thomas Konde, appeared before me and stated that he served the Defendant with the Summons to Enter Appearance on 27th February 2012. According to his evidence, he was accompanied by someone who knew the Plaintiff and the Defendant, and where the Defendant lives, a Mr. Mohammed.

40. When the said Thomas Konde and Mr. Mohammed went to the Defendant's residence which is next to Nidhamia Hall in Shella, they were informed by the Defendant's wife that the Defendant was at Ibnu Abbass Mosque.

41. It was the evidence of the said process-server that they went to the said mosque and Mr. Mohammed fetched the Defendant from inside the mosque whereafter he served him with the Summons to Enter Appearance.

42. The Defendant's place of residence was known to the Plaintiff and Mr. Mohammed considering that the Defendant is the Plaintiff's tenant.

43. The Defendant did not deny that he was indeed at the Ibnu Abbas Mosque on 27th February 2012 at about 4.00 pm

44. The evidence by Mr. Thomas Konde that he served the Defendant at Ibnu Abbas Mosque after visiting the Defendant's residence was not controverted by the Defendant.

45. I believe the evidence by Mr. Thomas Konde that he traced the Defendant, in the company of Mr. Mohammed, and served him with the Summons to Enter Appearance on 27th February 2012. Having

been served, the Defendant did not bother to enter appearance.

46. The second process-server, Mr. Muriuki Kinyua, informed the court that he was instructed to serve the Defendant with the Summons to Enter Appearance. This was the second service of the Summons on the Defendant.

47. According to the evidence of the process-server, he was taken to the Defendant's work place by a tuk tuk rider, a Mr. Omar who knew both the Plaintiff and the Defendant. Indeed, the tuk tuk rider confirmed to the court that he knew both the Plaintiff and the Defendant because he transports the Plaintiff's children and the Defendant's grandchildren to school.

48. The said tuk tuk rider, whom the Defendant knew, had no reason to lie to this court that they looked for the Defendant at the Municipal Council of Malindi and then at his residence on 30th May 2012.

49. The evidence of the Process-server and the tuk tuk rider that they met the Defendant on 30th May 2012 in his house is believable. In any event, the Defendant did not give any evidence to show that it was not true that he was in his house on 30th May 2012 as alleged by Mr. Omar and the second process-server.

50. The Defendant also admitted that he has grandchildren who are school going.

51. I am therefore satisfied that the Defendant was serviced twice with the Summons to Enter Appearance in this matter and he failed to file a Defence within the prescribed period. The judgment that was subsequently entered in this matter is therefore regular.

52. The Plaintiff's claim in the Plaint is that Mariam Binti Said (deceased) granted to the Defendant by a verbal agreement, a personal revocable licence to build a temporary structure for his residence on a small part of the suit property on consideration of the Defendant paying the agreed ground rent of Kshs.300 per month which was regularly adjusted upwards to Kshs.2,000 per month.

53. The Plaintiff further alleged that by a notice issued on 25th September 2010 and served on the Defendant on 29th September 2010, the personal revocable licence or right enjoyed by the Defendant was terminated and The Defendant was required to vacate and remove his temporary structure from the suit land. In addition, the Plaintiff prayed for ground rent from 1999 to September 2010, mesne profits for October 2010 to February 2012 of Kshs.34,000 and future mesne profits at Kshs.2,000 per month until payment in full.

54. The main prayer in the Plaint is for the immediate possession of the land in vacant possession and for the payment of ground rent and mesne profits at the rate of Kshs. 2000 from 1999 until payment in full.

55. In an application to set aside a regular judgment, the Defendant is obliged to attach on his affidavit a draft defence and respond to allegations raised in the Plaint. The Defendant did not attach a draft defence on his Application.

56. However, the Defendant has raised what he believes are triable issues in his Application. In my view, the non-attachment of a draft defence on an application to set aside Judgment is not fatal to the application if the applicant raises what he believes are triable issues that he will raise in his defence in the application.

57. All the court is required to ascertain from the application or a draft defence is whether the issues raised by the applicant can form a basis of a good or serious defence against the Plaintiff's action. If so, the applicant should be allowed to defend the action by filing a Defence.

58. The Defendant has admitted in his supporting affidavit that him, together with the other tenants, have been paying rent of Kshs.1,000 per month which was increased from Kshs. 300 per month.

59. If the Defendant last paid rent of Kshs.30,000 on 19th September 2000 as deponed in his affidavit, and if the payable ground rent as stated in his supporting affidavit is Kshs. 1,000 per month, then the said Kshs.30,000 was rent for 30 months. The said 30 months lapsed on 18th March 2002.

60. Even if the payable rent was kshs.300 per month as decreed at an interlocutory stage in Mombasa H.C.C.C. No. 206 of 1999, the Defendant was still in arrears as at 25th September 2010 when the Plaintiff issued to him a notice to vacate the suit premises.

61. For those reasons, I am satisfied that the Defendant does not have a possible defence to the Plaintiff's action for ejectment from the suit property.

62. However, the Defendant has raised what I consider to be a triable issue on the payable ground rent and mesne profits.

63. According to the Plaintiff and the Plaintiffs' evidence, the Defendant initially agreed to pay ground rent of Kshs. 300 which was regularly adjusted upwards to Kshs. 2,000 per month. It is the Plaintiffs' case that the Defendant fell in arrears of ground rent from 1999.

64. On the other hand, the Defendant has deponed that although the payable rent is Kshs. 300 per month, all the tenants on the suit property agreed to pay to the Plaintiffs Kshs. 1,000 per month as ground rent.

65. According to the Defendant, all the other tenants are paying ground rent of Kshs. 1000 per month and that the Plaintiffs have singled him out and demanded rent of Kshs. 2000 per month.

66. The Defendant referred the court to a pending matter in Mombasa HCCC No. 206 of 1999 in which the Defendant and the other tenants sued the Plaintiffs' mother claiming that the payable rent should be Kshs. 300 and not Kshs. 1000. The court issued an injunction in favour of the tenants.

67. The Plaintiffs have not made any reference to the said case in their pleadings. Indeed, it is not clear to this court if the orders of the court in that matter were ever set aside or not. In the circumstances, this court has to establish the payable ground rent or mesne profits before condemning the Defendant to make payment of the same.

68. On that ground alone, I find that the Defendant has a serious Defence to the Plaintiffs' action on the payable ground rent or mesne profits.

69. In the circumstances, I shall, which I hereby do, allow the Defendant's Application dated 17th June, 2014 in the following terms:

- a. **The Judgment of this court dated 12th July, 2013 and the Decree be and is hereby set aside.**
- b. **The Defendant to file his Defence within 14 days from the date hereof.**
- c. **Each party to bear his own costs.**

Dated and delivered in Malindi this 28th day of November, 2014.

O. A. Angote

Judge