



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI
CIVIL CASE NO.438 OF 2010

PETER MWANGI KIMANI.....PLAINTIFF

VERSUS

GOLDEN HOMES LIMITED.....1ST DEFENDANT/1STRESPONDENT

FRANCIS JOHN WANYANGE.....2ND DEFENDANT/ 2ND RESPONDENT

DR.BESRAT HAGOS.....3RD DEFENDANT/ 3RD RESPONDENT

RULING

This is a ruling on application dated 15th May 2017 filed by the defendant herein seeking the following prayers

1. Spent
2. That judgment/ruling issued on 21st July 2016 striking out the 3rd defendant /Respondent be set aside
3. That the plaintiff/applicant be allowed to file reply to the application by the said 3rd party/respondent to be struck out of suit.
4. spent
5. That costs of the application be provided for

Grounds on the face of the application are that the plaintiff /applicant was not part of the application to strike out 3rd defendant/respondent as there was failure to diarize the matter or to diarize it properly and further the hearing notice was too short; that the applicant's Advocate got to know of the ruling/judgment when they were served with notice of taxation. Finally that the applicant's plaint raises triable issues against the 3rd party and the plaintiff should be given an opportunity to canvass issues in the plaint against the 3rd defendant.

The application is supported by affidavit sworn by Protas Saende Gathege an Advocate in the firm of Meritad Law Africa LLP Advocates. He averred that he failed to attend court on 21st July 2016 when the application dated 29th June 2016 was struck out due to a mistake in diarizing the matter as the same was

diarized in both on 21st 2015 diary and 21st July 2016. He added that even though hearing notice was served on them it was served on short notice and was received under protest as can be seen from the court record. He averred that he only became aware of the matter when judgment was served together with notice of taxation. He stated that plaintiff's plaint raises triable issues against the 3rd defendant/Respondent. He concluded that the plaintiff should not be made to suffer due to inadvertent mistake on part of their Advocates.

In response the 3rd defendant filed Replying affidavit sworn on 14th June 2017. He averred that on 29th June 2016 his Advocates on record filed an application seeking to strike out his name from the suit on ground that he was a bonafide purchaser for value of apartment unit Block A No.1870/1/93 and not a party in the contract between plaintiff and the 1st defendant. He averred that the application was allowed as prayed and that the plaintiffs Advocates have all along been aware of the orders granted by the court. He added that his advocates filed a bill of costs dated 6th February 2017 together with notice of taxation. He averred that the plaintiffs Advocate participated in the taxation proceedings on 28th march 2017 and 9th may 2017 and in both days never raised any issue but sought more time to file response to bill of costs. He stated that there has been inexcusable and inordinate delay in seeking to set aside ruling issued on 21st July 2016. He deponed that the reason that the hearing notice was short is devoid of any merit as he is not the only Advocate in the firm and that he should have send an Advocate to hold brief. He averred that from his Advocates advice any cause of action against him has been overtaken by events as the apartment was transferred to him in the year 2013. He stated that besides the fact that the 3rd defendant was wrongly sued, his continued presence in this suit is unwarranted owing to the fact that he no longer own the apartment; that he will suffer unfair prejudice if the court permits the prayers sought through unwarranted and extra legal fees. He concluded by stating that the plaintiff's application is frivolous, an abuse of court process and has been brought in bad faith and is calculated towards occasioning further delay in this matter. He prayed to be allowed to proceed with taxation.

In submissions the applicant's counsel restated the ground raised on the face of the application. He cited the case of *Paul Asin t/a Asin supermarket vs peter mukembi(2013)eKLR* where the case of *chemwolo & another vs Augustine Kubende(1982-88)KAR13* was cited with approval in which case Apollo J.held that:-

“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 shall 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 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 purposes of imposing discipline.”

Plaintiff submitted that the prejudices likely to be suffered by the plaintiff if this application is not allowed out way prejudice the 3rd defendant stand to suffer. Plaintiff filed 5 other authorities which include the case of *Patel vs E.A.Cargo Handling Services Ltd* where the court held that

“It should be remembered that to deny a litigant a hearing should be the last resort of a court”

As to whether plaint discloses triable issues he submitted that the first prayer in the plaint is specific performance for transfer of apartment UNIT A5, BLOCK L.R.NO.1870/1/193.

Plaintiff submitted that the guiding principles in dealing with applications to set aside interlocutory judgment was set out in *CMC Holdings Ltd vs,Nzioki* where the court held as follows:-

“...the law is now well settled that in an application for setting aside Exparte judgment the court must consider not only the reason 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 raises triable issues.”

On the issue of delay the plaintiff submitted it is within the 3rd defendant's knowledge that delay was occasioned by the 1st and 2nd defendant's application to defer the matter to arbitration and failure by the 2nd defendant to cooperate leading resulting in a deadlock.

The 3rd defendant submitted that the plaintiff filed suit against the defendants seeking specific performance for transfer of Apartment A5, Block A on L.R No.1870/1.193 to the plaintiff or in the alternative the sum of KShs 17,000 which was the estimated value of the property. That the 3rd defendant was a bonafide purchaser of the property for value. 3rd defendant submitted that the plaintiff sought injunctive order to preserve the proportion 12th July 2010 plaintiff, 1st and 2nd defendants got orders referring the matter to arbitration. 3rd defendant submitted that this suit was dismissed on 12th March 2012 for want of prosecution. After dismissal the 3rd defendant successfully applied for removal of the caveat and got transfer of the property. The suit was reinstated on 22nd May 2014 a period of 2 years after. 3rd defendant submitted that even after reinstatement of the suit the plaintiff never prosecuted this suit for 2 years and that the only step taken in court is filing of 3rd defendant's application dated 26th June 2016 which sought to strike out 3rd defendant for this suit. That despite being served the plaintiff failed to respond to the application or attend court for the hearing which resulted in orders being granted as prayed and plaintiff ordered to show cause why the suit should not be dismissed for want of prosecution.

3rd defendant submitted that from the time of striking out the 3rd defendant on 21st July 2016, the plaintiff never took any action until January 2017 when they fixed the matter for mention on 26th January 2017. He further submitted that the plaintiff was served with bill of costs on 16th February 2017 and they participated in taxation proceedings on 28th March 2017 without raising any issue. He submitted that plaintiff asked for time to file response to bill of costs and instead of doing so filed this application.

3rd defendant submitted that the plaintiff has attributed failure to attend court to inadvertent mistake by counsel but has not explained delay in filing this application.

3rd defendant urged to consider whether guiding principles exercise of discretion as set out in the case of *Shah vs Mbogo* (1967) E.A.116 have been met. The court held as follows:

“...The principles governing the exercise of the courts discretion to set aside judgment obtained Ex parte. This discretion 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 a person who has deliberately sought whether by evasion or otherwise to obstruct the course of justice.”

He submitted that despite being served with the application to strike out 3rd defendant the plaintiff did not bother to find out the outcome of the application. He submitted that the plaintiff's inaction over the years clearly illustrate their behavior has been designed to frustrate and delay the course of justice. 3rd defendant submitted that the plaintiff has not explained delay in filing this application and the same is not excusable. He cited the case of *Kenya sugar board vs Ndungu* (2012) eKLR where the court found a delay of two months to be dilatory and inexcusable and dismissed the application seeking to set aside the orders dismissing the suit. He submitted 10 months delay in filing this application has not been explained; and that the 3rd stand to suffer injustice as the matter is at execution stage and the suit against 3rd party has been overtaken by events. 3rd defendant submitted that he is not a necessary party in this suit and that the plaintiff has not attached any draft response to the application to enable court gauge the merits of the case.

He concluded that the plaintiff is guilty of laches and do not therefore deserve orders sought, that the suit against 3rd defendant is overtaken by events and prejudice he is likely to suffer outweigh any prejudice to the plaintiff.

I have considered rival submissions filed by parties herein. The applicant has submitted that the plaintiff has triable issues against the 3rd party. First I wish to consider whether the plaintiff /respondent was given an

opportunity to respond and to be heard on the application. I have perused the 3rd party's application which was allowed on 21st July 2016. On perusal of affidavit of service filed, I note that the copy of the application attached to it was received under protest reason indicated "notice being too short". The receiving stamp date indicate 14th June 2016. On 21st July 2016. Plaintiff's Advocate failed to attend court. No response to the application had been filed by the time the matter came up for hearing; further there was no attendance nor representation for the plaintiff. As I write this ruling I have not seen any draft grounds of opposition to the application or replying affidavit. The application was allowed as prayed. The applicant herein had 7 days before the hearing of the application to file response. Even if the date for hearing was not convenient, 7 days was sufficient time for the applicant/plaintiff to file grounds of opposition/replying affidavit. The plaintiff never explained why no response was filed to the application even if the date for hearing was not convenient. No explanation has been given as to why a draft response to the application has not been availed to court.

That aside, on perusal of the pleadings, it is evident that the dispute is between the plaintiff and the 1st & 2nd defendants. It is not also disputed that at the time the property was transferred to the 3rd defendant this suit had been dismissed for want of prosecution. There was no order to stay transfer of the property to the 3rd party. I also note from the plaint, that the plaintiff has sought a sum of kshs 17,000 in prayer (b) as alternative to specific performance in prayer (b). The property has already been transferred to the 3rd party. On the face of application dated 15th July 2010 it is evident that the dispute referred to arbitration was between 1st&2nd defendant and plaintiff. Pleadings herein do not demonstrate any triable issue against the 3rd defendant. I find delay on the part of the plaintiff in filing this application and responding to the application allowed on 21st July 2017 inexcusable. It would also be an exercise in futility to set aside orders allowed on 21st July 2017.

From the foregoing I find that the plaintiff has not advanced sufficient reasons to warrant setting aside the order issued on 21st July 2016.

The application herein is dismissed with costs to the 3rd defendant.

Dated and Delivered at Nairobi this 31ST day of JULY 2017

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

.....COURT ASSISTANT

.....COUNSEL FOR APPLICANT/PLAINTIFF

.....RESPONDENTS/DEFENDANTS