REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CIVIL CASE NO. 75 OF 2018

ROBERT KIMANI NDUNGÚ.....APPELLANT

-VERSUS-

KENYA DEPOSIT INSURANE CORPORATION

(Being sued in its capacity as the receiver manager of

CHASE BANK LIMITED (IN RECEIVERSHIP).....RESPONDENT

RULING

1. On 26th July, 2021, this court dismissed this suit for want of prosecution. Before that date the partied herein had intimated to the Court that there were ongoing negotiations geared towards the settlement of the matter. That was the position till 21st January, 2019. The return date was fixed for 17th June, 2019. Thereafter the parties seemed to have gone to sleep and on 10th March, 2021, the Court on own motion fixed the suit for dismissal on 26th July, 2021, On the said day, only the Defendant was represented by learned counsel, **Ms Ndong**, who promptly urge he Court to dismiss the suit, and the same was dismissed but with no order as t costs.

2. By a motion dated 6th August, 2021, the Plaintiff/Applicant seeks the following prayers;

a. Spent

b. Spent

c. That this honourable court be pleased to set aside the orders made on the 26th July 2021 dismissing the suit and do grant the plaintiff leave to prosecute this matter.

3. The Plaintiff has also applied vide a motion dated 17th August 2021 seeking the following prayers;

a. Spent

b. Spent

c. Spent

d. Spent

e. That this honourable court be pleased to grant a temporary injunction restraining the respondents, their agents, servants or auctioneers from auctioning, selling, disposing, alienating or in any other manner interfering with the applicant's possession and ownership of his property pending the hearing and determination of this suit.

4. According to the Plaintiff/Applicant, the Notice to show cause was never received by the applicant or their advocates and as such they did not appear in court on the 26th July 2021 when the matter came up for dismissal. It was averred that the applicant assumed that the Notice to

Show Cause was not received by his advocates because his advocates moved offices from Shankardass House Nairobi to Greec Towers Ruiru. While appreciating the Postal Rule, the applicant averred that the same has its peculiar challenges and at times documents may not reach their recipients and urged the Court not to punish him for a mistake not directly attributable to him.

5. It was contended that the applicant only learnt that this matter was dismissed when the respondent sent its agents or valuers to conduct a valuation of the applicant's properties for purposes of disposing them off.

6. According to the applicant, the delay in prosecuting this matter was not advertent and it was majorly as a result of the court file missing from the registry and the adverse effects of the Covid-19 Pandemic. Though the Applicant made frantic calls and attendances to the registry, his efforts proved futile. It was noted that this fact was not controverted by the respondent who even filed an application dated 8th February 2021 seeking to reconstruct the file. The plaintiff expressed his readiness and willingness to prosecute his claim and averred that this application was brought without inordinate delay.

7. It was his case that Order 12 rule 7 of the ***Civil Procedure Rules, 2010*** donates to this court the discretion to set aside its orders where judgment has been entered or the suit has been dismissed and that the decision whether to reinstate a suit and the legal test to be met has been discussed in various cases, reference being made to the case of **Wanjiku Kamau -vs- Tabitha Kamau & 3 Others [2014] eKLR** where it was held that:

> **"The court has the discretion to set aside judgement or order and there are no limitations and restrictions on the discretion of the judge except of the judgement or order is raised. It must be done on terms that are just."**

8. Reference was also made to the case of **Patel -vs- E.A. Cargo Handling Services Ltd [1974] EA 75** at page 76 C and E where the court held that;

> **"There are no limits or restrictions on the Judge's discretion to set aside or vary an ex-parte judgement except that if he does vary the judgement, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given it by the rules."**

9. It was urged that the failure to attend court on the 26th July 2021 was a result of an excusable mistake or error and not indolence on the part of the applicant and in this regard, the Applicant cited the case of **Philip & another -vs- Augustine Kubende 1982-88 KLR 103** where the court held that;

> **"Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having this case heard on merit. I mind the broad equity approach to this matter is that unless there is fraud or intention to overreact, there is no error or default that cannot be put right by payment of costs. The court as is often said else for the people of deciding the rights of the parties and not the people imposing discipline".**

10. The Court was also urged to be guided by the case of **CMC Holdings Ltd -vs- James Mumo Nzioka (2004) KLR 173** where the Court of Appeal held that**;**

> **"The discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error."**

11. In support of his submissions the applicant relied on the case of **Winnie Wambui Kibinge & 2 others -vs- Match Electricals Limited Civil Case No. 222 of 2010** for the holding that:

> **"it does not follow that just because a mistake has been made a party should suffer the penalty of not having his case heard on merit."**

12. While urging the Court to allow the application the Applicant also relied on **Lee G. Muthoga -vs- Habib Zurich Finance (k) Ltd & Another Civil Application No. Nairobi 236 of 2009** where it was held that;

> **"It is a widely accepted principle of law that a litigant should not suffer because of his advocates oversight."**

13. According to the applicant, the fundamental principle of Natural justice was well reiterated in the case of **Wachira Karani -vs- Bildad Wachira Civil Suit No. 101 of 2011 (2016) eKLR** where it was found that,

> **"Court exists to serve substantive justice for all parties to a dispute before it. Both parties deserve justice and their legitimate expectation is that they will each be allowed a proper opportunity to advance their respective cases upon merits of the matter. This is the fundamental principle of natural justice."**

14. Based on the foregoing, the Court was urged to find merit in the application dated 6th August 2021.

15. Regarding the application dated 17th August 2021, it was the Applicant's case that the respondent had already through its agents or

auctioneers issued a Redemption Notice over the applicant's properties and that unless the application was allowed the respondent would dispose of the applicant's properties rendering this suit a nugatory, an academic exercise and a clear waste of the courts precious time. While citing the case of ***Giella -versus- Cassmann Brown*** it was contended that the Applicant had established that he has a *prima facie* case likely to succeed at trial.

16. In the applicant's view, he had clearly elucidated what irreparable damage or harm he may suffer if the order for injunction is not granted as the respondent has already issued a redemption notice over the applicant's properties and they shall not hesitate to dispose of the property. It was his position that the balance of convenience tilts in favour of the Applicant as he is likely to suffer irreparably should the sought injunction be declined.

17. On the other hand, it was urged that the respondent stood to suffer no prejudice whatsoever if the applications were allowed.

18. In response to the two applications, the Respondent contended that the Applicant and/or neglected to prosecute this suit since 17th June, 2019 and only approached Court after 1 year 8 months when the suit was dismissed for want of prosecution. The Court was urged to note that failure to prosecute this matter for such a long time has not been explained by the Applicant nor has he adduced evidence explaining the inordinate delay. In support of their position, the Respondent relied on **Ivita vs. Kyumbu (1984) KLR 441** where as follows:

> **"The test is whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay."**

19. They also relied on **Mwangi S. Kimenyi v. Attorney General and Another, Misc. Civil Application No. 720 of 2009** where it was observed that when the delay is prolonged and inexcusable to the extent that it would cause grave injustice to one side or both, the Court is obliged to dismiss the suit.

20. It was argued that the Applicant has been a beneficiary of conservatory orders issued in 2018 which restrained the Respondent from exercising its statutory power of sale and that the inordinate delay in prosecuting this matter has caused serious prejudice to the respondent as the Applicant has continued to be in default having failed to make any payments on the loan facility advanced to him by the Respondent.

21. It was the Respondent's submission that the delay is intentional, inordinate and inexcusable which is evidenced by the Applicant's failure to explain or mitigate his failure to prosecute the suit for almost 2 years as a result of which the Respondent has and continues to be greatly prejudiced by the continued pendency of the suit due to the injunctive orders granted to the Applicant in 2018. In support of its case the Respondent cited **Alshabai Hassan t/a Setlack Two Thousand v. Jaswinder Bhabra (2018) eKLR,** in which **Eboso J**. stated as follows,

> **"In the absence of any explanation justifying the delay or mitigation or urgings from the plaintiff craving for preservation of this suit, the court has no basis for sustaining the suit. The court is therefore satisfied that both the legal framework in Order 17 rule 2 of the Civil Procedure Rules and the established jurisprudential criteria for dismissal of suit on ground of want of prosecution have been satisfied."**

22. It was contended that despite the Applicant's assertion that the court file had been missing for a long time, no evidence has been adduced proving the Applicant's efforts to trace the file and have the matter set for hearing. The Applicant's reliance on the Respondent's effort to trace the file only points to his inexcusable neglect at prosecuting the matter. Further to the above, the Application being relied on by the Applicant was filed by the Respondent seeking leave to file a Notice of Motion Application dated 25th September, 2020 in the skeletal file which sought the dismissal of the suit for want of prosecution.

23. Regarding the prayer for injunction, it was contended that he who comes to equity must come with clean hands and in this case the Applicant cannot be said to have clean hands owing to the inordinate delay in prosecuting the matter and the laxity in pursing his claim after this Honourable Court granted him temporary injunction in 2018. Reliance was placed on the case of **Showind Industries vs. Guardian Bank Limited & Another (2002) 1 EA 284** where **Ringera J.** (as he then was) stated as follows: -

> **"…….an injunction is granted very sparingly and only in exceptional circumstances such as where the Applicant's case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the Applicant's conduct does not meet the approval of Court of equity or his equity has been defeated by laches."**

24. In the Respondent's view, the commercial relationship and agreement between the parties to charge the properties clearly contemplates the loss of the properties upon default even before the security is formalized and in this regard reliance was placed on **Maltex Commercial Supplies Limited & Another v. Euro Bank Limited (In Liquidation) HCCC Number 82 of 2006** in which the court observed that: -

> **"… Any property whether it is a matrimonial or spiritual house, which is offered as security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured."**

25. It was further contended that establishing a *prima facie* case alone is not sufficient basis to grant an interlocutory injunction and that the Court must be satisfied that the injury the Applicant will suffer if the injunction is not granted will be irreparable.

26. It was urged that in exercising judicial authority and its inherent powers, this Court has a duty to balance the rights of both parties to ensure justice is administered judiciously and expeditiously. The law must afford both parties a measure of protection, there is need to always preserve a balance between the respective rights of both Chargor and the Chargee.

27. The Court was therefore urged to find that the Applications dated 6th August, 2021 and 17th August, 2021 are devoid of merit and

dismiss them with costs to the Respondent.

Determination

28. I have considered the application herein, the affidavits in support thereof and the submissions filed.

29. There is no doubt that this Court has the power to grant an order reinstating a dismissed suit as was appreciated by the Court of Appeal in **Murtaza Hussein Bandali T/A Shimoni Enterprises vs. P. A. Wills [1991] KLR 469; [1988-92]** where it was held that there is inherent power to restore a case for hearing after it has been dismissed.

30. However, the decision whether or not to reinstate a dismissed appeal is no doubt an exercise of discretion. This being an exercise of judicial discretion, like any other judicial discretion must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. See **Gharib Mohamed Gharib vs. Zuleikha Mohamed Naaman Civil Application No. Nai. 4 of 1999.**

31. In this case, the Applicant's case is that it was never brought to his attention that the matter was scheduled for dismissal and he was doubtful whether his advocate was similarly notified since the advocates had moved offices. The general position was restated in ***Halsbury's Laws of England Fourth Edition Vol. 1 page 90 para 74*** as follows:

> **"The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice...**

32. This was the position in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** where the Court of Appeal expressed itself as follows:

> **"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...** ***A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at ...Denial of the right to be heard renders any decision made null and void ab initio*****."*** [Emphasis mine].

33. This was a restatement of Lord Wright's decision in **General Medical Council vs. Spackman [1943] 2 All ER 337** cited with approval in **R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007** that:

> **"If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision."**

34. In **Ridge vs. Baldwin [1963] 2 All ER 66** at 81, **Lord Reid** expressed himself as follows:

> **"Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void."**

35. However, in **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998** the Court of Appeal held that:

> **"Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."**

36. In this case, the suit was, on 26th July, 2021, dismissed for want of prosecution on the Court's own motion. The application for reinstatement was not made until 6th August 2021, less than a month later. In the circumstances where the ground for seeking to set aside is that the applicant was not aware that the matter was coming for dismissal, I am not prepared to hold that there was inordinate delay. It is clear from the record that the notice for dismissal was sent by post. Whereas it would have been proper for the applicant to obtain an affidavit from his former advocates confirming that he did not receive the notice, where a party has changed counsel as the applicant has done in this case, obtaining an affidavit from an advocate whose effect might well place the advocate in an awkward position is never easy.

37. In arriving at my decision, I am, however, guided by the decision of the Court of Appeal in **CMC Holdings Ltd vs. Nzioki [2004] KLR 173** where it was held that:

> **"In an application for setting aside *ex parte* judgement, the Court exercises its discretion in allowing or rejecting the same.**

That discretion must be exercised upon reasons and must be exercised judiciously…In law the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle. In the instant case the learned trial magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant's unchallenged allegation that its counsel did not inform it of the hearing date for the hearing that took place *ex parte* and hence it would appear was true and not if true, the effect of the same on the *ex parte* judgement was entered as a result of the non-appearance of the appellant and on the entire suit. The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate...The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the *ex parte* judgement is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues. The law is now well settled that in an application for setting aside ex parte judgement, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if draft defence is annexed to the application, raises triable issues. The Court has wide discretion in such cases to set aside *ex parte* judgement. In the instant case, the defence and counterclaim was already in the file when the matter was heard *ex parte* and the trial magistrate stated that she considered the same and dismissed the same defence and counterclaim when the appellant was not in court to put forward its case. Further it appears that certain matters raised in the defence were not considered at all and indeed could not be considered without the appellant's input...What the Trial Court should have done when hearing the application to set aside the *ex parte* judgement was to ignore her judgement on record and look at the matter afresh considering the pleadings before her and see if on their face value a prima facie triable issue (even if only one) was raised by the defence and counterclaim. If the same was raised, then whether the reasons for the appellant's appearance were weak, she was in law bound to exercise her discretion and set aside the *ex parte* judgement so as to allow the appellant to put forward its defence. Of course in such a case, the applicant would be condemned in costs or even ordered to pay thrown away costs. The learned judge should not have considered what the learned Trial Court had concluded on the evidence before her but should have in the same way looked at the pleading and considered whether a triable issue was raised by the defence and if so, then the appeal should have been allowed."

38. It has been said that seldom, if ever, do you come across an instance where a party has made a mistake in his pleadings which has put the other side to such disadvantage or that it cannot be cured by the application of that healing medicine. See **Waljee's (Uganda) Ltd vs. Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188.**

39. In considering whether or not to set aside the default judgement a judge has to judge the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgement, if necessary, upon terms to be imposed. Hence the justice of the matter and the good sense of the matter, are certainly matters for the judge. It is, as I have held elsewhere in this ruling an unfettered discretion, although it is to be used with reason, and so a regular judgement would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a *prima facie* defence which should go to trial or adjudication. The principle obviously is that, unless and until the court has pronounced a judgement upon the merits or by consent it is to have the power to invoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure. While the Judge may not be satisfied with the blunders or inaction of the defendant or his advocate, nevertheless he may hold that it would be just to set aside the ex parte decision. See **Bouchard International (Services) Ltd vs. M'mwereria [1987] KLR 193; Evans vs. Bartlam [1937] 2 All ER 647.**

40. As was held in **Sebei District Administration -v- Gasyali & others (1968) EA 300**;

"the nature of the action should be considered. The defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of the Court."

41. Taking into account all the circumstances of this case I am satisfied that the justice of the case mandates that the Plaintiff be given an opportunity of being heard. A court of justice, it has been held, has no jurisdiction to do injustice. See **M Mwenesi vs. Shirley Luckhurst & Another Civil Application No. Nai. 170 of 2000** and **Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai. 364 of 1999.**

42. I have said enough to show that I find merit in the Notice of Motion dated 6th August, 2021.

43. As regards the application for injunction, it is clear that before the case was dismissed, the parties herein had intimated that there were ongoing negotiations. It is also true that at one point none of the parties could trace the whereabouts of the court file prompting the Respondent to apply for the opening up of a skeleton file.

44. In these circumstances, what the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

45. Accordingly, I hereby set aside the order dismissing this suit and I reinstate the same to hearing. I further grant an interim injunction restraining the sale of the suit parcel of land pending the hearing and determination of this suit or further orders. As the parties had intimated

that there were negotiations, I hereby refer this matter to the Court Annexed Mediation which process is to be undertaken and completed within 60 days from the date hereof.

46. The costs of this application are awarded to the Defendant/Respondent.

47. It is so ordered.

RULING READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 25TH DAY OF APRIL, 2022

G V ODUNGA

JUDGE

Delivered the absence of the parties.

CA Susan