



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL CASE NO. 175'B' OF 1996

JACOB WANJA ODHIAMBO PLAINTIFF

VERSUS

AVTAR SINGH RUPRAH

T/A RUPRAH PANEL BEATERS DEFENDANT

AND

ORIENTAL COMMERCIAL BANK (formerly

DELPHIS BANK LIMITED 1ST INTERESTED PARTY

EMILY AWUOR OMBOTO 2ND INTERESTED PARTY

RULING

By the Notice of Motion dated 16th July 2008 the 1st Interested Party seeks orders that -

1. "(Spent)

2. This Honourable Court be pleased to set aside its orders of 14th July 2008 dismissing the Interested Party's Application dated 13th March 2008 due to non attendance.

3. This Honourable Court be pleased to re-instate its orders of 14th March 2008 and varied on 17th March 2008 restraining change of registration in the title to LR No. KISUMU MUNICIPALITY BLOCK 10/489 and the sale proceeds be not dealt with until hearing and determination of the Interested Party's Application dated 13th March 2008.

4. That this Honourable Court be pleased to set aside the following orders of 16th July 2008 halt all further orders issued thereafter:

a) The Plaintiff's Notice of Motion Application dated 14/07/08 be and is hereby allowed as prayed.

b) The confirmation of the sale of LR No. KISUMU MUNICIPALITY BLOCK 10/489 and a certificate of sale do issue.

c) The prohibitory orders registered on the title of LR No. KISUMU MUNICIPALITY BLOCK 10/489 on 25th March 2008 restraining the change in the title be discharged.

d) The Charge dated 18.8.1998 be discharged.

e) The Original Certificate of Lease issued to the Defendant be cancelled and a new certificate of lease do issue in the name of Emily Omboto as the new proprietor.

5. This Court stays the orders in prayer 4 pending interpartes hearing and determination of this application.

6. Costs of this application be in the cause.”

The application is premised on grounds that -

a) This Honourable Court issued orders dismissing the Interested Party's Application dated 13th March 2008 due to non attendance.

(b) The Application sought to set aside the purported settlement of terms filed by the firm of Bruce Odeny & Company Advocates, the warrants issued thereon and to nullify the auction sale of 7th March 2008.

(c) Failure to attend Court by the Plaintiff's Counsel was inadvertent and excusable.

(d) The mistake by the Interested Party's Counsel should not be visited upon the Interested Party.

(e) The Plaintiff's Counsel filed an application seeking orders that affect the 1st Interested Party and proceeded to obtain orders thereon without serving the 1st Interested Party or its Advocates.

(f) It is trite law that orders cannot be issued against a party in a suit without giving such party an opportunity to be heard.

(g) It is in the interest of justice that the orders sought be granted.

(h) Unless temporary stay orders are issued, the Interested Party will suffer substantially as it is secured creditor with priority rights and interest in the suit property.”

The application is supported by the affidavit of Jimmy Wafula Simiyu Advocate sworn on 16th July 2008 in which he narrates the happenings that ultimately occasioned his failure to attend court and deposes that the non-attendance was not deliberate and his mistake ought not to be visited upon his client.

Mr. Simiyu was on 13th April 2017 finally cross examined on his affidavit by the Advocates for the Plaintiff and the 2nd Interested Party.

The application was canvassed by way of written submissions.

For the 1st Interested Party it was submitted that the non-attendance that culminated in the dismissal of its application was inadvertent; that this was a simple case of misdiarizing the date in the advocate's honest belief that the matter was for hearing on 21st July 2008 and not 14th July 2008. It was also submitted that the dismissal of the 1st Interested Party's application and the allowing of the Plaintiff's application dated 14th July 2008 unfairly prejudiced the 1st Interested Party who had first rights to claim the property under the charge instrument dated 18th August, 1998 and which the court discharged on 14th July 2008.

It was further urged that this application was filed without undue delay – 2 days after the dismissal. This court was urged to follow the decision of the Court of Appeal in **Kasturi Limited V. Nyeri Wholesalers Limited [2014]eKLR**. The court was also urged to return the 1st Interested Party to the position it stood prior to 14th March 2008 as it is only fair and just to do so. It was argued that no loss will be occasioned

by the other parties should this application be allowed as in fact it will allow all the parties to ventilate their issues and positions clearly and that it is in the interest of justice that the 1st Interested Party be given a chance to defend its position as a secured creditor.

The application was opposed by both the Plaintiff and the 2nd Interested Party.

Counsel for the Plaintiff submitted that the application has no merit and that in any event the orders being sought to be set aside are eight years old and a lot of water has gone under the bridge; That the property has since changed hands and is currently charged to Kenya Commercial Bank Limited which is not a party to these proceedings. Further that the sums realized from the sale have also been released to the Plaintiff/ Decree Holder in settlement of the decree herein and to allow the application will be merely an academic exercise in futility.

The 2nd Interested Party opposed the application on the following grounds -

- “a) The 2nd Interested Party was an innocent purchaser for value without notice.**
- b) The 2nd Interested Party has spent a lot of resources renovating the suit property and has since registered the same in her name.**
- c) It will be an academic exercise changing the name on the title to its original status.**
- d) The proceeds from the sale have already been released to the decree holder upon dismissal of the 1st Interested Party's application dated 13/3/2008 making the hearing of the current application an exercise in futility.**
- e) The 1st Interested Party willfully and knowingly opted to not attend court on 14/7/2008 when their application dated 13/3/2008 was dismissed.**
- f) That having chosen not to attend court on the set date the 1st Interested Party cannot be heard to complain.**
- g) The orders granted on 14/7/2008 were rightly made and aimed at bringing this suit to its logical conclusion.**
- h) That it is in the interest of justice that litigation must end.**
- i) That the 1st Interested Party's recourse lies in damages.”**

The Advocate for the 2nd Interested Party contended that the 1st Interested Party's application was properly dismissed as it had no intention of prosecuting its application dated 13th March 2008; that all the Advocates including that of the 1st Interested Party were present when the hearing date was taken in the registry and their contention that a different date was chosen is therefore quite perplexing. The court was urged to find as in **Shah V. Mbogo & Another [1967]** that the discretion of the court ought not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.

On restoring of the 1st Interested Party to the position it was before the dismissal, Counsel for the 2nd Interested Party submitted that the impugned security was already sold and

registered to the 2nd Interested Party and the proceeds paid to the Plaintiff in settlement of the decree and reversing the events will be challenging and an exercise in futility. That moreover the 1st Interested Party has not laid a basis warranting the exercise of this court's discretion. Further that the application is incurably defective having been brought under the wrong provisions of the law. It is also contended that the 1st Interested Party will not suffer any loss the Plaintiff's Advocate having in an affidavit sworn on 17th September 2008 undertaken to forward what is due to them. Relying on **Josephat Mathui Muli V.**

Ezeetec Limited [2014]eKLR Counsel for the 2nd Interested Party urged this court to dismiss the application for reinstatement of the claim.

The proceedings of 14th July 2008 are not on the record and are not captured in the typed proceedings but it is not in dispute that on the said date the court dismissed the 1st Interested Party's application dated 13th March 2008 for non-attendance and thereafter set aside orders that had been made in favour of the 1st Interested Party.

I note that this is a matter that should long have been concluded. It has however taken a long time largely because of the change of the Judges handling the matter and to some large extent because it took long for the Ist Interested Party to procure the attendance of Mr. Simiyu, Advocate, for cross-examination. That was finally done on 13th April 2017.

Mr. Simiyu, Advocate maintained that he was under the mistaken belief that the date they had agreed on and taken for hearing of the application by the 1st Interested Party was 21st July 2008 and not 14th July 2008. He conceded that he ought to have checked with the registry the date that had been minuted in the file and stated that the buck stopped with him. He could not remember the clerk who gave the date and neither did he have his diary for the material period. He explained that he has since left the firm that acted for the 1st Interested Party and that the diary was left there.

Whether to set aside an *ex parte* order is in the discretion of the court. That discretion is unfettered. However as was held in **Shah V. Mbogo & Another [1967] EA 116** and as is

correctly submitted by Counsel for 2nd Interested Party the court is guided by the principle that its

“discretion is intended so as 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 course of justice.”

The main concern is to do justice to the parties – see **Maina V. Mugiria [1983] KLR 78** where **Shah V. Mbogo** was cited with approval. In the said case the Court of Appeal also held -

“1.

2.

3. The power to set aside the judgment does not cease to apply because a decree has been extracted (*Fort Hall Bakery Supply Company v. Frederick Muigai Wangoe [1958] EA 118*).

4. Some of the matters to be considered when an application is made are, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any other material factors which appear to have entered into the passing of the judgment which would not or might not have been present had the judgment not been *ex parte* and whether or not it would be just and reasonable, to set aside or vary the judgment, upon terms to be imposed (*Jesse Kimani v. McConnel [1966]EA 546,555F*).

5. The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered; the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered; and finally, it should be remembered that to deny the subject a hearing should be the last resort of a court. (*Jamnadas v. Sodha v. Gordandas Hemraj (1952) 7 ULR 7*)”

Having considered all the material before me and guided by the principles set out above I am persuaded that this is a proper case to exercise discretion in favour of the 1st Interested Party. This despite that a lot of water has passed under the bridge. Mr. Simiyu gave a plausible explanation as to why he did not

attend court. This is a mistake or omission that is excusable. None of the parties in opposition have laid before this court evidence that he was evading or obstructing justice. The application was filed timeously but was not heard expeditiously and this ought not to be visited upon the 1st Interested Party. It would not be just to deny the 1st Interested Party a hearing. The application to set aside the order dismissing the application dated 13th March 2008 is therefore allowed. However the application to restore the 1st Interested Party to its standing before dismissal of the application can only be determined upon hearing all the parties and should be canvassed at the hearing of the

application.

The costs of this application shall be borne by the 1st Interested Party. It is so ordered.

Signed, dated and delivered at Kisumu this 21st day of September 2017

E. N. MAINA

JUDGE

In the presence of:-

Mr. Mbeka for Plaintiff/Decree Holder (HB for Mr. Odeny)

N/A for Defendant

N/A for 1st Interested Party

N/A for 2nd Interested Party

C/A: Serah Sidera