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| Case Class: | Civil |
| Court: | Environment and Land Court at Malindi |
| Case Action: | Ruling |
| Judge: | Oscar Angote |
| Citation: | Paola Tarlazzi & another v Roberto Ciavolella [2014] eKLR |
| Advocates: | - |
| Case Summary: | - |
| Court Division: | Land and Environment |
| History Magistrates: | - |
| County: | Kilifi |
| Docket Number: | - |
| History Docket Number: | - |
| Case Outcome: | Application dismissed. |
| History County: | - |
| Representation By Advocates: | - |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |
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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 206 OF 2013

PAOLA TARLAZZI (Suing Through His Attorney And/Or Agent)

CARLA TARLAZZI.....PLAINTIFF/RESPONDENT

=VERSUS=

ROBERTO CIAVOLELLA.....DEFENDANT/APPLICANT

R U L I N G

Introduction:

1. What is before me is the Defendant's Application dated 5th September, 2014 in which the Defendant is seeking for the following orders:

(a) That the judgment entered against the Defendant for the Plaintiff on the 1st September 2014 be set aside forthwith and the Defendant be granted leave by this Honourable Court to file his statement of defence out of time.

(b) THAT upon granting leave to the defendant the draft statement of Defence annexed be deemed proper and as duly filed upon payment of the requisite court filing fees.

The Defendant's case:

2. According to the Defendant's deposition, his former advocate failed to file a Defence within the prescribed period because he concentrated on various applications filed by the Plaintiff, one of them being an application for contempt.

3. According to the Defendant, the failure to file a Defence is an inadvertent mistake of his advocate and that he has raised a strong and arguable grounds in his draft Defence; that the Plaintiff's case is premature and a non-starter; that the suit should have been filed in Italy and that it will be prejudicial if he is condemned unheard.

The Plaintiff's/Respondent's case

4. In his Replying Affidavit, the Plaintiff has deponed that the Applicant has failed to explain his failure

to file a Defence within time; that in any event the draft Defence is a sham and does not answer the allegations raised in the Plaintiff and that there is admission that the Plaintiff advanced to the Defendant the money claimed.

Submissions:

5. The Defendant's/Applicant's advocate filed his written submissions. Counsel submitted that the draft defence raised triable issues; that the cause of action arose in Italy and that the agreement of 27th September 2013 and the cheque were transacted and banked in Italy and therefore this court lacks the jurisdiction to deal with the dispute.

6. The Defendant's counsel submitted that the suit property known as Villas number 7 and 8 situated on land portion number 1271 Malindi are not owned by the Defendant but by Melville Limited where the Defendant is only a director.

7. The Defendant's/Applicant's counsel finally submitted that this court has discretion to allow the Defendant to file his Defence out of time.

8. Counsel submitted at length on the applicable law where summary judgment is sought.

9. On the other hand, the Plaintiff's/Respondent's advocate submitted that the delay by the Defendant in filing a Defence for over ten months amounts to obstruction of justice and or delay of the cause of justice; that the said delay is inexcusable and that the delay defeats the overriding objective of the Civil procedure Rules.

10. The Plaintiff's counsel finally submitted that the proposed Defence is a sham and does not answer to the allegations raised in the Plaintiff.

Analysis and findings:

11. On 18th May November 2013, the Plaintiff filed a Plaintiff seeking for a permanent injunction restraining the Defendant or his agent from selling, trespassing, dealing with and meddling in the property known as Villa number 7 and 8, situated on portion number 1371, Malindi.

12. The Plaintiff also sought for an order of payment of Euros 130,000 due and owing from the Defendant, and in the alternative the transfer of villa number 7 and 8.

13. In the Plaintiff, it has been alleged that in the year 2013, the Plaintiff advanced to the Defendant a sum of Euros 125,000 and the Defendant pledged to refund the money by giving to the Plaintiff a cheque number 1641958885 for the same amount. However the said cheque was dishonoured upon presentation.

14. The Plaintiff has also alleged that a further agreement for a sum of Euros 5,000 was entered into where it was agreed that the said sum should be added on the sum of Euros125,000 being payment for

use of Villa number 7 and 8. According to the Plaintiff, Euro 130,000 was to be paid to the Plaintiff failure of which the two villas were to be transferred to him.

15. The Defendant has not denied that he was served with the Plaintiff and the Summons to Enter Appearance. Indeed, the defendant appointed the firm of Kanyi J & Co. Advocates who filed their Memorandum of Appearance on 28th November 2013. The said firm however did not file a Defence. Instead, they filed a Replying Affidavit, in respect to the Plaintiff's Application for injunctive orders.

16. The Defendant's advocate also filed an application dated 17th February 2014 seeking to strike out the Plaintiff. That Application is still pending.

17. In the meantime, the Plaintiff's advocate filed an application for contempt which was heard and determined on 9th May 2014.

18. On 12th August 2014, the Plaintiff's advocate requested for Judgment for Euros 130,000 pursuant to the provisions of Order 10 Rule 4(2) of the Civil Procedure Rules.

19. When the request for judgment was placed before the Deputy Registrar, he declined to enter judgment on the ground that the entry of judgment would preempt and determine the application dated 12th June 2014.

20. The Plaintiff's advocate was dissatisfied with the Ruling of the Deputy Registrar. On 19th August 2014, the Plaintiff moved the Deputy Registrar by way of a letter requesting the Deputy Registrar to reconsider his decision of refusing to enter default judgment as requested.

21. The Deputy Registrar declined to reconsider his decision and informed the Plaintiff's advocate to instead move this court.

22. The Plaintiff's advocate addressed me on the issue of the request to have default judgment entered against the Defendant on 1st September 2014.

23. After hearing the Plaintiff's and the Defendant's counsel, I set aside the Ruling of the Deputy Registrar and entered Judgment in favour of the Plaintiff for the liquidated claim of Euro130,000. That is the order that the Defendant is seeking to set aside and to be allowed to defend the suit.

24. Order 10 Rule 4 of the Civil Procedure Rules provides that where the Plaintiff makes a liquidated demand and the Defendant fails to appear, the court shall on request enter judgment against the Defendant for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit to the date of the judgment and costs.

25. However, where a liquidated claim is made together with other claims, judgment on the liquidated claim shall be entered but the issue of costs shall await judgment of the other claims.

26. The Defendant has not denied that the Plaintiff has made a claim of Euros130,000. According to the Defendant, his advocate was engrossed in the Application for contempt that he forgot to file a Defence.

27. The issue of the Defendant's advocate forgetting to file a Defence within 14 days from the date of filing the Memorandum of Appearance just because he was engrossed in other Applications is not plausible. An advocate, or a litigant for that matter, ought to be aware that a Defence has to be filed

once he or she is served with a Plaint and summons to enter appearance.

28. In view of the admission by the Defendant that he was served with the Plaint, the default judgment that this court entered on 1st September 2014 is a regular judgment.

29. The court has the discretion to set aside a regular judgment where it is shown that the Defendant's Defence has merit. In the case of **CMC Holdings Limited Vs Nzioki (2004) 1EA 23**, the court of appeal held as follows:

“ In exercising its setting aside discretion, the trial court should also consider whether the defence on record or the draft defence is reasonable and whether it raises triable issues.”

30. Paragraph 3 of the Defendant's draft Defence has admitted that there is in existence an agreement dated 27th September 2013 between the Plaintiff and the Defendant.

31. However, the Defendant has alleged that that agreement cannot form or raise a cause of action and that the alleged villa number 7 and 8 on portion number 1371 situated in Malindi do not belong to the Defendant.

32. The Defendant has admitted in the draft Defence that the Plaintiff advanced to him Euro 125,000 and that as a guarantee, the Defendant was to issue to the Plaintiff a cheque of similar amount which was issued in Italy; that the cheque having been issued in Italy by the Plaintiff, it automatically follows that the cause of action arose in Italy and that the suit should have been filed in Italy and not in Kenya.

33. The admissions by the Defendant in his Defence are as follows: that he was paid 125,000 Euros by the Plaintiff and that he issued to the Plaintiff a cheque for the said amount as a security for repayment of the said money.

34. The Defendant however contests the jurisdiction of this court to enforce the said contract and that in any event villas number 7 and 8 situated in Malindi do not belong to the Defendant.

35. The default judgment in this matter is for the liquidated claim of 130,000 Euros and not for the transfer of villas number 7 and 8 to the Plaintiff. The prayer for the transfer of the two villas in the name of the Plaintiff is in the alternative. Once the Plaintiff recovers the 130,000 euros, the alternative prayer becomes moot and cannot be granted. The converse is true. It therefore does not matter at this stage that the two villas are not registered in the name of the Defendant because the default judgment was for the payment of 130,000 euros and not the transfer of the two villas.

36. The agreement of 27th September 2013 states that the Defendant owes the Plaintiff 125,000 Euros. Clauses 4, 5 and 6 of the same agreement states as follows:

3. Mr. Tarlizzi Paola (the Plaintiff) will leave the above said villas at the use and/or care of Mr. Ciavolella Roberto (the Defendant) until such time of the eventual sale of the same, which will not however be beyond the 30th day of April 2013 and not any further.

4. The use and/or care of the above said property up to the 30th day of April 2013, is quantified to the equivalent of £5,000 which will then be added to the initial debt

5. In the event that the total debt of £130,000 will be satisfactorily repaid in advance by the 30th day of April 2013, then the subject villa's ownership will revert to Mr. Ciavolella Roberto (emphasis mine).

37. It is not clear why the date for the repayment of the Euro 130,000 by the Defendant is indicated as 30th April 2013, or in the alternative the transfer of the said two villas in favour of the Plaintiff was to be 30th April 2013 considering that the agreement was signed on 27th September 2013.

38. However, what is clear is that the Defendant was to refund to the Plaintiff Euro 130,000 or transfer the two villas to him as per the agreement. That is plain reading of the said agreed which the Defendant has acknowledged he signed and even gave a cheque as security for the said amount.

39. The only issue that I am supposed to consider with a view of determining whether the Defendant has a reasonable defence to the Plaintiff's claim for Euro 130,000 is whether this court has jurisdiction to enforce the agreement.

40. The agreement in respect of the amount of Euro 130,000 was drawn in Italy and was presumably signed by both the Plaintiff and the Defendant in Italy.

41. None of the advocates addressed me on the applicable principles of private international law, which is a branch of law concerned with cases having a foreign element.

42. According to the **Halsbury's Laws of England, 4th Edition, Volume 8, paragraph 406**, the English Court (read Kenya) has jurisdiction in actions personam against the person who is present in England (Kenya) when the writ of summons or other originating process is served upon him. As a general rule, the domicile, residence and nationality of the parties are all immaterial.

43. The author further states that in certain types of cases, the English court (Kenya) has discretion whether or not to take jurisdiction. According to Halsbury, examples of cases in which the court make not have jurisdiction is where the leave of court is required for the service of process outside jurisdiction; where proceedings in respect of the same subject matter are pending in a foreign country; where a contract provides that all disputes between the parties are to be referred to the exclusive jurisdiction of a foreign tribunal and where the court is being asked to exercise its discretion in cases involving foreign land.

44. It is not in dispute that the Defendant was served with summons in this country. Indeed, the Defendant entered appearance after being served and subsequently defended an application for contempt.

45. There is no evidence before me to show that there is a pending matter of a similar nature between the parties herein in a foreign country. There is also no evidence that while signing the agreement, the parties intended to oust the jurisdiction of this court.

46. In the case of **St Pierr Vs South American Stones (1935) ALL ER 408 at 414, Scott L J** stated as follows:

“ The right of access to the King's court must not be lightly refused. In order to justify a stay two conditions must be satisfied, one positive and the other negative: The Defendant must satisfy the court that the continuance of the action could work an injustice because it would be oppressive or vexatious to him or would be an abuse of the court and the stay must not cause an injustice to the Plaintiff. On both the burden of proof is on the Defendant.”

47. In the case of **Spiliade Maritime Group Vs Cansulex Ltd (1987) AC 460**, Goff LJ held as follows:

“In my opinion, the burden resting on the Defendant is not just to show that England is not the natural or appropriate forum for the trial but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, a proper regard is paid to the fact that jurisdiction has been founded in England as of right.....The court must first look; and this will include not only factors affecting convenience or expense, but also other factors such as the law governing the relevant transaction and the process where the parties respectively reside or carry on business.”

48. The Defendant has not shown in his affidavit or draft defence the inconvenience that this suit would cause him or that the filing of the suit in Kenya and not in Italy is oppressive or vexatious, or that he does not reside in Kenya or does not carry on any business in Kenya. Consequently, the issue of ousting the jurisdiction of this court by the Defendant, who is a director of Melville Limited, the proprietor of villa number 7 and 8 situated in Malindi, does not arise.

49. In any event, the agreement between the Plaintiff and the Defendant was to be performed in Kenya considering that the Defendant, on behalf of Melville Limited, agreed to transfer villa number 7 and 8 situated in Malindi to the Plaintiff in default of paying the 130,000 Euros.

50. In the circumstances, and considering the admissions made by the Defendant, and the clear and unambiguous terms of the agreement between the Plaintiff and the Defendant, I find and hold that the Defendant has not raised any triable issue in his draft Defence to enable this court to exercise its discretion in his favour.

51. The amount of Euro130, 000 is due and owing. The Defendant should honour the agreement he voluntarily entered into with the Plaintiff by paying the said amount if indeed villa numbers 7 and 8 do not belong to him as he claims. The Defendant cannot keep both the villas and the money without any justiciable reason for doing so.

52. Any protracted proceedings by allowing the Defendant to defend the suit will be a waste of judicial time and will be contrary to the overriding objectives of the Civil Procedure Act and the Rules which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes.

53. For those reasons, I dismiss the Defendant's Application dated 5th September, 2014 with costs.

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

O. A. Angote

Judge



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