REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT NAIROBI

ELC SUIT NO. 443 OF 2017

SIMJAM LOGISTICS LIMITED..PLAINTIFF

VERSUS

MAUREEN DOREEN KAARI..DEFENDANT

RULING

The Plaintiff brought this suit against the defendant on 30th June, 2017 seeking the following reliefs:

1. Eviction order against the defendant from Maisonette No. 81 situated on all that piece of land known as L.R No. Nairobi/Block 82/8759 – Greenspan Estate Nairobi (hereinafter referred to as “the suit property”).

2. Costs of the suit.

In its plaint dated 29th June, 2017, the plaintiff averred that it was the registered owner of the suit property having purchased the same on 26th October, 2016 at a public auction that was conducted by Equity Bank Limited in exercise of its statutory power of sale after the defendant had defaulted in repaying the loan that was advanced to her by the said bank. The plaintiff averred that after purchasing the suit property as aforesaid, the same was transferred to its name but it did not take possession of the same because the defendant was still in occupation thereof. The plaintiff averred that on 8th February, 2017 the defendant wrote to the plaintiff through its advocates on record and requested to be given 30 days within which to vacate the suit property. The plaintiff averred that although the defendant was given the time that she had requested for, she had unlawfully and without justifiable cause remained in possession of the suit property.

Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 29th June, 2017 seeking a mandatory injunction to compel the defendant to give vacant possession of the suit property to the plaintiff. The application was brought to court under certificate of urgency on 30th June, 2017 and was listed for hearing inter partes on 26th September, 2017. When the application came up for hearing on 26th September, 2017, the defendant’s advocate sought adjournment of the same on the ground that the defendant required more time to respond to the application. The application for adjournment was opposed by the plaintiff’s advocate. The same was however allowed by the court and the defendant was granted leave to respond to the application within seven (7) days of the order. The plaintiff’s application was adjourned to 23rd October, 2017 for hearing.

When the application came up for hearing on 23rd October, 2017, neither the defendant nor her advocate attended court. Since the hearing date for the application was given in court in the presence of the defendant’s advocate, the court allowed the plaintiff’s advocate to argue the application. The court thereafter considered the application together with the affidavit in support thereof and found the same to have merit. The application was allowed as prayed and the defendant granted 30 days to vacate the suit property failure to which the plaintiff was to be at liberty to apply for her forceful eviction.

The defendant did not vacate the suit property as ordered by the court. Instead, the defendant changed advocates and filed an application by way of Notice of Motion dated 4th December, 2017 seeking, an injunction restraining the plaintiff from selling, interfering with her quiet possession or in any other way dealing with the suit property pending the hearing of the suit; the setting aside of the order made herein on 23rd October, 2017 and the hearing afresh of the plaintiff’s application dated 29th June, 2017 and, leave to file a defence and counter-claim against the plaintiff. This is the application which is the subject of this ruling.

The defendant’s application was brought on the grounds that the plaintiff’s application dated 29th June, 2017 was fixed for hearing on 23rd October, 2017 when the defendant’s previous advocate failed to file a response to the application and to attend court for the hearing of the same as a result of which the application was heard ex parte and allowed by the court. The defendant contended that she only came to know that her previous advocate had not responded to the application and had also failed to attend court when she was served with the order that

was made on 23rd October, 2017 for her eviction from the suit property. The defendant contended that the mistakes of her previous advocates should not be visited upon her. The defendant contended that she had a good defence to the plaintiff's claim. The defendant contended that she discovered after the sale of the suit property to the plaintiff that one of the directors of the plaintiff was a manager at Equity Bank Limited's Upper Hill Branch. The defendant contended that the Credit Manager at Equity Bank Limited's OTC Branch misled her to consolidate her mortgage and personal loans thereby leading to her inability to service the loans resulting in the sale of the suit property. The defendant accused the plaintiff and Equity Bank Limited of engaging in insider trading and for conflict of interest in the manner they handled her case. The defendant contended that she had finished paying the loan that she had borrowed from Equity Bank Limited and that there was need for accounts to be taken so that if there was any amount outstanding, she could clear the same.

The defendant's application was opposed by the plaintiff through grounds of opposition dated 16th January, 2018. The plaintiff termed the application defective, incompetent and bad in law. The plaintiff contended that no valid grounds had been put forward to justify the orders sought by the defendant. The plaintiff contended that the defendant was given an opportunity to defend the plaintiff's application dated 29th June, 2017 but failed to do so. The plaintiff contended that the defendant had approached the court with unclean hands in an attempt to prevent the plaintiff from taking possession of the suit property which it lawfully purchased at a public auction. The plaintiff contended that Equity Bank Limited which the defendant had accused of wrong doing in the sale of the suit property was not a party to this suit and that the plaintiff was not privy to the allegations made against the said bank.

The defendant's application was heard by way of written submissions. The defendant filed her submission on 19th March, 2018 while the plaintiff filed its submissions in reply on 6th April, 2018. I have considered the defendant's application together with the two (2) affidavits which were filed in support thereof. I have also considered the grounds of opposition that was filed by the plaintiff in opposition to the application. Finally, I have considered the parties' respective submissions and the authorities cited in support thereof.

The following is my view on the application. The defendant's application has two (2) limbs. The first limb is seeking injunction restraining the plaintiff from dealing with the suit property pending the hearing and determination of the suit while the second limb of the application is seeking the setting aside of the order made herein on 23rd October, 2017 and leave to file defence and Counter-claim. I find no merit in the defendant's prayer for injunction. The defendant has not filed a defence to the plaintiff's claim. The injunction sought in my view has no basis. The same has been sought in vacuum. There is no pleading before the court from which the court can gauge the strength of the defendant's case against the plaintiff. What is before the court is a draft defence and counter-claim which cannot form a basis for an injunction. I find the injunction application premature. The defendant should have waited until it has a defence and counter-claim on record before moving the court for an order of injunction. As things stand now, I am not satisfied that the defendant has a prima facie case against the plaintiff to warrant the grant of the temporary injunction sought.

With regard to the second limb of the application which seeks the setting aside of the orders made on 23rd October, 2017, no reasonable explanation has been given by the defendant for her failure to respond to the plaintiff's Notice of Motion application dated 29th June, 2017 and to appear in court for the hearing of the application. I am of the view that it is not sufficient to state that her previous advocate failed to act. There is no evidence that the defendant has lodged a complaint against the said advocate. I do not think that in this era we can say that a mistake of an advocate should not be visited against his client. If such mistake is not to be visited against the client, against who should such failure be visited? Should it be visited against the opposite party or the court? This is a question that has bothered me for some time. In the case of Stephen Ndungu Kimungu *v* James Muigu ELC No. 1172 of 2000, this is what I said:

> **"The hard question that must be answered is who should take responsibility for a party's advocate's failure to perform his professional duties? Is it the opposite party or the court? I believe that the answer would depend on the circumstances of each case. There cannot be a general rule. In the circumstances of this case, I am of the view that the advocate concerned should not only bear the blame but should also carry the loss and damage if any arising from the consequences of his neglect of duty. The justice train can no longer be delayed, stopped, derailed or re-routed by the parties or their advocates. Once the train takes off on a scheduled trip, those left behind must bear the consequences of their failure to get on board".**

The advocates must be accountable to their clients and must take full responsibility for their actions. If they fail to attend court and ends up losing a case, they should bear the loss suffered by the client as a consequence of such failure. I do not think that scarce judicial resources should be spent in reinstating such cases for fresh hearing.

That said, I am alive to the fact that a right to a hearing is a constitutional right. In the Court of Appeal Case of, Richard Nchapi Leiyangu *v* IEBC & 2 others, Civil Appeal No. 18 of 2013, the court stated that:

> **"The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent power to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there should be proportionality"**.

In the circumstances of this case, I do not think that the plaintiff would suffer prejudice that cannot be compensated in costs. In **Phillip Chemwolo & Another *v* Augustine Kubede [1982-88] KAR 103 at 1040, Apalloo J** (as he then was) stated as follows:

> ***"Blunders 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 his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."***

The principles applied by the courts in applications for setting aside default judgments are well settled. In the case of Patel *v* E. A. Cargo Handling Services Ltd. [1974] E.A 75, the Court stated as follows:

“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. I agree that where it is a regular judgment, as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits.”

I am inclined to exercise my discretion in favour of setting aside the orders that were made herein ex parte on 23rd October, 2017 and allow the defendant to defend the plaintiff’s Notice of Motion application dated 29th June, 2017. I aware however that the plaintiff purchased the suit property in the year 2006 at Kshs.9,000,000/= and that he has not been able to take possession as a result of the defendant’s refusal to vacate the same. The loss being suffered by the plaintiff is real and the court cannot close its eyes to the same. In view of the conduct of the plaintiff and her previous advocates which has contributed to the delay in the prosecution of the said application which will have to be heard afresh thereby exposing the plaintiff to more loss, the orders by this court setting aside the ex parte orders made on 23rd October, 2017 shall be conditional. I will also grant the defendant leave to file a statement of defence and counter-claim.

Due to the foregoing, the defendant’s Notice of Motion application dated 4th December, 2017 succeeds in part. The application is allowed on the following terms:

1. The orders made herein on 23rd October, 2017 are set aside and the defendant is granted leave to defend the Plaintiff’s Notice of Motion application dated 29th June, 2017.

2. The defendant shall file a replying affidavit and/or grounds of opposition to the said application within 14 days from the date hereof.

3. The plaintiff shall be at liberty to file a supplementary affidavit within 14 days from the date of service of the defendant’s response.

4. The defendant is also granted leave to file a defence and counter-claim if she so wishes within the same period of 14 days from the date hereof.

5. The orders granted in (1), (2) and (3) above are conditional on the defendant depositing in an interest earning bank account in the joint names of the advocates on record for the defendant and the plaintiff a sum of Kenya Shillings Three Million (Kshs.3,000,000/=) within thirty (30) days from the date hereof as security for the losses the plaintiff is likely to incur as a result of the defendant’s continued occupation of the suit property if she loses the case at the trial.

6. In the event that the defendant fails to deposit the said sum of Kshs.3,000,000/= within the prescribed period, the order granted in one (1) above and consequential orders granted in (2) and (3) above shall stand discharged and the order made on 23rd October, 2017 shall be reinstated automatically without any further reference to the court.

7. The defendant shall pay the plaintiff the costs of the application assessed at Kshs.10,000/= forthwith.

Delivered and Dated at Nairobi this 20th day of December 2018

S. OKONG’O

JUDGE

Ruling read in open court in the presence of:

Mr. Viaki for the Plaintiff/Respondent

Mr. Mokaya for the Defendant/Applicant

Catherine-Court Assistant