



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 18 OF 2014

CAROLINE AWOUR ODHUNO.....PLAINTIFF

VERSUS

1. HOUSING FINANCE COMPANY OF KENYA LTD

2. GUERNSEY ISLAND INVESTMENTS LTD.....DEFENDANTS

RULING

1. This matter has a pending application dated **7th August, 2019** taken out by the 1st Defendant/Applicant and the substantial prayer therein seeks to dismiss the instant suit for want of prosecution or for being moot.

2. The said application has occasionally been listed for hearing but for some reasons it has never proceeded. At first, it was listed for hearing before the Honourable P.J Otieno on **20th November, 2019** but the Plaintiff's counsel sought for an adjournment for the reason that he needed to file a **Replying Affidavit** in addition to the **Grounds of Opposition** he had filed. He explained that he could not file the affidavit in time for the reason that he had travelled outside Kenya and that notwithstanding, it was the first time the application had been listed for hearing. However, the court declined the request for adjournment and further directed that the matter for hearing of the application at 12.00 noon.

3. The Plaintiff was however aggrieved by those directions and she sought leave to appeal which was of course granted and by the time the court reconvened at 12.00 noon, the Plaintiff had already launched an appeal in the Court of Appeal and simultaneously filed an application seeking stay of proceedings in this matter. Nonetheless, the court did not proceed with the application dated **9th August, 2019** since the Plaintiff asked the court to recuse itself on grounds that the court seemed to be biased against her. It is then the suit was transferred to this court.

4. The matter has since then been mentioned on various date including **10th December, 2019** when the application dated **9th August, 2019** was for fixed for hearing on **11th February, 2020** but presumably the court was not sitting. The matter was thereafter mentioned on **25th August, 2020, 4th March, 2021, 4th May, 2021, 30th June, 2021** and on **21st September, 2021** when the application seeking dismissal of the suit was listed for hearing.

5. However, the hearing did not proceed as **Mr. Kongere** Counsel for the 1st Defendant has challenged the legality of the **Replying Affidavit** filed by the Plaintiff. He says that the Honourable P.J Otieno on **20th November, 2019** rejected the Plaintiff's application for leave to file a **Replying Affidavit** to application dated **9th August, 2019** and therefore the **Replying Affidavit** filed by the Plaintiff on **5th February, 2020** is improperly on record. He therefore holds the view that once some orders have been denied by one Judge then the same orders cannot later be granted by a different Judge and if so, the same would be tantamount to abusing the court process.

6. In response, **Mr. Tindika** for the Plaintiff holds the view that any party, pursuant to the provisions of **Order 51 Rule 14** of the **Civil Procedure Rules**, a party is at liberty to file a response before an application is heard and so is the Plaintiff herein. He further adds that the orders granted the Honourable P.J. Otieno were only applicable to that particular date but not any day in future.

THE DETERMINATION

7. Having laid out the above summary and submissions of the **parties**, this Court finds that the sole issue for determination at the moment is whether the **Replying Affidavit** filed by the Plaintiff on **5th February, 2020** should be expunged from the record.

8. The contention is based on allegations that on **20th November, 2019**, the Honourable P.J. Otieno denied the Plaintiff's request to file a

Replying Affidavit and as such, the Plaintiff completely lost the chance to file a **Replying Affidavit** and this court cannot direct otherwise.

9. I have thoroughly read through the record and especially the contested orders made on **20th November, 2019**. I am convinced that the key issue that was considered by the court on that material date was whether the application for adjournment made by the Plaintiff could be granted or not. The court then considered the grounds adduced by both the parties with the Plaintiff's counsel stating that the reason for seeking the adjournment was that the Plaintiff intended to file a **Replying Affidavit** to an application seeking to dismiss the suit which had been scheduled for hearing. The Plaintiff's counsel further added that he was unable to file the affidavit on time owing to his travelling outside the country and returned few days to the hearing date.

10. The Defendant on the other hand maintained that the Plaintiff had exhibited inordinate delay since the filing of the suit and thus it would be inappropriate to further adjourn the case. Upon considering those submissions the court declined the application for adjournment and directed that the matter proceeds as then scheduled for hearing of the application.

11. Therefore, my humble view is that, the issue on whether or not the Plaintiff was to file a **Replying Affidavit** was not an issue addressed by the court. In addition to that, the court did not expressly state that the Plaintiff was precluded from filing a **Replying Affidavit**. What the court stated is that, failure by the Plaintiff in filing a **Replying Affidavit** in time was not sufficient ground for granting an adjournment in the premises. I am also of the view that had the court intended to completely take away the Plaintiff's right to file a **Replying Affidavit**, then the court would have stated so on its reason.

12. Based on the foregone discussion, it is clear that the 1st Defendant misconstrued the orders of this court granted on the **20th November, 2019** by stating that the Plaintiff was precluded from filing a **Replying Affidavit**. I therefore see no reason of expunging the Plaintiff's **Replying Affidavit**, so that given that the 1st Defendant seeks to dismiss the Plaintiff's case, it is in the interest of justice that the Plaintiff be granted an opportunity to explain why those orders should not be granted.

13. In the end, this court issues the following orders;

a) That the Plaintiff's Replying Affidavit filed on 5th February, 2020 is properly on record.

b) The Plaintiff is directed to follow up with the registry to ensure that her Replying Affidavit as well as the grounds of opposition are placed on the court file since they are not on record.

c) The 1st Defendant be and is at liberty to file a Supplementary Affidavit in response to the Plaintiff's averments.

d) The 1st Defendant is directed to fix its application dated 7th August, 2019 for hearing on a priority basis.

e) There shall be no orders as to costs.

It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF JANUARY 2022.

D. O. CHEPKWONY

JUDGE

IN THE PRESENCE OF:

NO APPEARANCE BY EITHER PARTY