



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC. NO. 17 OF 2014

SUNRISE HOMES LIMITED.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED..... 1ST DEFENDANT

SPOTLIGHT INTERCEPTS AUCTIONEERS..... 2ND DEFENDANT

BY WAY OF COUNTERCLAIM

NATIONAL BANK OF KENYA LIMITED..... PLAINTIFF

VERSUS

SUNRISE HOMES LIMITED..... 1ST DEFENDANT

CHARLES WACHIRA NGUNDO.....2ND DEFENDANT

MARTIN MUNYAO KIMEU..... 3RD DEFENDANT

BY WAY OF COUNTERCLAIM

MARTIN MUNYAO KIMEU.....1ST PLAINTIFF

FLORENCE MUTHONI KIMEU..... 2ND PLAINTIFF

VERSUS

SUNRISE HOMES LIMITED..... 1ST DEFENDANT

UNITED WAY KENYA LIMITED.....2nd DEFENDANT

CHARLES WACHIRA NGUNDO3rd DEFENDANT

GRACE WAIRIMU WACHIRA.....4th DEFENDANT

NATIONAL BANK OF KENYA LIMITED.....5th DEFENDANT

RULING

1. The hearing of this matter proceeded in the absence of the Plaintiff and a Judgment was delivered on 9th August 2019.

The Plaintiff now moves Court through a Notice of Motion dated 25th November 2019 for the following substantive prayers:-

(3) That this Honourable Court be pleased to review and/or set aside its Judgment issued on 9th August 2019 dismissing the Plaintiff's/Applicant's suit together with all the consequential orders pending hearing and determination of this Application.

(4) That this Honourable Court be pleased to reinstate the main suit.

2. Although inelegantly pleaded, the application is understood to be a plea for the Judgment to be set aside and for the Plaintiff to be granted an opportunity to prosecute its case on merits.

3. The firm of Munyalo Muli & Co. Advocates are in conduct of this matter on behalf of the Plaintiff now as they were when this matter proceeded to hearing upto Judgment. The Court is told that the said firm instructed one Wachira James Waithaka to conduct the suit on its behalf and to prosecute it to the end.

4. That the said Wachira passed on in February 2019 and on hearing of his death the firm took back the conduct of the suit. Mr. Tito Muli who swore an affidavit in support of the application is the owner of the said firm and depones that it was only on 11th September 2019 that he learnt of the Judgment in the matter after his firm was served with a copy of the draft decree by the Advocates for the 1st Defendant. Counsel states that he did not know that Mr. Wachira was not attending to the matter.

5. Martin Munyao Kimeu and Florence Muthoni Kimeu, the Plaintiffs in the second counterclaim support the Application.

6. National Bank of Kenya Limited, the 1st Defendant to the main suit, vehemently opposes the application. An affidavit sworn on behalf of the Bank by one Samuel Mundia on 5th December 2019 highlights the history of the proceedings herein which paints the Plaintiff as a less than diligent litigant.

7. This Court has considered the arguments made for and against the grant of the orders.

8. There is undoubted evidence that not only for the dates when this matter proceeded to hearing but also on the date when Judgment was delivered Munyao Muli & Co., the firm on record for the Plaintiff, was duly served with hearing notices. The firm does not deny this.

9. What I hear the firm to say is the counsel Wachira James Waithaka had been instructed and allocated the conduct of this matter. Counsel Waithaka is said to be dead and this was alluded to by counsel Kibe for the Plaintiffs in the second counterclaim when he supported that matter. I did not hear the Bank or its counsel doubt the veracity of that information and this Court has no reason to disbelieve.

10. The dead tell no tales and we shall never know why counsel Waithaka did not attend Court at the hearing. This Court is keen on giving litigants their day in Court. The Court will give the Plaintiff the benefit of doubt that counsel who was charged with prosecuting and defending their interests may have let them down.

11. Yet, the Respondent has incurred costs in prosecuting its case and should the Court be inclined to set aside the Judgment, as it is, then all that effort will be lost forever. There must be some re-compensation by way of costs. Secondly, this is an old matter and needs to be concluded without further ado. For that reason the Court shall be making orders for the quick disposal of the matter.

12. Ultimately I allow the application of 25th November 2019 on the following terms:-

a) The Judgment herein of 9th August 2019 is hereby set aside.

b) Hearing of the matter to start de novo.

c) Costs of all proceedings from 28th March 2017 to date shall be paid by the Plaintiff to the Bank

within 30 days of their assessment.

d) The Court shall forthwith give directions on the hearing.

Dated, Signed and Delivered in Court at Nairobi this 28th Day of September 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

No appearance for Applicant.

Mwango holding brief for Sisule for 1st Defendant.

Miano holding brief for Kibe Mungai for 1st And 2nd Plaintiffs in Counterclaim