



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI**

Civil Suit 3 of 2007 (OS)

KASIMU SHARIFU MOHAMED.....PLAINTIFF

VERSUS

TIMBI LIMITED.....DEFENDANT

R U L I N G

By an application by way of Chamber Summons dated 30th October 2007, pursuant to the provisions of **Order IXA Rule 10 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act**, the applicant seeks Orders:

1) That the honourable court be pleased to set aside the *ex parte* judgment, decree, registration of the respondent as owner, any title issued to the respondent, any title transferred to the respondent to any third party, and/or any other consequential orders or acts based upon the *ex parte* judgment and decree.

2) That there be a stay of execution of the *ex parte* judgment and decree herein pending the hearing *inter partes* of the application and/or its determination.

3) The honourable court be pleased to issue an order forthwith restraining the respondent from transferring to any third party, disposing any interest, constructing or otherwise dealing with the suit property pending the hearing *inter partes* of this application and/or its determination.

4) The costs of this application be provided for.

The application is grounded upon the annexed affidavit of **Abdul Hamid Aboo** and on the grounds hereunder and/or further grounds to be adduced at the hearing hereof.

1. That the respondent is in the process of disposing the suit property so as to defeat this application to set aside the *ex parte* judgment and has on 26-10-07 lodged a transfer at the Lands registry transferring the suit property to Cyprea Ltd.

2. That on 29-10-07 the respondent's advocate wrote to the Lands Registrar urging him to expedite registration of the said transfer in favour of Cyprea Ltd.

3. That the failure to serve the originating summons was deliberate and orchestrated by the plaintiff who at all material times knew the directors of the applicant company personally and was in

touch with them.

4. That the failure to serve process in this suit discloses a disturbing pattern by the same advocate of irregularly obtaining *ex parte* judgments in similar adverse possession suits.

5. That the purported service by post was null and void as the same was effected without direction of the court as is mandatory under Order XXXVI Rule 3D(3). In any event the applicant's postal address is P O Box 5451 Malindi and not P O Box 868 Malindi as alleged by the respondent.

6. That the applicant is the bona fide owner of the suit premises and holds a valid title thereto.

7. That the respondent purported to acquire ownership of the suit property by a decree from a suit which was a nullity for being *res judicata*, to wit, **PMCC Civil case No. 238 of 1997 – Timbi Ltd VS. Kasimu Sharifu Mohamed** and *sub judice* to the previously instituted **Msc. Civil Application No. 46 of 2006 – Timbi Ltd VS Land Disputes Tribunal** and **Senior Resident Magistrate Malindi** pending at High Court Mombasa as at 16-1-07 when this suit was instituted.

For the applicant it was argued that, Timbi Ltd is the bona-fide owner of Plot No. 503 Watamu and is in possession of the original title exhibited as “**AHA 1**”. That on 19th October 2007 Mr. Saleem Ghalia, the applicant's advocate, while conducting a routine search in respect of the suit property discovered that the plaintiff/respondent had been registered as the owner. In this regard I was shown exhibit “**AHA 2**”, a copy of the title. Upon perusal of the register he further discovered that registration was done on the basis of a judgment and decree issued by this court on 11th July 2007.

That so soon after obtaining registration the plaintiff/respondent is now in a hurry to dispose of the same. Towards that end, he has obtained the lessor's consent on 26th October 1997 and subsequently lodged transfer forms transferring the suit property to CYPREA LTD. Copies of the consent of the Ministry of Lands dated 22nd October 2007, transfer and application for registration of transfer and the forwarding letter are marked as exhibit “**AHA 3**”.

That the applicant company with a registered office at Plot No. 435/XXVI, Mama Ngina drive, Sea View Plaza, Mombasa, never received any court papers by registered post or otherwise.

That in any event the applicant's postal address is C/o P. O. Box 1541, Malindi as opposed to C/o P. O. Box 868, Malindi as borne out by the copies of applicant's annual return for the year 2006 exhibited as “**AHA – 4.**”

That there has been previous matters between the same parties herein. One of them being **Mombasa Msc. Civil Application No. 46/2006** which is pending in High Court at Mombasa. Arising from the said pending case the respondent is aware that Saleem Ghalia Advocate and Ushwin Khanna Advocate, holding brief for Mr. Saleem Ghalia, have always been acting for the defendant/applicant in all previous matters concerning the same property and same parties. Naturally, the respondent and/or his advocate should have enquired from the said advocates how to trace - **Timbi Ltd.**- their client.

A perusal of the court file shows that the court never gave any directions as to how and on whom the summons were to be served as mandatorily enjoined by **Order XXXVI rule 3D (3)** of the Civil Procedure Rules thereby rendering the alleged service null and void.

That in any event the respondent herein had made contact with **Guanfranco Vitali**, a director of the applicant company, and negotiations were underway on the best way to resolve the matter out of court.

The respondent at no time mentioned of the existence of this subject suit in Malindi.

That the respondent has knowingly misled the court in deponing on oath that prior to the filing of this subject suit, he has enjoyed quiet and uninterrupted occupation of the parcel of land for over 12 years. Yet the applicant had instituted, **Malindi PMCC No. 238/1997: TIMBI LTD. V. KASIMU SHARIFU MOHAMMED** seeking to have the respondent herein evicted from the suit property for trespass. It is significant that the court held in favour of the applicant. In this respect the applicant annexed judgment in support exhibit “**AHA – 5**”.

That after losing Malindi **PMCC No. 238 of 1997**, the respondent lodged **Lands Dispute Tribunal Case no. 19 of 1999: KASSIM SHARIFU V. TIMBI LTD** and obtained judgment against the applicant. Like in the subject suit, the proceedings in the tribunal case went on without the knowledge of the applicant which exposes a streak in pulling a fast one on the applicant all the time. Copies of the proceedings and judgment of the said tribunal case are annexed as exhibit “**AHA – 6**”.

That the decision of the said Tribunal was subsequently adopted as a judgment of the court vide **Malindi Land Disputes Tribunal Case No. 3/2005**. A copy of the order is exhibited herein as “**AHA 7**”.

That the applicant being aggrieved with the said tribunal’s order instituted **Mombasa HC. Misc. Civil Application No. 46/2006** for Judicial Review. In the Judicial Review application, the applicant is seeking for the quashing of the decision of the said Land’s Tribunal and the adoption of the said order by the Senior Resident Magistrate. The said Judicial Review application was scheduled for hearing on 17th October 2007 before Maraga J, but the same was adjourned by consent of respective counsels with a view to pursuing an out of court settlement. The honourable court in its wisdom, on 23rd January 2006, ordered that there be a stay of the implementation and execution, as per exhibit “**AHA 8,**” until the determination of judicial review proceedings. The order staying the award was received on 16th March 2006 by the Registrar of Titles Mombasa and registered as such vide exhibit “**AHA 9**”.

From the foregoing evidence, the applicant contended that the respondent has not been candid with this court. Moreover, the applicant in cahoot with his advocate, **Mr. Maranga Maosa**, has been involved in concealing many facts to the court and swearing false affidavits of service thereby exhibiting a consistent pattern of deliberate and calculated abuse of the court process as evidenced in exhibit “**AHA 10**”.

That since discovering the respondent’s illegal attempts to fraudulently dispose of the suit property the applicant obtained an injunction order in **Mombasa HCC Msc. Application No. 46/2006** as per exhibit “**AHA 11**”.

By reason of the foregoing matters, the applicant urged the court to set aside the exparte judgment entered herein on 11th July 2001 and all the consequential orders and decree arising therefrom.

The applicant relied wholly on the grounds on the face of the application and the affidavit in support in addition to oral submissions of counsel.

The respondent opposed the application and relied on the replying affidavit of **Kassimu Sharifu Mohammed** sworn on 1st November 2007 in addition to submission of counsel.

For the respondent, it was argued that judgment and decree of this court was obtained on 11th day of July 2001. The same was given effect by the issuance, on 24th September 2007, of a provisional certificate of title marked exhibit “**KSM 11**”.

That subsequently the respondent lodged a transfer with the Registrar of Titles, Mombasa for its registration at 9.00am on 26th July 2001 as per exhibit “**KSM 3**”. Hence execution has already taken place and he no longer has any proprietary interest over the suit land.

That from the judgment herein, it is clear that the implication of **Malindi Land Disputes Tribunal Case No. 19/1999; Malindi PMCC No. 238/1997 and Mombasa Misc. Civil Application No. 461/2006** were well addressed therein.

That the respondent has been in quiet possession of the suit property as evidenced by copies of bundle of letters marked as Exhibit “**KSM 4-5**”.

That the applicant was duly served under and in accordance with Order V Rule 2(a) of the Civil Procedure Rules after undertaking a proper search at the Registrar of Companies Offices as per exhibit “**KSM 6**”.

That exhibit “**AHA 4**” has no evidence of having been presented to the Registrar General for stamping under S. 108 of the Companies Act.

All in all the respondent denied the allegation of bad faith, concealment of material facts from court, deception and fraud.

At the hearing of the application leave was sought and obtained pursuant to the provisions of Order XVIII Rule 2 to cross-examine Mr. Maranga Maosa advocate, on the contents of his affidavit of service sworn on the 19th day of March 2007. The salient facts that stand out from the said cross-examination are as follows;

(i) the summons to enter appearance was neither taken out nor served with the originating summons.

(ii) the originating summons itself, if the court record is something to go by, did not limit the time within which the defendant could enter appearance.

(iii) mandatory directions as enjoined by the provisions Order XXXVI Rule 3D(a) were not complied with.

(iv) the efforts allegedly made in tracing the applicant/defendant were suspicious in that:

(a) within one working day of filing the originating summons the process server had declared that he could not trace the defendant. That was false by reason of the fact that filing was on 18th January 2007 – a Thursday – and by 22nd January 2001 – a Monday – the process server had already declared that he was unable to trace the applicant/defendant. Moreover, the authority of one Augustine Maina to serve process is equally in doubt.

(b) it is not possible that the Registrar General could write to the process server, Mr. Maranga Maosa advocate, – on 8th January 2007 upon an enquiry made on 18th January 2007. In which case, the answer preceded the enquiry. The said advocate must be deemed to have sworn a false affidavit.

(c) order V Rule 2(a) and (b) require that service on a corporation must be effected on the company secretary, director or any other principle officer. The process server, Mr. Maranga Maosa, has admitted that he did not make effort to trace the company secretary at Seaview Plaza in Mombasa

where the said company has offices and the said advocate also practices law. In the absence of evidence of making effort, Order V Rule 2a, Rule 2b, does not apply.

From the said anomalies counsel urged me to find, **inter-alia**, that the entire suit (O.S) is a nullity since summons to enter appearance was not taken out or if taken out not served as enjoined by **Order XXXVI Rule 3D**.

That the entire suit offends the provisions of Order XXXVI Rule 7 and 8 of the Civil Procedure Rules.

That Judgment should be set-aside, and adverse orders made against Mr. Maranga Maosa advocate, in line with the provisions of the Advocates Act, the oaths and statutory Declaration Act or any other relevant statute.

The principles upon which a court of law and equity would set aside a dismissal order or judgment in default is now well settled.

In **KIMANI V. MCCONELL [1966] E.A 547, HARRIS, J**, in dealing with the question as to the circumstances to be borne in mind by a judge in application under Order IX Rule 10, said this [ibid at p.555a]

“--- in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties. It would be just and reasonable to set aside or vary the judgment, if necessary upon terms to be imposed ---“

In **KENWOOD TRADING COMPANY LTD V. LEONARD MUTUA: COURT OF APPEAL CIVIL APPEAL NO. 55 OF 1996** their Lordships had this to say at page 5

“---exercise of discretion to set aside exparte judgment requires an overall view of all the circumstances which lead to non-appearance of the defendant or counsel. The court has also to bear in mind the interests of the litigant in taking view of the overall view of the circumstances---.”

The circumstances that led to the granting of ex-parte judgment have been explained by the applicant in his affidavit in support and carefully analysed herein. I have taken cognizance of the fact that the property is a prime one worth substantial amount of money. That being the case it would not be in the interest of justice that the applicant should lose the property without the case being heard on merits.

Most important, it is clear to me that the summons to the originating summons were not taken out or if ever taken out were not served as enjoined by the relevant law. It is equally clear to me that the said summons were not served with the originating summons. Mandatory direction as enjoined by Order XXXVI Rule 3D were not given (**see BUSIA CIVIL SUIT NO. 47/2004 (O.S): ANTONY WECHULI ODWASI V. AFRED KIHSA WANYANGANYI**)

Order **XXXVI Rule 3D** of the Civil Procedure Code provides:

“1. An application under Section 38 of the Limitation of Actions Act shall be made by originating summons.

2. The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed

3. The court shall direct on whom and in what manner the summons shall be served.”

It is instructive to note that Rule 3D provides that the court shall direct on whom and in what manner the summons shall be served. If summons is neither taken out or if taken out it is not served, it cannot be a mere irregularity. (See **CRAIG V. KANSTEN (1943) 1 K.B at page 262**. Their Lordships had this to say in similar circumstances:

“The question we have to deal with is whether the admitted failure to serve the summons upon which the order in this case was based was a mere irregularity or whether it was something worse, which would give the defendant the right to have the order set aside. In my opinion it is beyond question that failure to serve process where service of process is required, is a failure which gives to the root of our conception of the proper procedure in litigation. Apart from proper ex parte proceedings, the idea that an order can validly be made against a man who has had no notification of any intention to apply for it is one which has never been adopted in England. To say that an order of that kind is to be treated as a mere irregularity, and not something which is effected by a fundamental vice, is an argument which in my opinion, cannot be sustained.”

In this case it is doubtful, for the reasons disclosed, whether summons were ever taken out. It is further doubtful whether the same were ever served, judging by the evidence that came out from the cross-examination of Mr. Maranga Maosa advocate. The problem is further compounded by my finding that the aforesaid advocate is not candid.

After due consideration of all the issues raised by this application I am of the considered view that this application should be granted.

The upshot is that;

1. The exparte judgment entered on 11th July 2007 is set aside, together with all consequential orders emanating therefrom, with costs to the applicant.

2. The Registrar Mombasa Land Registry is hereby ordered to restore the title of Plot No. 503/Watamu (R. No's 16721 forthwith, to M/s Timbi Ltd. pending the outcome of the suit.

3. A copy of this ruling, order and proceedings to be served upon the Secretary, Advocates Disciplinary Committee by way of complaint under Section 56 as read together with Section 60 of the Advocates Act against Mr. Maranga Maosa Advocate who has sworn and filed a false affidavit in court proceedings. The Deputy Registrar of this court shall swear an affidavit setting out the allegations of professional misconduct in terms of Section 60(2) of the Advocates Act [Cap 16] Laws of Kenya.

4. Mr. Maranga Maosa advocate to pay personally the costs of this application.

5. The parties herein do undertake discovery exchange of documents and framing of issues in terms of the provisions of Order X Rule 11A and ensure that this matter is fixed for hearing within six months from the date hereof.

DATED and DELIVERED at Malindi this 27th day of November 2007.

N. R. O. Ombija

JUDGE



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