



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MILIMANI**  
**CIVIL SUIT NO 296 OF 2008**

DR JOSEPH N.K. ARAP NG'OK.....1<sup>ST</sup> PLAINTIFF

ALICE NG'OK.....2<sup>ND</sup> PLAINTIFF

**VERSUS**

EABS BANK LIMITED.....DEFENDANT

**RULING**

**INTRODUCTION**

1. The Plaintiff's Notice of Motion application dated 19<sup>th</sup> February 2014 and filed on 20<sup>th</sup> February 2014 was brought under the provisions of Sections 1A, 1B and 3A, Order 12 Rule 7, Order 51 Rule 15 of the Civil Procedure Act and all enabling provisions of the law. Prayer Nos (1) and (2) were spent. It sought the following remaining orders:-

**a. Spent.**

**b. Spent.**

**c. THAT this Honourable Court be pleased to set aside its orders made on 29<sup>th</sup> November 2013 to the effect that the Plaintiff's suit herein is dismissed for want of prosecution.**

**d. THAT the Plaintiff's suit be unconditionally reinstated.**

**e. THAT the costs of this Application be in the cause.**

**THE PLAINTIFFS' CASE**

2. On 19<sup>th</sup> February 2014, the 1<sup>st</sup> Plaintiff swore a Supporting Affidavit on his own behalf and that of the 2<sup>nd</sup> Plaintiff. Cheryl Onindo Advocate also swore an Affidavit on the same date. The Plaintiffs' two (2) sets of written submissions were dated and filed on 9<sup>th</sup> June 2014 and 22<sup>nd</sup> September 2014 respectively.

3. On 29<sup>th</sup> November 2013, the court allowed the Defendant's application dated 29<sup>th</sup> October 2013 that had sought the dismissal of the suit herein for want of prosecution. They said that their then advocates, M/S Onindo & Co Advocates did not attend court on the said date as they were not aware that the matter

was to come up in court on the said date. They said that they only became aware of this fact in mid-December 2013. They had also been unable to trace the court file until they wrote a letter to the Deputy Registrar.

4. Their said advocates denied ever having been served with any Hearing Notice and challenged the Affidavit of Service that showed that they were served at 13<sup>th</sup> Floor Electricity House because it was clear from their pleadings on the court record indicated that they operated from Caxton House 3<sup>rd</sup> Floor Room 6B.

5. It was the Plaintiffs' contention that the dispute as to whether they had fully paid the mortgage money in respect of the subject property ought to be ventilated at trial and that they would suffer irreparable loss and damage if the suit herein was not reinstated.

### **THE DEFENDANT'S CASE**

6. In response to the said application, on 9<sup>th</sup> May 2014, Daniel Kuhutha Njoroge swore a Replying Affidavit on behalf of the Defendant. The same was filed on 12<sup>th</sup> May 2014. Its written submissions were dated 28<sup>th</sup> July 2014 and filed on 29<sup>th</sup> July 2014.

7. The Defendant stated that it sought to have the suit stuck out against it for the reason that the Plaintiffs had since 4<sup>th</sup> November 2009 not taken any steps in the prosecution or finalisation of the suit and that no useful purpose would be served by setting aside the order that dismissed the suit for want of prosecution.

8. It was emphatic that the Plaintiff's advocates were served at Agip House 1<sup>st</sup> Floor on 12<sup>th</sup> November 2013 as the Process Server had established that the said advocates were operating from the offices of Moses Siagi Advocate at Agip House 1<sup>st</sup> Floor and not at Electricity House as had been indicated in the LSK website.

9. It took great exception to the Plaintiffs' advocates' assertions that the stamp acknowledging receipt of the application seeking to dismiss the suit herein for want of prosecution had been forged or that its advocates had falsified service. It was its averment that the Plaintiffs' withdrawal of instructions from their advocates was an unsavory attempt to shift their failure to prosecute the suit herein. It therefore urged the court to dismiss the application herein.

### **LEGAL ANALYSIS**

10. It is trite law that a litigant ought not to be condemned unheard, a right that is now very much entrenched in Article 50 of the Constitution of Kenya, 2010 as was rightly submitted by the Plaintiffs. The Plaintiffs were emphatic that their advocates were not served, a fact that was re-emphasised by their Advocate Cheryl Onindo.

11. They placed reliance on the case of **Republic vs Business Premises Rent Tribunal & 2 Others [2014] eKLR** and several other cases where the common thread was that a litigant must never be denied the right to be heard as this had the effect of rendering any decision delivered therein null and void *ab initio*.

12. They also referred the court to the case of **Yamko Yadpaz Industries Limited vs Kalka Flowers Limited [2013] eKLR** which referred to the case of **HCCC No 1864 of 1991 Abraham Kiptanui vs Delphis Bank Limited & Another** (unreported) in which it was held that a judgment had to be set aside once it was established that judgment on record was irregular. However, the court did not find this case to have been relevant to the facts of this case.

13. What was more pertinent herein was the case of **Shah vs Mbogo & Another [1967]EA 116** that they relied upon where it was held that the court has power to exercise its discretion judiciously to avoid injustice or hardship to a party resulting from accident, inadvertence or excusable mistake more so if the

omissions, commissions or inadvertence were on the part of its advocate.

14. The court found itself in agreement with the submissions by the Defendant that the presumption as to service lay in the party questioning it to show that the return of service was wrong. In this case, Cheryl Onindo, Advocate for the Plaintiffs swore an Affidavit in which he denied ever having operated from Agip House. On the other hand, the Defendant was emphatic that its Process Server served the said Plaintiffs' advocates at Agip House.

15. The Defendant did not file an affidavit that would have shed some light in this matter. It had, however, already filed an Affidavit of Service. It was now the word of George Watiri, the Process Server against that of Cheryl Onindo, the Plaintiffs' advocate. As was rightly pointed out by the Defendant in the case of **Karatina Garments Limited vs Nyanarua [1976-80] 1 KLR 114** that it relied upon:-

**“...if the court is faced with conflicting affidavits as to the alleged service of process, it is proper that the deponents should be examined on oath in order to establish the truth.”**

16. Unfortunately, neither the Plaintiffs nor the Defendant sought the cross – examination of the deponents of the affidavits in question making it difficult for the court to make a conclusive finding on exactly what happened. Faced with that dilemma, the court had to fall back on the extent of prejudice it deemed would be suffered by the Plaintiffs if the court was to have found that their advocates were served but they failed to attend court due to inadvertence and/or omission on the part of the said advocates.

17. In a ruling of 4<sup>th</sup> November 2009, Khaminwa J (as she then was) held as follows in respect of L.R. No Nairobi/72/1032, the subject premises herein:-

**“...it is clear that on 1/1/2008, the principal sum plus interest charged had already been paid...It is confirmed by the auctioneer that only Kshs 860,656.79 is unpaid. It is not clear where he has obtained such information... the plaintiffs have demonstrated a *prima facie* case to warrant issue of interlocutory injunction. If the property was sold for the alleged disputed charges, the plaintiffs would lose their house where they have resided for many years and the money paid being the principle and interest would be lost.”**

18. Clearly, there was a lot of stake in this matter as far as the likely loss that the Plaintiffs were to bear. The court did not wish to delve into the question of loss or prejudice as it had since been addressed by the said learned judge but it did note the observations by the said judge.

19. Bearing in mind that there was no attendance in court on 29<sup>th</sup> November 2013 when the suit herein was dismissed for want of prosecution and the court was unable to establish exactly what transpired regarding service of the Defendant's Notice of Motion application dated 29<sup>th</sup> October 2013, the court found and held that it was in the best interest of justice to exercise its discretion to allow the Plaintiffs prosecute their claim herein. The court rejected the Defendant's submissions that no useful purpose would be added by reinstating the suit herein on the ground that the Plaintiffs had failed to prosecute their case due to the loss and prejudice that the Plaintiffs were likely to suffer if their suit was not reinstated.

20. The court judiciously exercised its discretion to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake that could have been caused by the omissions, commissions or inadvertence of the said Plaintiffs' advocates when they failed to attend court. It is important to point out here that the court did not for a fact find that the said Plaintiffs' advocates were served and they failed to attend court but rather, it arrived at this decision having looked at the circumstances hypothetically.

21. Notably, courts have now moved from determining matters on technicalities. A party's right to access court and to fair hearing is now enshrined in Article 50 of the Constitution of Kenya, 2010. While excusing such inadvertence, mistake or omission so as to ensure a party is afforded a reasonable and fair opportunity to be heard, the court should consider the prejudice that would be suffered by the party against whom the orders would be granted. It also ought to consider whether the application has been filed timeously.

22. The Plaintiffs filed their application to set aside the orders dismissing their suit for want of prosecution issued on 29<sup>th</sup> November 2013 on 16<sup>th</sup> October 2012. That cannot be said to have been inordinate delay. While the Defendant did not demonstrate what prejudice it would suffer, the court was of the firm view that the Plaintiffs ought not to be allowed to go scot-free. The Plaintiffs must compensate the Defendant for the inconvenience of being brought back to the rigours of litigation for the hearing of the matter herein. An award for costs would thus be adequate in the circumstances of the case herein.

23. Having considered the pleadings, the affidavit evidence and the written submissions and the case law in support of the respective parties' cases, the court found that this was a fit case for it to exercise its discretion to set aside the orders that it had issued on 29<sup>th</sup> November 2013 and allow the Plaintiffs to prosecute their suit. Indeed, Order 51 Rule 15 of the Civil Procedure Rules, 2010 is very clear that the court has powers to set aside any order made *ex parte*.

### **DISPOSITION**

24. For the foregoing reasons, the court finds that the Plaintiffs' Notice of Motion application dated 19<sup>th</sup> February 2014 and filed on 20<sup>th</sup> February 2014 was merited and the same is hereby allowed in terms of Prayer Nos (3) and (4) therein.

25. The Plaintiffs are hereby ordered to pay the Defendant's advocates thrown away costs in the sum of Kshs 5,000/= within fourteen (14) days from the date of this ruling. In default thereof, the suit will stand dismissed for failure to comply with the court's directions and/or orders.

26. Parties are hereby directed to take all relevant action to prepare the suit herein for trial.

27. It is so ordered.

**DATED and DELIVERED at NAIROBI** this 28<sup>th</sup> day of January 2015

**J. KAMAU**

**JUDGE**