



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS CIVIL APPLICATION NO.E002 OF 2019

A.O. BASID LIMITED.....PLAINTIFF/APPLICANT

VERSUS

ASL CREDIT LIMITED.....DEFENDANT/RESPONDENT

RULING

Background

1. Through an application dated 6th September 2019 (hereinafter “**the earlier application**”) the defendant/applicant sought the following orders:

*i. That pending hearing and determination of this suit, and any other proceedings in this matter, the plaintiff/respondent be ordered to immediately release motor vehicle registration number KAY 247F, ZD 0644, ZC 9751, ZD 0643, ZC 5936, ZD 848, ZD 3849, KBL 979Z, ZD 5403,ZD 5402, ZD 5400, ZD 5401, ZD 5398, KBP 333A, KBP 700A, ZD 5756, ZD 5757, ZD 4171, ZD 6340, KBQ 004C, ZD 6830, ZD 0891, ZD 0892, ZD 0888, ZD 0890, KBP 204M, ZD 5090, KBT 031 D, KBV 093J, KBP 008Y, ZC 8290, ZC 7890, KCG 440P and KCG 450P (hereinafter “**the Suit Motor Vehicles**”) and deliver the security motor vehicles to the defendant/applicant and that Nairobi Police County Commander be and is hereby directed to assist in enforcement of these orders.*

ii. That pending hearing and determination of this suit, and any other proceedings in this matter, the Honourable court be pleased to direct the plaintiff/respondent herein to forthwith deposit the admitted sum of Kshs 69,643,992/= in a joint interest earning account.

iii. That pending hearing and determination of this suit, and any other proceedings in this matter, the Honourable court be pleased to direct the plaintiff/respondent herein to forthwith give an undertaking for damages for the outstanding amount of Kshs 216,219, 615/= by depositing in court a bank guarantee of the outstanding amount.

iv. That in the alternative to prayer (vi, vii and viii) above, that pending the hearing and determination of this suit, the Honourable court be pleased to set aside, vary and or discharge the order issued on 12th February, 2019 vacating the injunctive orders restraining the defendant/applicant from repossessing and or selling the plaintiff’s motor vehicle registration numbers KAY 247F, ZD 0644, ZC 9751, ZD 0643, ZC 5936, ZD 848, ZD 3849, KBL 979Z, ZD 5403,ZD 5402, ZD 5400, ZD 5401, ZD 5398, KBP 333A, KBP 700A, ZD 5756, ZD 5757, ZD 4171, ZD 6340, KBQ 004C, ZD 6830, ZD 0891, ZD 0892, ZD 0888, ZD 0890, KBP 204M, ZD 5090, KBT 031 D, KBV 093J, KBP 008Y, ZC 8290, ZC 7890, KCG 440P and KCG 450P pending the hearing and determination of the suit.

v. That cost of the application and the suit be borne by the plaintiff/respondent.

2. The application was not opposed by the plaintiff/respondent and was by a ruling delivered on 30th January 2002 allowed as prayed.

3. Following the ruling of 30th January 2020, the plaintiff filed the application dated 4th March 2020 which is the subject of this ruling.

The plaintiff’s case.

4. In the application dated 4th March 2020 the plaintiff seeks orders to set aside and stay the execution of the ruling dated 30th January 2020 so that the earlier application can be heard on merit.

5. The application is supported by the affidavit of the plaintiff's director, **Mr. Abdi Basid Omar Sheikh**, and is premised on the grounds that:

1. By an ex parte ruling dated 30th January 2020, this Honourable court allowed the respondent's application dated 6th September 2019 as prayed.

2. The applicant learnt of the ruling on 29th February 2020 following a courtesy call on its advocate's office (Messrs. Allamano & Associates).

3. The applicant was flummoxed to learn of an application filed by the respondent dated 6th September 2019 which was neither brought to its attention nor responded to by way of a replying affidavit. Aggrieved by the conduct of Messrs. Allamano & Associates Advocates, the applicant appointed the firm of Messrs Bryan Yusuf Advocate to take conduct of this matter on its behalf.

4. It's an established principle of law that the omissions of counsel on record shouldn't be visited on an innocent client. The omissions of the firm of the firm of advocates formerly on record were not in the best interest of the applicant, and have since left it condemned unheard.

5. The respondent is at an advanced stage of realizing the orders of this Honourable court in the ruling of 30th January 2020, absent an urgent intervention by this honourable court, the applicant will be grossly prejudiced.

The defendant/Respondent's case

6. The defendant opposed the application through the replying affidavit of its advocate **Mr. Daniel Wandera** who avers that the application is incompetent, devoid of merit, utterly vague, an abuse of the court process and that it is filed with the sole purpose of delaying the legitimate right of the defendant to realize the amounts due and owing from the plaintiff.

7. He states that the plaintiff has all along been aware of the instant proceedings wherein he has not only participated but has also made attempts at negotiating the payments even after the delivery of the impugned ruling. He highlighted the instances of the attempted negotiations and stated that the plaintiff indicated that:

a) It would wire the sum of USD 403,000/- to the Defendant/Applicant and the same was to come from Paris, France against his collectibles from Total Uganda.

b) It brought a deal of prospective customers who wanted to buy 2 Prime Movers for Kes 18,000,000/- and were to remit the same to the Defendant/Applicant.

c) It was also making effort or suggesting that it had found a buyer for Mombasa Land property known as LR. No. Mainland North/Section VI/1213/1214 and the proceeds if the sale were to be remitted to the Defendant/Applicant. The Defendant/Applicant is yet to receive those funds.

8. He further states that the plaintiff completely defied, disregarded and ignored this court's orders of 15th August 2019 that directed him to furnish the defendant with the full information regarding the location of the suit motor vehicles within 14 days. He contends that the defendant is genuinely apprehensive about the whereabouts of the said motor vehicles which it fears the plaintiff may have sold or removed from this court's jurisdiction.

9. He further avers that the plaintiff remains indebted to the defendant and adds that this court should not exercise its discretion to assist a party who seeks to benefit from its own wrong doing.

10. Parties canvassed the application by way of written submissions which I have carefully considered. The main issue for determination is whether the applicant/plaintiff has made out a case for the granting of orders of stay of execution and the setting aside of the impugned orders of 30th January 2020.

Analysis and determination

11. It is to be noted that the plaintiff instituted these proceedings against the defendant on 23rd May 2018 seeking orders, *inter alia*, for the recalculation of the true and correct interest accruing on the principal sum of the charge agreement, the release of the log books to the suit motor vehicles and a permanent injunction to restrain the defendant from repossessing and selling the suit motor vehicles.

12. The plaintiff's case was that in the year 2016, the defendant granted it hire purchase facilities for its business enterprises wherein the defendant created a charge over the suit motor vehicles. The plaintiff claims that defendant took advantage of the its late installment payments and resorted to charging unilateral, punitive and illegal interest rates and penalties.

13. The plaintiff's contention is that should the correct interest accruing on the loan be recalculated, the plaintiff will be found to have paid an amount that is in excess of the contractual sum. The plaintiff blames its previous advocates on record, **M/S Allamano & Associates advocates** for failing to attend court and to respond to the application dated 6th September 2019. I however note that when the earlier application came up for directions, the plaintiff's advocate was present in court and was granted 7 days to respond to earlier application after

which the same was listed for hearing on 30th October 2019. The said application was heard on 30th October 2019 when not only did plaintiff's advocate not attend court but he had also not filed any response or submissions to the said application.

14. Even though the general rule is that the mistakes of an advocate ought not to be visited upon the client, courts have taken the position that it is not enough for the client to heap all the blame on his counsel as the client must show that he took tangible steps and exercised due diligence in following up his case.

15. This is the position that was taken by Ringera J. (as he then was) in *Omwoyo v African Highlands & Produce Company Ltd* [2002] I KLR where he stated:

“Time has come for legal practitioners to shoulder the consequences of their negligent act or omissions like other professionals do in their fields of endeavour. The Plaintiff should not be made to shoulder the consequences of the negligence of the Defendant’s advocates. This is a proper case where the Defendants remedy is against its erstwhile advocates for professional negligence and not setting aside the judgment”.

16. In *Shah v Mbogo & Another* [1967] 6A U7 the Court of Appeal of East African held that:

“Applying the principle that the court’s discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice, the motion should be refused”. [own emphasis]

17. In the present case, I note that the defendant's claim that the plaintiff did not comply with this court's orders of 15th August 2019 was not controverted. I further note that the plaintiff did not deny defendant's claim that it was truly indebted to the defendant and that it had entered into negotiations with the defendant with a view of settling the debt.

18. Having noted that the plaintiff was the initiator of the instant case, this court finds it quite baffling that the plaintiff did not bother to take any steps to follow up on the progress of its case despite the numerous court appearances by its former advocates on record only to be woken up from its deep slumber by the events that followed the delivery of the impugned ruling.

19. In the circumstances of this case and having noted that the plaintiff did not comply with this court's orders of 15th August 2019, I am not satisfied that the plaintiff has made out a case for the granting of the discretionary orders to set aside the orders of 30th January 2020.

20. This court takes cognizance of the fact that the rules of natural justice requires that no party be condemned unheard, however, in the present case, I find that the plaintiff cannot seek the aid of the court to set aside orders in his favour when it failed to obey orders from the same court. Needless to say, flagrant disobedience of court orders, if left unchecked, may result in erosion of judicial authority and render recourse to it for redress an exercise in futility.

21. For the above reasons, I find that the application dated 4th March 2020 is unmerited and I therefore dismiss it with costs to the defendant.

Dated, signed and delivered via Microsoft Teams at Nairobi this 11th day of June 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Miss Mwangi got defendant/respondent

Miss Bondi for Onyango for applicant

Court Assistant: Silvia