



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

CIVIL CASE NO. 433 OF 2012

BEATRICE OLOO ODHIAMBO PLAINTIFF

VERSUS

REGINA NGUNDO 1ST DEFENDANT

CRYSTAL VALUERS LIMITED 2ND DEFENDANT

STEPHEN MMBAJIWE NYAMU

T/A LIFILINE TRADERS 3RD DEFENDANT

ELIZABETH W. MUIGAI

T/A WAGLY AUCTIONEERS 4TH DEFENDANT

R U L I N G

1. On the 18th July 2013, the Plaintiff herein filed a Notice to Act in Person which accompanied her Notice of Motion dated 17th July 2013. Being unaware of the procedure in relation to suit before this Court, the Plaintiff's said Application was brought:

“pursuant to the relevant provisions of the Civil Procedure Act I Rules and the powers of the court under law”.

The Plaintiff's said Application prayed that this Court be pleased to stay, set aside and/or alter the *ex-parte* Orders and Ruling issued on 20th and 26th June 2013 by this Court. It also requested that the Plaintiff be granted a temporary stay of execution pending the hearing and determination of the said Application *inter-partes* as well as a stay of proceedings in any related matters to this suit including *CMCC No. 7343 of 2009*, *CMCC No. 7657 of 2009* and *BPRT Case No. 27 of 2010*. The Plaintiff requested that her Application dated 7th November 2012 be heard afresh. I have made a careful perusal of the Court file and there is no trace of any application made by the Plaintiff dated 7th November 2012. The only applications on record around that time was that of the Plaintiff dated 15th October 2012 and that of the Defendants dated 2nd November 2012 which I ruled upon in my Ruling delivered on 20th June 2013.

2. The Plaintiff's Application before Court is grounded as follows:

“A. A ruling and order were issued on the 20th and 26th June 2013 respectively by the Hon. Justice Havelock compelling the Plaintiff to pay substantial costs, including security for costs to the Defendants within 45 days failing which the substantive suit will stand dismissed.

B. The said ruling and orders were issued upon the defendants’ averments that the Plaintiff is yet to pay the costs in CMCC No. 7657 of 2009 which had actually been paid at the time.

C. It is my honest belief as the plaintiff that the failure of my former advocates M/s Anyoka & Company Advocates to file a response to the defendant’s application for stay and payment of costs and security, despite my strict instructions, has put me in the current predicament.

D. The said ruling and orders were also issued on the plaintiffs then advocates’ purported claims that they could not reach me the plaintiff other than by postal address to secure proper instructions; whilst they have been communicating by telephone and email all along.

E. It is in fact the said previous advocates who have in fact frustrated my efforts to have the matter before this court heard and determined expeditiously.

F. Contrary to the defendant’s unsubstantiated allegations, I the Plaintiff is not a vexation litigant and the true and correct position is that I the plaintiff have been a victim of counsels that have failed to apply ethics of professionalism ethics in their profession.

G. I the plaintiff seek sympathy of justice for the orders sought to be granted”.

3. The Application was supported by the Affidavit of the Petitioner sworn on 17th July 2013. In that Affidavit, the Plaintiff made reference to the various matters in which she had been involved all as a result of the actions that she had taken not only against the first and second Defendants herein but also two firms of auctioneers in connection with her goods having been distrained for non-payment of rent for the lease premises being Maisonette No. 3 on L. R. No. 37/260/7, Nairobi. All in all, she had been involved in disciplinary cases Nos. 37 and 48 of 2010 as against the 3rd and 4th Defendants herein as well as *CMCC No. 7343 of 2009*, *CMCC No. 7657 of 2009*, *BPRT No. 27 of 2010* and *HC Misc Appl. No. 353 of 2010* quite apart from this matter before Court. The Plaintiff annexed to her said Supporting Affidavit copies of documentation in relation to the various matters including a copy of her complaint as against Billy Amendi & Co. one of a number of other firms of advocates acting on her behalf, made to the Advocates Complaints Commission. The Plaintiff went to great pains to explain that she had paid all monies necessary by way of costs awarded against her by the various courts and tribunals. However, her main complaint was as against her previous advocates. She expressed the view and honestly believed that that she had been a perpetual victim of professional negligence and misconduct.
4. The Replying Affidavit of the **Timothy Njehia**, a director of the second Defendant herein, was sworn on 26th July 2013. The deponent had been advised by his advocates on record that the Plaintiff had been given sufficient time to respond to the first and second Defendants’ Application dated 2nd November 2012, upon which this Court had ruled on 20th June 2013. She had not done so. It was only upon the issuance of the Orders arising from the said Ruling that the Plaintiff had reacted. The deponent was of the view that the Plaintiff had resorted to what he termed her “*modus operandi*” of prolonging matters before Court by blaming her advocates, sacking them and taking up the matter by acting for herself personally with a view of getting sympathy from the Court to allow her more time to settle the unpaid costs. The deponent had also been advised by his advocates on record that the Plaintiff’s Application before Court had no basis in law and had not

- been brought under any legal provision. In his view, all the Plaintiff needed to do to have her matter heard, was to pay the outstanding costs as ordered by the Court.
5. With the leave of the Court, the Plaintiff filed a Further Affidavit on 8th October 2013. That Affidavit attacked the position taken by the deponent of the Replying Affidavit of the Defendants. The Plaintiff annexed the Ruling in *HC Civil Appl. No. 353 of 2010* of Sitati J. in which the learned Judge had dismissed the Preliminary Objection of the Defendants herein as to the appeal from the *Business Premises Rent Tribunal* (“BPRT”) being filed without leave of the Court. The Judge had dismissed the Preliminary Objection with no order as to costs and made no reference in her Ruling to the costs of the Tribunal, so this Court found it difficult to understand where the Plaintiff was coming from where she states in her said Further Affidavit that it was not true that she should pay the costs of *Tribunal case No. 27 of 2010*. It is quite clear from the proceedings in the Tribunal case that the Plaintiff’s Application dated 25th January 2010 was dismissed with costs to the Landlord (the Defendants) to be taxed. Regrettably, the Plaintiff’s Further Affidavit continued in the same vein in relation to the various matters before this Court, the Chief Magistrate’s Court and the Business Premises Rent Tribunal. In my opinion, the matters raised therein did not bring before this Court any new points of evidence that were not already before the Court at the hearing of the Defendants’ said Application of 2nd November 2012.
 6. Before the Plaintiff gave her submissions in person before this Court, I took the precaution of reading to her the entire **rule 1 of Order 45** of the Civil Procedure Rules. I emphasised that for this Court to change its Orders delivered by way of its Ruling dated 20th June 2013, the Plaintiff had to show that there was discovery of new and important matters or evidence which were not within her knowledge or could not be produced by her at the time that this Court’s Order was made. I also emphasised that I could only review my said Orders on account of some mistake or error apparent on the face of the record or for any other sufficient reason. I formed the opinion that the Plaintiff acknowledged what was required of her. She opened her submissions by going into some detail as to the payment of the Costs awarded against in *CMCC No. 7657 of 2009*. She pointed to the fact as detailed in her Affidavit in support of her Application that she had paid Shs. 44,835/- to Ideal Auctioneers which included in the costs of *CMCC No. 7657 of 2009*. She then went on to say that the BPRT case had been staying at by the High Court on appeal by Sitati J. and, as a consequence, the Respondent’s fees were not paid or payable by her at that stage. Quite why the Plaintiff made that submission to the Court, it is unaware. In ordering the Plaintiff to pay the various sums covering the costs of discontinued suits, I made no Order as to the payment of the costs in the BPRT case in my said Ruling of 20th June 2013.
 7. Thereafter, the Plaintiff then went on to detail that her daughter had been kidnapped during the course of the Court cases as above which presumably was intended to seek sympathy from this Court. She further went on to note that her then advocate Messrs. Anyoka & Associates had not responded to the accusation of non-payment of costs made by the Respondents. The Plaintiff also noted that she would not be in a position to pay Shs. 350,000/- which was the amount that this Court had ordered that she should do so by way of security for costs again as per its Ruling of 20th June 2013. The Plaintiff went on to deny that she was a vexatious litigant, as the Respondents would have this Court believe. They had also wanted the Court to believe that the Plaintiff had failed to pay the rent for the premises that she had occupied since 2009 and she challenged the Respondents to produce evidence to that effect. This was one of the matters that had come before the Auctioneers’ Licensing Board and the Plaintiff maintained that the Auctioneer had admitted before the Board that the arrears of rent was not owed.
 8. The Plaintiff raised other matters in her submissions querying the supposed lack of knowledge of the Respondents in respect of the Court of Appeal *Miscellaneous Application No. 353 of 2010*, yet they were represented by the same counsel in the matter. It was pointed out by Mr. Mbabu for the Respondents that there was no Miscellaneous Application lodged in the Court of Appeal, the same was before the High Court as the appellate court for the BPRT. Finally, the Plaintiff submitted that her application for review was made in good faith and she requested the Court to give reasons as to why the Respondents’ Application dated 2nd November 2011 should not be struck out. She asked that this Court should look into the question of costs as litigants had no one to run to. She maintained that the Respondents had always ambushed her, pointing to the fact that only 6 days after this Court’s said Ruling was delivered on 20th June 2013, the Respondents had run to execute against her. She appealed for leniency and submitted that the main mistake was as a result

- of one counsel. She noted as per the court's record that a Mr. Wanyoike had at one time appeared for her but she had never met him and had never instructed him.
9. Mr. Mbabu, learned counsel for the Respondents, submitted that the Plaintiff's Application before Court did not comply with the requirements of **Order 45** of the *Civil Procedure Rules*. She had been given ample time to respond to the Respondents' said Application dated 2nd November 2012. He maintained that this whole suit had arisen out of a tenancy dispute from which no less than five separate suits had been aired before Court and various tribunals. He then went on to outline the history of the various suits before Court culminating in the Application for stay of execution which had been filed in this Court in *High Court Appeal 353 of 2010*. That application had never been prosecuted and the Appeal had not moved a step beyond September 2010. This suit was filed in September 2012. No steps had been taken by the Plaintiff as regards compliance with **Order 11**. Had it not been for the Respondent's Application for security, this matter would be lying in the Registry. He noted that the Plaintiff had raised 2 other matters in relation to the Auctioneers Licensing Board in which his clients were not involved. The Plaintiff had now come to Court complaining about the lack of progress by her advocates and counsel noted that she had had 5 separate advocates representing her in the various matters before the tribunals and the Courts. Counsel noted that the Plaintiff had been ordered to pay various costs in the various matters and until she did so, she should have no audience before Court, a fact that had been taken into account in this Court's said Ruling of 20th June 2013. This was not a case for justifying the review of the Court's Orders. He asked that the Plaintiff's Application dated 17th September 2013 be dismissed with costs.
10. In a brief response, the Plaintiff went into detail as to which costs she thought she had paid, but failed to mention which costs she had not paid. She admitted hiring 5 separate advocates to represent her. She was willing to pay the costs in *CMCC No. 7343 of 2009*. As regards the BPRT case, the auctioneers were the agent of the Respondents. The auctioneers had broken into her house without a Court Order and had attached her goods. She had not been in arrears of rent at the time which fact the Auctioneers' Licensing Board had found. She submitted that this Court should look at what had created this case. She would not have brought the case before this Court if it was not part and parcel of the auctioneers' actions. She concluded that the Ruling of this Court dated 20th June 2013 had been delivered in the absence of any evidence from her side.
11. **Order 45** for review, sets out the grounds which such an application should be predicated upon. **Rule 1 (1)** of the Orders reads:

“(1) Any person considering himself aggrieved—

a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay”.
(underlining mine).

The parameters from which such an application for review are to be set out as stated above are that there should be discovery of new and important evidence, an error apparent on the face of the record or for any other sufficient reason.

12. To my mind, the Plaintiff offered no evidence that was not within her knowledge at the time when the Respondents' said Application dated 2nd November 2012 was filed. All that she submitted before this Court as regards the various cases in which she has been involved, including the two matters brought before the Auctioneers Licensing Board, she was aware of in November 2012. It

is immaterial, in my view, to plead that no evidence was placed on her behalf before this Court in relation to the Respondents' said Application. The Plaintiff has not said that she was unaware of the Application and it was incumbent upon her, in my view, to chase her advocate so as to ensure that her side of the story was placed before this Court. What the Plaintiff has now stated in her Affidavit in support of the Application dated 17th September 2013 showed that such had been put before this Court prior to the hearing of the Respondents' said Application dated 2nd November 2012. The Plaintiff has not submitted that there has been some mistake or error apparent on the face of the record or that there was any other sufficient reason. In this regard, I would adopt the Ruling in **Francis Origo & Another v Jacob Kumali Munagala [2005] eKLR**, where the Court of Appeal held:

“From the foregoing, it is clear that an applicant has to show that there has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason... Our parting shot is that an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal. (emphasis added). **Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction.” (underlining mine).**

13. Indeed, in this matter before Court, I believe that the Plaintiff has proceeded in the wrong direction. In view of her submission that evidence was not put before this Court by the firm of advocates representing her at the time, her remedy would seem to lie in that direction. However, she has failed to file an appeal as against my said Ruling delivered on 20th June 2013. Instead she has sought to come before this Court by way of review as per her Application dated 17th September 2013. In my view, the said Application was brought before this Court with inordinate delay, almost 3 months after the Ruling was delivered. As a result of what I have detailed above, I have no hesitation but to dismiss the Application dated 17th September 2013 with costs to the first and second Respondent.

DATED and delivered at Nairobi this 28th day of January, 2014.

J. B. HAVELOCK

JUDGE