REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. 178 OF 2016

ENRIQUE HEGUET HUERTA.....….....PLAINTIFF

VERSUS

KENNETH KILOLE WILLIAM.....DEFENDANT

RULING

[1] The Notice of Motion dated **13 September 2016** was filed herein by the Defendant/Applicant under **Sections 1A** and **1B** of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya**; **Order 10 Rule 11, Order 22 Rule 22 and Order 51 of the Civil Procedure Rules, 2010**, for the following orders:

> [a] That service of the application be dispensed with in the first instance (spent);
>
> [b] That the application be certified as urgent and be heard exparte in the first instance due to the urgency of the relief sought herein (spent);
>
> [c] The ex parte proceedings, resultant judgment as well as the pending taxation proceedings be set aside, pending the hearing and determination of the application;
>
> [d] That the suit herein be set down for hearing on merit;
>
> [e] That the costs of the application be in the cause.

[2] The application was premised on the Supporting Affidavit annexed thereto sworn by the Defendant on **13 September 2016** and the grounds set out on the face of the Notice of Motion. He conceded therein that he was duly served with Summons to Enter Appearance and the Plaint and that he promptly forwarded the documents to his Advocates **M/s Wambasi & Company Advocates**; and that his said Advocates prepared his pleadings in response, which he went through and signed. He further stated that his Advocates thereafter made several attempts at filing the pleadings, all in vain, for the reason that the court file could not be traced and the Registry staff were adamant that they could not accept receipt of the documents without the court file.

[3] The Defendant further averred that it was not until **4 August 2016** when his Advocates were finally allowed to file the Memorandum of Appearance; and that he is apprehensive that unless this application is allowed and the orders sought granted, taxation of the Plaintiff's Bill of Costs will be proceeded with and execution levied; thereby denying him a chance for a merit hearing. It was the contention of the

Defendant that he has a good defence and that he has all along had the intention of defending the suit. He added that he intends to take out Third Party proceedings against the Developer of the project, to whom the Plaintiff's funds were forwarded and who has refused and/or declined to surrender the title documents for onward transmission to the Plaintiff. The Defendant expressed confidence that he has an arguable defence, and to this end, he exhibited a draft Defence to his Supporting Affidavit and urged the Court to exercise its discretion in its favour in the interest of justice.

[4] The application was opposed by the Plaintiff vide his Replying Affidavit sworn on **19 September 2016**, wherein he averred that the default judgment was regularly entered herein and urged the Court to note that no action was taken by the Defendant thereafter until **4 August 2016** when the Memorandum of Appearance was filed. He further averred that a regular default judgment can only be set aside if there is a bona fide defence to the claim, which, in his view, has not been shown herein, granted the express admission by the Defendant in Paragraph 5 of draft Defence that the he received the money that is the subject of this suit and had not refunded the same; and that there was no relationship between the Plaintiff and the Developer of the suit property.

[5] The Plaintiff further refuted the Defendant's deposition that the court file was unavailable in the Registry, contending that had this been the case, he would have availed evidence of any efforts made by him to have the file located, including relevant letters to the Deputy Registrar. It was thus the averment of the Plaintiff that the Defendant has completely failed to explain the three months' delay between **15 June 2016** when the default judgment was entered and **14 September 2016** when the instant application was filed. He added that, even after the Defendant filed his Memorandum of Appearance on **4 August 2016**, it took him a further period of one month before filing this application, which delay has also not been explained. The Plaintiff accordingly urged the Court to find that the Defendant is not deserving of its discretion and dismiss his application with costs.

[6] The application was canvassed by way of written submissions which were highlighted on **31 January 2017**. I have given due consideration to the submissions made herein, including the authorities relied on by Learned Counsel for the parties. I have similarly perused the pleadings filed by the Plaintiff and the response made thereto in the draft Defence annexed to the Supporting Affidavit, and what emerges therefrom, from the Plaintiff's perspective, is that the parties entered into an arrangement whereby the Defendant agreed to sell, and the Plaintiff agreed to purchase **Villa No. B5** on **Land Reference No. 29324** (the Suit Property) off-plan. The Defendant had made representations to the Plaintiff to the effect that he was the architect involved in the construction of housing units on the aforementioned property and was the owner of **Villa No. B5**; and that he was willing to sell the Suit Property to the Plaintiff and thereafter transfer his interest therein following full payment of the purchase price of **Kshs. 19,950,000.00** for the unit, which would be ready for occupation by **15 November 2013.**

[7] It is not in dispute that the Plaintiff proceeded to make payments to the Defendant towards the purchase of the Suit Property, or that the payments were made as follows:

[a] On 25 September 2013 - USD 92,000

[b] On 23 October 2013 - USD 6,660; and

[c] On 10 December 2013 - Kshs. 11,095,000

It was the contention of the Plaintiff that, by **13 May 2016** when this suit was filed, the Plaintiff had neither handed over the Suit Property to him nor refunded the purchase price, despite numerous demands and reminders.

[8] There is further no contestation that the Defendant was duly served with Summons to Enter Appearance as well as the Plaint and the documents filed therewith. Evidently, service was personally effected on the Defendant on **24 May 2016** and that he acknowledged service by signing and dating a copy of the Summons. The Defendant thereupon had 15 days from the date of service to enter an appearance in accordance with **Order 5 Rule 1** of the **Civil Procedure Rules**. That the Defendant did not

comply is not in dispute. Accordingly, the Plaintiff was at liberty to apply for default judgment as he did, which judgment was entered herein on **15 June 2016**. In the premises, the question for my determination is whether the Defendant has shown sufficient cause to warrant the setting aside of that, otherwise regular, judgment.

[9] Order 10 Rule 11 of the **Civil Procedure Rules**, under which the instant application has been brought, simply provides that:

> **"Where judgment has been entered under this order, the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."**

Thus the discretion afforded by the above provision is wide enough to meet the ends of justice in each situation that presents itself before the Courts. This is in line with the expressions of the Court that decided the case of **Patel vs. East Africa Cargo Handling Services Ltd [1974] EA 75** thus:

> **"...There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just..."**

[10] It is now trite that where, as in this case, there is a regular judgment, the Court would not be inclined to set it aside unless there is good cause for doing. In the case of **Patel vs. East Africa Cargo Handling Services Ltd** (supra), this principle was expressed thus:

> **"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 to it by the rules...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..."**

[11] In addition to the foregoing, the Court of Appeal laid down the test to be employed in determining an application of this nature in **Mohamed & Antother vs. Shoka [1990] KLR 463** in the following words:

> **"...the tests for the correct approach in an application to set aside a default judgment are: firstly whether there was a defence on merits; secondly, whether they would be any prejudice; and thirdly, what is the explanation for any delay..."**

[12] Applying the foregoing principles to the facts hereof, I have perused the draft Defence annexed to the Supporting Affidavit, with a view of ascertaining the following:

[a] Whether a plausible explanation has been given for the delay;

[b] whether there is a defence on merit;

[c] Whether the Plaintiff stands to suffer prejudice.

[13] On whether a plausible explanation has been given for the **delay**, it was the Defendant's contention that numerous attempts were made by his Advocates to have his pleadings filed but that the court file could not be traced in the Registry. There is however absolutely no evidence in proof thereof. Due diligence would dictate that the matter of the missing file be taken up with the Deputy Registrar, particularly because time was of the essence herein. Not a single letter was done to the Deputy Registrar in this instance, at least no evidence of such attempts was drawn to the Court's attention.

[14] Accordingly, I would agree with the expressions of **Havelock, J**. in **Golbo Construction Co. Ltd vs National Water Conservation & Pipeline Corporation & Another [2013] eKLR** that evidence of any attempts made to have the court file located would be necessary to enable the Court exercise its discretion in the Applicant's favour. I would take the view therefore that the Defendant has not satisfactorily explained his failure to respond in time to the Summons to Enter Appearance that was duly

served on him. Additionally, it is noteworthy that even after the file was found, and a Memorandum of Appearance filed on behalf of the Defendant, it took him over one month to file the instant application; and again no explanation whatsoever was proffered for this dilatory conduct.

[15] As to the question of **prejudice**, the Court was urged, by Counsel for the Plaintiff to consider that he has suffered and will continue to suffer great economic prejudice as he has had to wait since **2013** to be refunded his money. It was further urged that he has since obtained a regular judgment in his favour and was poised to proceed with taxation of his costs when the instant application was filed. I am, in the premises persuaded that any further delay herein would continue to adversely affect the economic interests of the Plaintiff. On the other hand, it was not demonstrated what prejudice, if any, the Defendant stands to suffer if the application is not granted, given that his cause of action against the Developer would be left intact. In any event, the Plaintiff has the Suit Property in his name, which property continues to appreciate in value. Thus, while the interests of the Defendant remain protected, the Plaintiff continues to suffer in terms of lost investment opportunities.

[16] As to whether there is a **Defence on the merit**, it is noteworthy that the Defendant admitted having received the purchase price. He did not deny that he had assured the Plaintiff that the Suit Property would be available for occupation by **15 November 2013**. The Defendant admittedly did not meet its part of the bargain. Indeed, by the time this suit was filed, no serious attempts had been made by the Defendant to ameliorate the situation; and there was no rebuttal of the Plaintiff's averment, per Paragraph 17 of the Replying Affidavit, that he has been demanding his money back from **16 July 2014**, all in vain.

[17] I note that in his draft Defence, it is the Defendant's contention that he forwarded the purchase price to the Developer **M/s Serene Valley Properties (K) Limited;** and that all these facts were within the knowledge of the Plaintiff. He further averred in the draft Defence that it was the failure by the Developer to complete the project and issue a Certificate of Occupation to him that frustrated the transaction between him and the Plaintiff, for which reason, it is intended to have the Developer enjoined to these proceedings. I would however agree with the Plaintiff that the agreement was in terms; which terms have not been adhered to by the Defendant. The Plaintiff is accordingly entitled to a refund of the monies paid; and whereas the Defendant may be having a good case against the Developer, there would be absolutely no reason as to why that should be an impediment to the recovery by the Plaintiff of his funds on account of failed consideration. Indeed it was conceded by the Defendant that there was no privity of contract between the Plaintiff and the Developer.

[18] Thus, upon a careful consideration of the material presented before me, my finding is that the Defendant has not made a good case for the grant of the orders sought. He has failed to satisfactorily explain why he did not respond to the Summons to Enter Appearance within the stipulated timelines; and he has failed to show that he has a triable defence to raise herein. It is also my finding that it would not be in the interests of justice to further keep the Plaintiff from the funds that are justly owing and due to him. Indeed, in the case of **Shah vs. Mbogo [1967] EA 116** it was held thus with regard to the discretion for setting aside a default judgment**:**

> **"...this discretion to set aside ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice..."**

[19] Lastly, it is necessary to comment briefly on the manner in which the prayers in the Defendant's Notice of Motion were crafted. Clearly, Prayers 1 and 2 are spent. In Prayer 3, it was sought that "**the ex-parte proceedings, resultant judgment as well as the pending Taxation proceedings be set aside, pending the hearing and determination of this application.**" (emphasis supplied) Accordingly, even this prayer, which appears to be the centerpiece of the Notice of Motion, is spent. Prayers 4 and 5 would only lie were the ex-parte judgment to be set aside, which, as has been explained herein above is not the case. Thus, even in terms of the main relief sought, the application is altogether misconceived, for the Court can only grant a party the specific relief sought and prayed for in its application.

[20] In the result, it is my finding that the Defendant's application dated **13 September 2016** it devoid of merits and is hereby dismissed with costs.

Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF APRIL 2017

OLGA SEWE

JUDGE

DATED, COUNTERSIGNED AND DELIVERED AT NAIROBI THIS 12TH APRIL, 2017

RACHEL NG'ETICH

JUDGE