



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO 189 OF 2014

ALICE WANJIRU HINGA.....PLAINTIFF

VERSUS

KENA ROSCAS LIMITED.....1ST DEFENDANT

YOUTH ENTERPRISE DEVELOPMENT FUND.....2ND DEFENDANT

RULING

INTRODUCTION

1. The 2nd Defendant's Chamber Summons dated 8th July 2014 and filed on 9th July 2014 was brought under **the Judicature Act Cap 8, Rules 3 (a), 3(2) and Part 1 of the High Court {Practice and Procedure Rules}**. Prayer No (1) was spent. It sought the following remaining orders:-
1. Spent.
2. **THAT this Honourable Court be pleased to review, set aside, vary and/or vacate the exparte orders of this Court granted by the Honourable Justice Havelock on the 25th of June, 2014 and in particular Order (1) restraining the 2nd Defendant by way of a temporary injunction from selling, alienating, disposing off and or interfering with the Plaintiff title number L.R Ngong/Ngong/20694 until the hearing of this suit and Order (2) ordering the Defendants to discharge and return to the Plaintiff her title number Ngong/Ngong/20694 unconditionally.**
3. **THAT in the alternative, this Honourable Court be pleased to stay the implementation and execution of the said orders issued on the 25th day of June, 2014 pending the interpartes hearing and determination of the Plaintiff's/Respondent's application dated 5th May, 2014.**
4. **THAT this Honourable Court be pleased to issue such other order as may be just and expedient in the wider interest of justice.**
5. **THAT the costs of this application be provided for.**

THE 2ND DEFENDANT'S CASE

2. The application was supported by the Affidavit of Catherine Namuye, the Acting Chief Executive Officer of the 2nd Defendant. It was sworn on 8th July 2014. The 2nd Defendant filed its Written Submissions dated 5th November 2014 on 10th November 2014.
3. It averred that on 17th June 2014, its Acting CEO filed a Replying affidavit to the Plaintiff's Notice of Motion application dated 5th May 2014, which affidavit was filed on the morning of 19th June 2014 when the Plaintiff's application was scheduled for hearing. However, the said application was not listed on the Environment and Land Court cause list for that day.
4. It was therefore its case that the Plaintiff's application was clearly opposed and that the Plaintiff obtained *ex parte* orders irregularly and in bad faith to its detriment as the Plaintiff's Advocates they knew that the matter was filed in the Environment and Land Court and not in the Commercial and Admiralty Division.
5. It therefore urged the court to grant the orders it had sought in its application.

THE PLAINTIFF'S CASE

6. In opposition to the Application, the Plaintiff filed the Grounds of Opposition dated 8th August 2014 on 11th August 2014. Her written submissions were dated 7th November 2014 and filed on 10th November 2014.
7. The Plaintiff averred that the Notice of Motion application dated 5th May 2014 was listed in the normal manner and that it was the 2nd Defendant who failed to exercise due diligence on perusal of the daily cause list for 19th June 2014. She further averred that the 2nd Defendant's Replying Affidavit filed by the 2nd must have been filed after the court file had left the registry. It was also her assertion that the Replying affidavit was served upon her Advocates after the application had been dealt with by the court.
8. It was therefore her case that the orders were granted on merit after Havelock J (as he then was) had satisfied himself that the granting of the orders was warranted. She thus urged the court to dismiss the 2nd Defendant's present application.

LEGAL ANALYSIS

9. The law and principles to be applied on setting aside are well settled. The court has a wide discretion when making a determination as to whether or not to set aside an *ex parte* order. The discretion is intended to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice- **See Shah vs Mbogo & Another [1967] EA 116.**
10. The 2nd Defendant's counsel maintained that on 18th June 2014, they filed a Replying affidavit in response to the Plaintiff's application that was dated 5th May 2014, a fact that was not contested by the Plaintiff. In fact the Plaintiff contended that the same was served upon her Advocates after the application had been heard and determined and that the 2nd Defendant or its counsel failed to exercise due diligence in perusing the daily cause list.
11. It was evident from the court proceedings of 19th June 2014 that when the application was coming up for hearing, neither was the 2nd Defendant in court nor the said Replying Affidavit on the court record as was rightly contended by the Plaintiff and admitted by the 2nd Defendant.
12. On enquiring at the registry, the 2nd Defendant's counsel was advised to fix another date since the files in relation to various Environment & Land Court Division matters could not be retrieved from the file cabinets which were "dysfunctional".
13. It would appear that this was a case of misfiling as the 2nd Defendant filed its Replying Affidavit in the Environment & Land Court Division registry although the matter had already been transferred to the Commercial & Admiralty Division. The matter was also not listed in the Environment and Land Court Cause list for the day.

14. A perusal of the court file shows that this matter was initially filed in the Environment and Land Court Division but on 8th May 2015, the Presiding Judge of the said Division transferred the same to the Commercial & Admiralty Division for further directions. In fact, the Plaintiff's application dated 5th May 2014 was filed in the Environment & Land Court and heard *ex parte* when the Plaintiff was directed to take a hearing date at the registry.
15. In all this, it was not clear whether or not the Plaintiff informed the 2nd Defendant that the matter had been transferred from the Environment & Land Court to the Commercial & Admiralty Division leading this court to give the 2nd Defendant the benefit of doubt for having believed that the same was to be listed in the Environment and Land Court cause list.
16. Having considered the pleadings, affidavit evidence and written submissions in support of the parties' cases, it was the court's view that the omission was an excusable mistake on the part of the 2nd Defendant's counsel. It could therefore not be said that the 2nd Defendant intended to obstruct or delay the course of justice.
17. As the Plaintiff had not demonstrated any prejudice or loss she would suffer would if the interlocutory orders of 19th June 2014 were set aside, the court was persuaded that this was a suitable case for it to exercise its wide and unfettered jurisdiction to set aside the Ruling by the learned judge to avoid any injustice or hardship to the 2nd Defendant and in the interests of justice. Indeed, the court's discretion is derived from Order 51 Rule 15 of the Civil Procedure Rules, 2010 that give power to this court to set aside any *ex parte* orders. Appreciably, the orders granted to the Plaintiff were final in nature, which was hotly contested by the 2nd Defendant. Shutting it from presenting its case would be too draconian.

DISPOSITION

18. In the circumstances foregoing, the upshot of this court's ruling was that the 2nd Defendant's Chamber Summons dated 8th July 2014 and filed on 9th July 2014 was merited. The same was allowed in the following terms:-

- a. **The interlocutory orders granted on 19th June 2014 be and are hereby vacated.**
- b. **The Plaintiff's application dated 5th May 2014 be fixed for *inter partes* hearing within 7 days from the date of this ruling.**
- c. **There is no order as to costs.**

19. It is so ordered.

DATED and DELIVERED at NAIROBI this 28th day of May 2015

J. KAMAU

JUDGE