REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 214 OF 2011

GRAND CREEK LLC……..……1ST PLAINTIFF

JOHN KRISTLER COORS……..…2ND PLAINTIFF

VERSUS

NATHAN CHESANG MOSON…….....……..DEFENDANT

RULING

1. Before the Court was the application by the Defendant dated 25th February 2013, brought under the provisions of Order 10 Rule 11 of the Civil Procedure Rules, as well as Sections 1A, 1B, 3 and 3A of the Civil Procedure Act. The Defendant sought for stay of execution of the judgment of Musinga, J delivered on his behalf on 25th January 2013 by Kimondo, J.
2. Further, the Defendant prayed for the said judgment to be set aside and for the Court to have an opportunity to look at the submissions filed. The application was premised on the grounds that the honourable Judge, in his judgment dated 25th January 2013, had delivered the same without having had an opportunity to consider the Defendant's submissions dated 4th December 2012, and that the learned Judge would have come to a different conclusion had he considered the said submissions.
3. The application was further supported by the affidavit of Zablon Muruka Mokua deposed to on 25th February 2013, and in which the deponent reiterated the grounds as adduced in support of the application, and the Further Supporting Affidavit deposed to on 14th March 2013.
4. In opposing the application, the Plaintiffs filed their Notice of Preliminary Objection dated 24th August 2015, in which they raised the objection on the jurisdiction of the Court to set aside or review the judgment delivered on 25th January 2013, and, the Replying Affidavit of Christina W. Ndiho-Mutisya sworn on 6th March 2013.
5. Therein, it was deposed to that the Defendant was indolent, and that the instant application was made as a last effort by the Defendant to delay the Plaintiffs from enjoying the fruits of their judgment. Further, it was deposed to that the Defendant's allegation that the learned Judge did not consider his submission in his rendering of his judgment dated 25th January 2013 are both unfounded and uninformed, and that these attempts were made after the realization or being awakened by the consequences of his failure to pay his debt owed to the Plaintiffs.
6. In his submissions dated 13th October 2015, the Defendant submitted that the application was not brought under the wrong provisions of the law, and if that were the case, then the provisions of Article 159(2)(d) of the Constitution of Kenya provided a remedy for such technicalities, and as such, the Court would be required to consider the application without undue regard and

consideration to procedural technicalities. Further, it was submitted that the Court could still invoke its inherent jurisdiction pursuant to Section 3A of the Civil Procedure Act and grant the orders sought by the Defendant.

7. The Plaintiffs submitted, in their submissions dated 30th September 2015, that the Defendant's reprieve, if any, having been aggrieved by the judgment of Musinga, J, lay with the lodging of an appeal in the Court of Appeal. It was submitted that the allegations made that the learned Judge did not consider his submissions before rendering his judgment were misplaced, and based on mere suppositions.
8. It was reiterated that the Defendant had failed to substantially prove that his right to be heard had been infringed, and, that such conjecture, as relied upon by the Defendant, would not in any way constitute evidence that the Court erred in delivering the judgment that it did.
9. Further, it was submitted that the application had been brought under the wrong provisions of the law, and as such, the Court did not have the proper authority to adjudicate upon the instant application. In this regard, they relied upon the determinations made in **Joel K. Yegon& 4 Others v John Rotich& 4 Others (2004) eKLR** as well as **Henry Ndung'uKinuthia v Barclays Bank of Kenya & Another (2014) eKLR**.
10. The application is supposedly brought under Order 10 Rule 11 of the Civil Procedure Rules which provides as follows;

> ***"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."***

11. The grounds upon which the Defendant primarily relies upon is that the learned Judge in rendering his decision dated 25th January 2013, did not consider the submissions that he had filed. The Defendant did not reiterate as to whether there was an error apparent on the face of the record, or whether there was a mistake and/or error that the Court had made in rendering its judgment. Is the claim that the learned Judge did not consider his submissions sufficient grounds, therefore, for the Court to consider setting aside or varying the judgment of Musinga, J delivered on 25th January 2013?
12. In the Court of Appeal decision of **HellenMakone v Brenda Michieka [2015] eKLR** with regards to an appeal on grounds that the trial Judge in the matter had failed to properly exercise his discretionary powers to set aside an interlocutory judgment, the appellate Court held thus;

> ***"The principles upon which a court can set aside an interlocutory judgment are well stated in the case of Chemwolo& another -v- Kubende[1986] KLR 492.Where a regular judgment has been entered, the court will not usually set it aside unless it is satisfied that there are triable issues which raise a prima faciedefence which should go for trial. The Court of Appeal will not interfere with the discretion of a trial judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifest that he was clearly wrong on the exercise of his discretion and as a result there has been a miscarriage of justice. In Kenya Safari Lodges & Hotels Ltd -v- Tembo Tours & Safaris Ltd.[1985] KLR 441 it was stated that in an application for setting aside a default judgment, the court will consider whether the defendant has any merits to which it should pay heed and if merit is shown, the court will not prima facie allow the default judgment to stand. The court will have regard to the applicant's explanation for his failure to appear after being served, though as a rule, his fault, if any, can be sufficiently punished by terms as to costs."***

Similarly, in **National Bank of Kenya Ltd v Ndung'uNjau (1997) eKLR**, it was held that;

> ***"In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground or appeal but not for review."***

Also, in **Patel v E.A. Cargo Handling Services Limited [1974] E.A 75,** wherein the Court of

Appeal held as follows, at page 76;

> ***"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 judgement, as is the case here, the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits."***

13. In his judgment, the Judge rendered himself as follows;

> ***"The Defendant entered appearance and filed a defence denying the averments made by the Plaintiffs in their plaint. In particular, the defendant stated that the amount of Kshs 17,00,000/- was given to him by the 2nd Plaintiff and his team as a donation/gift to purchase the house that he and his family were renting. Being a donation/gift, the defendant avers that the same was not subject to repayment…the defendant neither attended court nor adduced any evidence in respect of his defence…I have considered the evidence adduced, as well as the pleadings on record."***

Before making his determination, the learned Judge had on 26th November 2012, directed the Defendant to file his submissions within ten (10) days of the said date when the matter had come up for hearing. The Defendant, through his appointed legal counsel, filed submissions on 4th December 2012. The judgment was due for delivery on 19th December 2012, although the same was not delivered until 25th January 2013.

14. The claim made by the Defendant is a blatant misapprehension of the freedom and power of Court to render itself on an informed decision, and of the authority conferred upon it pursuant to the provisions of Article 159(1) & (2) of the Constitution. No cogent reason has been adduced by the Defendant to support the claim that the Court did not consider his submission.
15. This is clearly, an attempt by the Defendant to subvert the course of justice, by filing a frivolous, vexatious and spurious application that would not only be an abuse of the process of the Court, but also deny the Plaintiffs from enjoying the fruits of their judgment.
16. In the case of **Moses Wachira v NielsBruel& 2 Others (2013) eKLR**, Havelock, J (as he then was) rendered himself thus;

> ***"Based on this, counsel had introduced the authorities as above of Musiara Ltd Savings & Loan Kenya Ltd as well as the extract from Halsbury's Laws of England in relation to the breach of natural justice. The extract from paragraph 84 of the volume 1(1) reads as follows:***
>
> > ***"84. Natural justice and fairness. Implicit in the concept of fair and adjudication lie two cardinal principles, namely, that no man shall be a judge in his own cause (nemojudex in causasua), and that no man shall be condemned unheard (audialterampartem). These two principles, the rules of natural justice, must be observed by courts, tribunals, arbitrators and all persons and bodies having the duty to act judicially, save where their application is excluded expressly or by necessary implication."*** (emphasis added).

At paragraph 96 of the same volume, the learned authors detail thus:

> ***"96. Opportunity to be heard. A person or body determining a justiciable controversy between parties must give each party a fair opportunity to put his own case and to correct or contradict any relevant statement prejudicial to his view. A corresponding duty may rest upon an authority notwithstanding that its enquiry or decision relates to the affairs of one party only, or that the controversy lies between itself and a single party. In some situations fairness will require a deciding body to take the initiative in inviting the interested parties to submit representations to it."*** (emphasis added).

As held by the Court of Appeal in the ***Savings & Loan Kenya*** ***case:***

> ***"The very foundation upon which any judicial system rests is that a party who comes to court shall be heard fairly and fully. The court is duty bound to hear all parties to the case and failure to do so is an error.""***

Under the rules of natural justice, as enunciated in the abovementioned case, the Defendant was given ample opportunity to be heard, and which the Court did, and thus rendered its decisions, conscious of the averments made by both parties, and in consideration of all the evidence that had been placed before it. For the Defendant to contend otherwise, it would be an averment that the Court may have been biased, or made a decision on a misapprehension of the facts, or that indeed, the entire judgment was premised on a failure to consider the Defendant's submissions. Nothing could be further from the truth, and as asserted by the Plaintiff, it is legally unconscionable for the Defendant to be able to comprehend what was going through the learned Judge's mind at the time he prepared his judgment. His assertions are therefore, misplaced, in the least, and further, based on mere suppositions.

17. The upshot is that the Defendant's application is unmeritorious and the same is dismissed with costs to the Plaintiffs.

Dated, signed and delivered in court at Nairobi this 23rd day of March, 2016.

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C. KARIUKI

JUDGE