



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 142 OF 2012

ANN NJOKI MURANI PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED 1ST DEFENDANT

SAVINGS & LOAN KENYA LIMITED (S&L) 2ND DEFENDANT

MUSA NYAKWAYE 3RD DEFENDANT

RULING OF THE COURT

1. The **Notice Motion** before the court is dated 29th September 2016. It is filed by the Plaintiff on 1st October 2015 and seeks to secure the following orders;

1. *This Application be certified urgent and be heard ex-parte in the first instance.*
2. *Leave be granted to the firm of Masaviru & Ketoo Advocates to take over the conduct of this matter from the firm Adoto & Advocates.*
3. *Pending the hearing and determination of this application interpartes, an order of stay do issue against the judgment of this court delivered on 18th September 2015.*
4. *The order made herein n 25th April 2015 and the judgment delivered on 18th September 2015 be set aside and/or stayed.*
5. *Costs be in the cause.*

2. The Application is premised on the grounds set out there and is supported by Affidavit of NAOMI KATHURE GITHAKA sworn on 29th September 2015 and a Supplementary Affidavit sworn on 16th October 2015. The Deponent states that she is the Donee of a general power of attorney dated 8th July 2008 granted to her by the Plaintiff.

3. The Applicant's case is that on 21st September 2015, she visited the firm of Akoto & Akoto advocates with a view to enquire about the whereabouts of their case, and was informed that the case was due for judgment on 21st September 2015 the same day. She then attended the court for the delivery of the judgement in the absence of their advocates who was evasive. The applicant later was saddened and devastated to learn from the Judgment that the Plaintiff's suit was dismissed on 21st April 2015 for non-attendance of Counsel and Plaintiff. Subsequently, the conversation she had with Mr. Akoto was not a pleasant one and it culminated in him giving the Applicant the file because he could not explain to the Applicant the turn of the events. All along, the Applicant was convinced that she had a very good

defence on record against the 3rd Defendant's counterclaim with overwhelming chances of success, and if she had the opportunity to testify, she would have demonstrated that the alleged sale never took place and the so called sale was a conspiracy between the Bank and the 3rd Defendant to deprive the Plaintiff of her property. She would also have demonstrated that the alleged address on the Statutory Notices was sent to a local address despite the fact that the Plaintiff purchaser had provided a foreign address on the letter of offer. Further that the Auctioneers had breached provisions of the Auctioneering Act and the rules made thereunder. The Applicant would also have demonstrated that an order of eviction would have untold effect on innocent tenants or persons who are not parties to this suit and who have put all their hard earned investments in the premises. The Applicant's case is that some of the tenants have for a very long period built and developed their good will and if the sudden and unregulated eviction is allowed to go on, their fortunes shall be blown to the wind, their innocence notwithstanding. That is why the Applicant is pleading with this court to accord her an opportunity to prosecute her claim and defend the 3rd Defendant's counterclaim.

4. The Application is opposed by the 3rd Defendant through a Replying Affidavit sworn by MUSA NYAKWAYE on 7th October 2015. The 3rd Defendant/Respondent has also filed a Notice of Preliminary Objection on 8th October 2015.

5. The 1st Defendant/Respondent has also opposed this application through an undated Replying Affidavit sworn by JAMES ODWAKO filed herein on 21st October 2015.

6. Parties by consent allowed prayer 2 of the application, paving way for the current advocates for the Plaintiff/Applicant to come on record herein for the Plaintiff. Parties also agreed that the Preliminary Objection filed herein be determined together with the application.

7. The brief background to this application, commencing from the moment this particular court started hearing this matter on 13th February 2013, is that the Plaintiff has always been represented in this court by an advocate, and many times over and again, Mr. Masaviru, the current Advocate for the Plaintiff has appeared for the Plaintiff as an associate from the firm of M/s Akoto & Akoto Advocates then on record for the Plaintiff. On 9th March, 2015 when this matter came up for hearing a Mr. Keli holding brief for Mr Akoto for the Plaintiff successfully sought for adjournment on the basis that Mr. Akoto was sick, with the court noting that that was the last adjournment. The court listed the matter for hearing on 21st April 2015. On that day, neither the Plaintiff nor her advocates were in court. Mr. Mwangi acting together with Mr. Akech applied for the dismissal of the Plaintiff's suit under Order 12 Rule 3 of Civil Procedure Rules, which allows for dismissal of suit where only the Defendant attend court during the hearing and does not admit the claim. The court agreed with that submission and dismissed the Plaintiff's suit. However, since the 3rd Defendant had a counter – claim, Mr. Nyakiangana for the 3rd Defendant after also applying for the dismissal of the Plaintiff's suit, also made an application under order 12 Rule 3 (3) to proceed with the Defendant's counter-claim dated 9th July 2012. Mr. Nyakiangana then proceeded with the counter-claim, which the court allowed in terms of the judgment delivered on 18th September 2015. It is this judgment that the Plaintiff/Applicant seeks to set aside on account that the Plaintiff's advocate did not inform the Plaintiff of the hearing date.

8. Parties filed submission to the application which I have considered. I raise the following issues for determination in this application.

- i. ***Whether the Preliminary Objection is meritorious.***
- ii. ***Whether the court can set aside or stay the order made herein on 21st April 2015 and the judgment delivered on 18th September 2015.***

WHETHER THE PRELIMINARY OBJECTION IS MERITORIOUS

9. The 3rd Defendant/Respondent has stated in his notice of Preliminary Objection filed herein on 8th

October 2015 that the application herein is incompetent in view of the Appeal filed by the applicant in the Court of Appeal, hence this court has no jurisdiction to deal with this matter. In regard to this issue, what I can see on record is Notice of Appeal filed in the Court of Appeal on 2nd October 2015. Memorandum of Appeal is not attached to enable this court to know the nature of the intended appeal. However, none of the parties, including the 3rd party who filed the said Preliminary Objection submitted on the same in their written submissions. I think this was a clear understanding that the said Preliminary Objection had no merit in stopping the application before the court.

WHETHER JUDGMENT HEREIN OR ORDER OF 21ST APRIL 2015 CAN BE SET ASIDE

10. The respondents in their submissions were emphatic that the Plaintiff was to blame for the delay in this matter, and that the Plaintiff had actually lost interest in this suit, if the history of the record is anything to go by. The 3rd Defendant submitted that the matter was filed in court in the year 2012 and given First Track heading. Subsequently the plaintiff lost interest in prosecuting the case immediately upon filing it. The suit relates to a challenge by the plaintiff of the exercise of a Statutory Power of Sale over the suit property title No. Ngong/Ngong/20254 by the 1st Defendant bank in favour of the 3rd Defendant. The suit property had been charged in favour of Savings & Loan (K) Limited to secure financial loan granted to the plaintiff but the said institution has since been amalgamated with the 1st Defendant Bank as per the Banking Act. At the time of commencement of this suit, the suit property had already been sold to the 3rd Defendant in a public auction by the 1st Defendant in exercise of a chargee's statutory power of sale. In the suit it is admitted on behalf of the plaintiff that she defaulted in repaying the Bank facility granted to her with terms and conditions. Further the 3rd Defendant submitted that it is not in dispute that the Plaintiff was served with Statutory Notice dated 26th January, 2011 and that the suit property was advertised for sale in a public auction in the Daily Nation of 10th January, 2012. The auctioneer also served appropriate redemption notice and notification of sale. This is also not disputed. The public auction was concluded and proceeds of sale forwarded to the Bank and the suit property has been transferred to the 3rd Defendant as an innocent purchaser without notice. All the foregoing is not in dispute. The 3rd Defendant's case is that the plaintiff in his supporting affidavit filed on 1st October, 2015 has avoided to address all the issues raised herein above. Apart from mere allegations set out in the said Affidavit, the applicant has not filed any document to demonstrate that she has any defence to offer even if this matter is re-opened. However, the 3rd Defendant who is an innocent purchaser for value stands to suffer prejudice having gone through court process and further being denied the fruits of his purchase since the year 2012. In demonstrating why the Plaintiff has allegedly lost interest in the suit, the 3rd Defendant referred to the following events:

1. That it is the 3rd Defendant who initiated and fixed this matter for pre-trial which was to be held on 24th September, 2012.
2. That on 5th November, 2012 the matter was listed for mention to confirm whether the plaintiff had complied with order 11 of the Civil Procedure Rules all in vain.
3. That as at 29th November, 2012 the plaintiff had declined to comply with pre-trial issues which resulted into this matter being fixed for hearing notwithstanding the non-compliance.
4. That as records clearly indicate all along it is the 3rd defendant who fixed this matter for hearing as the plaintiff had lost interest in the matter. This is demonstrated in the invitation letter in the court file.
5. That this matter was fixed on several occasions by the 3rd Defendant for hearing but the plaintiff for one reason or the other failed to attend any hearing hence occasioning several adjournments.
6. That on 9th March, 2015 this matter came up for hearing when the plaintiff once again sought for

an adjournment which the court rejected but later did indulge the plaintiff, and set the hearing for 21st April, 2015.

11. It is on this day that the plaintiff or her Advocate once again failed to turn up to prosecute their case. In view of the foregoing the 3rd Defendant submitted that the plaintiff indeed lost interest in this case upon filing the same hence the current application has no merit as justice delayed is justice denied. The 3rd Defendant submitted that the principles for stay of execution and setting aside judgment under order 12 Rule 72 of the Civil Procedure rules are well settled. Whereas the court has discretion to set aside judgment, that discretion must be exercised judicially. The court must also look at the nature of the delay and in this case a period over five months without any good explanation is inordinate delay.

The 1st Defendant also submitted alongside the 3rd Defendant. However, on her part, the Plaintiff/Applicant submitted that she has demonstrated that she was not aware of the proceedings of 21st April 2015, when the matter proceeded *ex parte* in the absence of her erstwhile counsel and herself, the Applicant has deponed that her absence from court on that date was not wilful but she was not informed by her former Advocate that the matter was coming up for hearing on that material date, and that non attendance was solely occasioned by her former advocate who failed to appraise her of the hearing date. All these matters came to the attention of the Applicant when she received a copy of the Judgment on 21st September 2015 and perused it at least Five months later while all along his erstwhile counsel had assured her everything was intact. The Applicant submits that she has a very strong case with high chances of success and an impeccable defence to the 3rd Defendant's counterclaim. If given a chance to testify and litigate her case on merit the Applicant will demonstrate that the alleged sale never took place, she will also demonstrate that the statutory notices were sent to an address other than the one stipulated in the letter of offer. The Applicant submitted that she is an innocent litigant caught in between the law and the unfortunate mistakes of her legal counsel, and that the administration of justice normally requires that such a litigant should be given a chance to litigate her case on merit unless there is a clear intention to overreach, steal a march and / or delay justice, in the absence of the foregoing this court should be inclined towards excusing the mistake rather than barring the applicant from litigating her case on merit. The Applicant cited the case of **Patel – vs – E. A. Cargo Handling Services Ltd**, where the court stated thus:

*“In considering and application to set aside an *ex parte* Judgment, the nature of the action should be considered, the defence if any being 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 a litigant a hearing should be the last resort of a court”*

12. I have considered the submission of the parties in this matter. The principles guiding the setting aside of *ex-parte* orders are trite that the court has wide powers to set aside such *ex parte* orders save that where the discretion is exercised the court will do so on terms that are just. In **CMC Holdings Limited-vs-Nzioki (2004) 1 KLR 173**:

*“That discretion must be exercised upon reasons and must be exercised judiciously...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 amongst others an excusable mistake or error. It would not be proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error”.*

13. This court has not found a sound explanation from the applicant on what basis they seek to set aside the orders of 21/04/2015. The only reason fronted by the plaintiff's advocates is that the former advocates were indolent while dealing with the matter. On this issue the decision in **John Ongeri Mariaria & 2 Others vs. Paul Matundura Civil Application No. Nai. 301 of 2003 [2004] 2 EA 163** is opt. It was held that: **“Legal business can no longer be handled in such sloppy and careless manner. Some clients must learn at their costs that the consequences of careless and leisurely approach to**

work by the advocates must fall on their shoulders...Whenever a solicitor by his inexcusable delay deprives a client of his cause of action, his client can claim damages against him...Whereas it is true that the Court has unfettered discretion, ... judicial discretion must be exercised.

14. The court's discretion in setting aside the orders are wide and unfettered, however the same should be exercised judiciously. The court record clearly shows that this matter came before court on 9th March 2015 when the plaintiff's advocate sought an adjournment despite the other parties being ready to proceed. In the premises, the matter was set down for hearing on 21st April 2015 when the matter was dismissed through Order 12 Rule 3. The court as a custodian of justice shall ensure that orders are set aside in instances of excusable error or mistake. In the case of **Branco Arabe Espanol vs. Bank of Uganda [1999] 2 EA 22, Oder**, it was stated that:

“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered”.

15. Pursuant to the foregoing paragraphs of this ruling, the Plaintiff's/Applicant's application under reference is dismissed with costs to the Respondents.

Orders accordingly.

READ, DELIVERED AND DATED, AT NAIROBI THIS 25TH DAY OF APRIL 2016.

E. K. O. OGOLA

JUDGE

Ruling Read in open court in the presence of:

Mr. Masaviru for Plaintiff

Mr. Makori hb Kimani for the 1st & 2nd Defendant

M/s Maitei hb Nyakiangano for the 3rd Defendant.

Teresia – Court Clerk