



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. 207 OF 2012

ISHMAEL NYAMBU MWANDAWIRO.....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LIMITED....DEFENDANT

RULING

[1] Before the Court for determination is the Plaintiff's Notice of Motion dated **23 October 2015**, which was filed herein pursuant to **Sections 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya**, and **Order 12 Rule 1 and 7 of the Civil Procedure Rules, 2010**, for orders setting aside the dismissal order made herein on **18 June 2016**; and that the suit to be reinstated and, and that the costs of the application be provided for. The application was predicated on the following grounds:

- [a] The Plaintiff has a good and valid claim against the Defendant;
- [b] The Plaintiff stands to suffer irreparable loss/damage if the suit herein is not reinstated;
- [c] The Defendant/Respondent will not be prejudiced in any way that cannot be remedied;
- [d] The Plaintiff/Applicant will be ready to avail himself for hearing of the suit at any time should this court fix the case for hearing;
- [f] The Plaintiff/Applicant has so far substantially redeemed the loan account when the Defendant went ahead and unprocedurally, illegally, unlawfully sold the house and failed to declare the sale value.

[2] In support of the application, an affidavit was filed therewith sworn on the **23 October 2015** by **Susan Nyang'**, Counsel for the Plaintiff, wherein it was averred that the Plaintiff had substantially redeemed the loan advanced to him by the Defendant when the Defendant proceeded to sell the suit property, being **House Number 348 on LR No. Nairobi Block 82/1758 at Savannah Estate Phase IV**; and that this suit was consequently filed for the nullification of that sale which, according to the Defendant, was illegally done; but that the suit was dismissed on **18 June 2015** for want of prosecution without any notice to the Plaintiff. It was further deposed by Counsel that the Plaintiff was unaware of the dismissal as the file had been misplaced at the time, and therefore no immediate remedial action could be taken by the Plaintiff to ameliorate the situation. She therefore urged the Court to provide the Plaintiff with an opportunity to prosecute his case for a determination on the merits by setting aside the dismissal order aforesaid.

[3] The application was opposed by the Defendant vide the Grounds of Opposition dated **29 November 2016**. The Defendant urged the Court to note that, whereas the Plaintiff filed this suit **10 April 2012**, he did not take any steps to have it listed for directions or heard for over three years until its dismissal on **18 June 2015**. In any event, it was argued, the suit is *res judicata*, the Plaintiff having filed an earlier suit before the Chief Magistrate's Court, being **Milimani Commercial CMCC No. 7499 of 2006**, which was settled by consent on **21 July 2006**. The Court was urged to note the admission by the Plaintiff, both in the lower court pleadings and in the instant suit, that he defaulted in repaying the loan; and therefore that the Defendant was justified in exercising its Statutory Power of Sale.

[4] Regarding allegations that the court file has been missing, it was the contention of the Defendant that those are baseless and unsubstantiated allegations; and that in any event, the Plaintiff was at liberty to seek the reconstruction of the file, which he never did. The Defendant also questioned the propriety of Counsel swearing an affidavit in respect of contentious matters, such as those deposed to in paragraphs 5 to 9 of the Supporting Affidavit. Further to the Grounds of Opposition, the Defendant relied on the Affidavit sworn by its Legal Manager, **Ms. Eunice W. Kamau**, and filed herein on **28 February 2017** to which she annexed the pleadings and other documents lifted from **Milimani Commercial Courts CMCC 7499 of 2006** for the Court's perusal. Thus, the Defendant rooted for the dismissal of the Plaintiff's application with costs.

[5] The application was disposed of by way of written submissions, following the directions to that effect dated **8 February 2017**. It was the submission of Counsel for the Plaintiff that no Notice to Show Cause was served on the Plaintiff before the dismissal order was made; and that the Plaintiff has always been ready and willing to prosecute the suit but that the file was unavailable. Counsel relied on the following authorities in support of her submissions:

[a] **Equity Bank of Kenya Limited vs Urbanus Kyong'oi Mule T/A Kanyangi Complex [2016] eKLR;**

[b] **Professor Mwangi S. Kamenyi vs. Attorney General & 2 Others, Nairobi Commercial No. 720 of 2009;** and

[c] **Ibrahim Athman Said vs. Ibrahim Abdille Abdullah & Another, ELC No. 663 of 2009.**

[6] The Respondent's written submissions, which were filed herein on **16 May 2017**, highlighted the argument that the suit is *res judicata* by dint of **Section 7 of the Civil Procedure Act**; and in support thereof, Counsel relied on the cases of **William Koross (Legal Representative of Elijah C.A. Koross) vs. Hezekiah Kiptoo Komen & 4 Others [2015] eKLR** and **Mwangi Njangu vs. Meshack Mbogo Wambugu and Another, HCCC 2340 of 1991.**

[7] Having carefully considered the application, the response thereto by the Defendant and the written submissions filed herein as well as the pleadings and the record of the proceedings herein, there is no dispute that, since this suit was filed on **10 April 2012**, no action was ever taken by the Plaintiff to prosecute the suit; or that a period of 3 years of inaction had passed by the time the suit was dismissed on **18 June 2015** for want of prosecution pursuant to **Order 17 Rule 2(1) of the Civil Procedure Rules**. Accordingly, the issue for my consideration is whether sufficient cause has been shown for the setting aside of the dismissal order dated **18 June 2015**, there being no gainsaying that the Court has an unfettered discretion to set aside that *ex parte* order. In this respect, I find instructive the holding of the Court in **CMC Holdings Limited -vs- Nzioki [2004] 1 KLR 173** that:

"In law, the discretion that a Court of law has, in deciding whether or not to set aside ex-parte order...was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would...not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error..."

[8] Thus, I have carefully perused the grounds set out on the face of the application as well as the

averments in the Supporting Affidavit with a view of gleaning the reasons, if any, for the Plaintiff's inaction between **10 April 2012** and **18 June 2015** when the dismissal order was made. The only excuse given appears to be that the court file went missing, yet there is not a single correspondence in that regard that was exhibited to support the allegation. At paragraph 7 of the Supporting Affidavit, reference was made by Counsel to a letter dated **2 June 2015** which she wrote to the Deputy Registrar, but even this letter was not exhibited, and does not appear to be on the record. In any event, that letter would not possibly account for the situation obtaining prior to **2 June 2015**.

[9] It is noteworthy too that although in the written submissions filed by Counsel for the Plaintiff, it was contended that the Plaintiff was pursuing **High Court Misc. Civil Application No. 427 of 2014** which, according to her, was to be consolidated with this suit. This is a point that was raised from the bar, as it were, and has no factual basis in the Supporting Affidavit. It is now trite that submissions cannot plug the gap created by failure by a party to adduce evidence in proof of matters in issue. In **Daniel Toroitich Moi vs. Stephen Muriithi & Another [2014] eKLR**, the Court of Appeal expressed itself thus in this regard:

"...Submissions cannot take the place of evidence. The 1st Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all."

Thus, no documents having been availed by the Plaintiff to the Court confirming the subject matter of **HCMA No. 427 of 2014** and its nexus with the instant suit, or whether indeed any correlation exists therein in terms of the time period in issue herein. Accordingly, even this ground cannot avail the Plaintiff herein.

[10] I do bear in mind the words of **Apaloo JA** that in appropriate cases, the Court should be inclined to consider the larger interest of justice and go for a merit hearing as blunders do occur. Thus, in **Philip Chemowolo & Another v Augustine Kubende, [1982-88] 1 KAR 103** the Court expressed itself thus:

"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 ... 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."

[11] With the foregoing in mind, I have looked at the pleadings with a view of ascertaining whether there is a triable issue to warrant a merit hearing. It is manifest from paragraph 6 of the Plaintiff's property had already been sold by the time the suit was filed; and that the relief sought by the Plaintiff included, *inter alia*, a declaration that the sale of the suit property was illegal and an order that ownership be reverted to the Plaintiff. Granted the provisions of **Section 99** of the **Land Act, No. 6 of 2012**, it is doubtful that such a remedy would be available against a purchaser for value. That provision states:

"(1) This section applies to--

(a) a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or

(b) a person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.

(2) A person to whom this section applies--

(a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land;

(b) is not obliged to see to the application of the purchase price;

(c) is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular.

(3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.

(4) A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power."

[12] It is plain therefore that whatever remedy there might be herein would only be in damages; but even then, the Defendant adduced uncontroverted evidence vide the Replying Affidavit of **Eunice W. Kamau** and the annexures thereto, that the Plaintiff had earlier filed **CMCC 7499 of 2006** in respect of the same subject matter between the same parties. In the Plaint filed in **CMCC No. 7499 of 2006**, one of the prayers was for **"...a declaration that the sale of House No. 348 Nairobi Block 82/1758 in Savannah Estate Phase IV was illegal, unlawful and/or unprocedural."**

[13] At paragraph 9 of the Replying Affidavit, it was deposed that, on **14 July 2006**, when **CMCC No. 7499** came up for hearing *inter partes* of an injunction application, **"...the parties agreed to have the matter marked as settled with no order as to costs."** and that the consent was adopted on **21 July 2006** as an order of the court. The consent was exhibited as **Annexure EWK-2** to the Replying Affidavit; and it confirms that the parties thereto had consented through their Advocates to have the entire suit marked as settled with no orders as to costs. Accordingly, it was the contention of the Defendant that the instant suit would be *res judicata* in any event.

[14] It was further averred in the Replying Affidavit that a belated attempt was made by the Plaintiff six years later to have the Consent Order aforementioned set aside; and that the application to that effect was dismissed on **16 December 2013**. Thereupon, the Plaintiff filed **High Court Misc. Application No. 427 of 2014** seeking extension of time to appeal against that ruling. It was however not stated what became of that application for extension of time. What is clear however, is that all the averments aforementioned, in respect of **CMCC No. 7499 of 2006** were entirely uncontroverted by the Plaintiff; and that the dispute between the parties in that suit was finally determined by dint of the consent. In the premises, it is my considered finding that no useful purpose would be served by reviving this suit, which was dismissed long after the settlement aforementioned. Indeed, one is tempted to surmise that the reason for the unexplained delay in the prosecution of this suit could very well be that settlement.

[15] The foregoing being my view of the matter, I would find and hold that the Plaintiff's application dated **23 October 2015** is totally devoid of merit, and the same is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2017

OLGA SEWE

JUDGE