

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

MISCELLANEOUS APPLICATIONS NOS. 798 AND 799 OF 2011

OSERO & CO. ADVOCATESAPPLICANT

VERSUS

EASY PROPERTIES LTD.REPODENT

RULING

1. On 20th December 2012 this Court allowed prayers sought in Notices of Motion dated 14th June 2012 in relation to the above two matters, that judgement be entered in favour of the Plaintiff herein in the amount of Shs. 94,700/- and Shs.54,000/= being the taxed and certified costs due to the Plaintiff. The Defendant in both suits filed applications by way of Notice of Motion dated 5th February 2013 seeking a stay of execution of the Decree arising from the taxation of the Advocates' Client Bill of Costs in relation to both files. The Defendant also maintained in its said applications that the Decree and the Advocate/Client costs had been fully satisfied/discharged. The Defendant further asked for costs of the application. The same was served upon the Plaintiff's advocates on record and came before this Court on 11th February 2013. In the absence of the Plaintiff and any response from it by way of Affidavit, this Court granted the prayers as to the Advocate/Client costs having been fully satisfied as well as awarding the Costs of the Application to the Defendant.
2. Somewhat aggrieved at the Orders of Court issued on 11th February 2013, the Plaintiff filed a fresh Notice of Motion dated 5th July 2013. The Application sought prayers that the *ex parte* Orders issued in the Defendant's favour on 11th February 2013 as above, be set aside. The Plaintiff also sought the issuance of warrants of attachment against the Defendant. The Application was brought under the provisions of **Order 51 rule 15** of the *Civil Procedure Rules* as well as **section 3A** of the *Civil Procedure Act*. The grounds in support of the application noted that the Decree and the advocate/client costs had not been fully satisfied/discharged and if the Orders were not granted, the Plaintiff would suffer immense loss and damage.
3. The Application was supported by the Affidavit of the Plaintiff **Lewis Ndemo Osero** sworn on even date. The deponent detailed that he was an advocate of this Court practising under the name of the Plaintiff. He had instructed Mr. Gacau Kariuki, advocate, to act for him in both these suits. He noted that Mr. Kariuki had failed and/or neglected to offer services to his satisfaction in these matters as he did not attend Court on the material day (presumably being the 11th February 2013). He had subsequently come to learn of the Orders issued in favour of the Respondent herein upon perusal of the Court file and had decided to act for himself in the matters, filing the necessary Notice of Change of Advocates. He maintained that the Respondent had refused, failed and/or neglected to pay him the taxed costs as ordered by the Court and as such was truly indebted to him in the amounts of Shs. 94,700/- and Shs. 54,000/= respectively.
4. The Defendant filed Grounds of Objection dated 27th September 2013. As regards HCMisc Application No. 798 of 2011, the Defendant maintained that the advocate/client's costs had been fully discharged vide cheque no. 010230 dated 1st April 2011 in the amount of Shs. 84,000/- which was received by the Plaintiff on 4th April 2011 at 3.45 p.m. on that day. As regards **HC Misc Application No. 799 of 2011**, the Defendant maintained that the advocate/client's costs had

been fully discharged vide cheque no. 010230 dated 6th July 2009 for Shs. 54,500 which had been received by the Plaintiff on 7th July 2009 at 8.30 a.m. Otherwise, the Defendant maintained that the Plaintiff's Application was incompetent and that it disclosed no sufficient reason to warrant the prayers sought. It also maintained that the said Gacau Kariuki had not failed and/or neglected to offer services in that he had filed Grounds of Opposition dated 7th February 2013, in relation to the Defendant's said Application of 5th February 2013. In the Defendant's view, the remedy of the Plaintiff lay as against Mr. Gacau Kariuki.

5. In support of its Application, the Plaintiff filed submissions on 22nd October 2013 in relation to **HC Misc Application No. 799 of 2011**. The submissions detailed the fact that the Defendant had filed its Applications dated 5th February 2013 but that Mr. Gacau Kariuki, representing the Plaintiff, had failed to attend Court when the Applications came for hearing on 11th February 2013. The Plaintiff noted that the Decree herein was issued on 17th January 2013 in the amount of Shs. 94,700/-. It maintained that the Decree could not have been fully discharged by way of a cheque for Shs. 54,000/- dated 6th July 2009 as alleged in the Grounds of Opposition. The Plaintiff maintained that the Defendant was truly indebted to it and had just sought ways to deny the Plaintiff the fruits of his labour. It submitted that it had demonstrated that the Defendant was not truly deserving of the Orders that were issued by this Court on 11th February 2013. It maintained that the same should be set aside and warrants of attachment issued.
6. The Defendant filed its submissions as regards the Plaintiff's said Application dated 5th July 2013 on 21st November 2013. Having set out the prayers of the Plaintiff's said Application, the Defendant noted that **Order 51 rule 15** gives the Court the discretion to set aside *ex-parte* orders. The Defendant noted that the Plaintiff's Application before Court had been brought for the sole reason that its Advocate had failed to attend Court on the material date and as such, the same was misconceived and bad in law. The Defendant noted that the failure by the Plaintiff's Advocate on record to appear at the hearing of the Defendant's Application dated 5th February 2013 was not sufficient reason to set-aside the *ex parte* Orders. It was not in dispute that a Decree was issued as against the Defendant in both suits. That notwithstanding, the Defendant was not liable to pay legal fees at all. The Defendant repeated what had been informed to Court on many previous occasions, that it was the purchaser of units in the Defendant's development who was responsible to pay legal fees in connection with the transaction. The sale agreement as between the Defendant and the purchaser, in HC Misc Application No. 799 of 2011, one **Grace Mirigo Mwai** had tendered her cheque to pay legal fees in the amount of Shs. 54,500/- the same being dated 6th July 2009. As a result, the Plaintiff had come before Court with unclean hands as it had already been paid its fees in connection with that transaction. It was unfounded for the Plaintiff to allege that the cheque was in payment of the Decree herein. The Defendant maintained that the Plaintiff's remedy lay as against its own advocates and not the Defendant herein. It referred to the authority of **Bi-Mach Engineers Ltd v James K. Mwangi [2011] eKLR** in which the Court of Appeal had found that if an advocate was simply guilty of inaction, that would not be an excusable mistake which the Court may consider with some sympathy. The client had a remedy against such advocate. It noted that the Court had granted the Orders sought in the Defendant's said Application to the extent that the costs of the Plaintiff had been fully discharged. It was the Defendant's further submission that there was no sufficient reason disclosed by the Application to warrant the prayers sought.
7. Order 51 rule 15 of the Civil Procedure Rules, 2010 simply reads: **"The court may set aside an order made ex parte."** That allows the Judge hearing the Application to set aside, a complete discretion to set aside an *ex parte* Order or not, as a case may be. To this end, I have perused the finding of this Court on 11th February 2013 in relation to both Miscellaneous Applications before it. The Court's record reads:

"As there is no appearance by the Respondent today, I grant prayers 3 and 4 of the Applicant's Notice of Motion dated 5/2/2013. I am satisfied that the same has been served on the Respondent."

This Court does not deliver *ex parte* Orders lightly. The Application of the Defendant dated 5th February 2013 was supported by the Affidavit of one **Peninnah Owando** sworn on even date. The deponent thereof explained the position with regard to the purchasers of units in the Defendant's development paying for legal fees and other expenses in relation to the conveyancing documentation

as regards relation thereto. She also produced evidence of a cheque drawn on the Cooperative Bank of Kenya Ltd, Machakos branch dated 1st April 2011 in the amount of Shs. 84,000/-. That cheque was in favour of the Plaintiff and had been attached to a letter addressed to the Plaintiff dated 4th April 2011 in which details had been given by J. Muoki & Co. Advocates acting for the Purchaser of the unit, Mr. Samuel Mackenzie Kyalo as to how the amount of Shs. 84,000/- was made up – Shs. 65,000/- of the same covering legal fees for the preparation of the Lease for unit number 14 on L. R. No. 12715/552, Mombasa Road. As a result, the Court had accepted such evidence that the conveyancing fees had, in fact, been paid to the Plaintiff.

8. Quite clearly, the Orders given by this Court on 11th February 2013 discharged not only the Decree herein but also the Advocate/Client costs. I would tend to agree with the Defendant that if that prayer had not been allowed, the Plaintiff would be unjustly enriching itself as, in the Court's view, it had already been paid for Advocate/Client fees in both the said Miscellaneous Applications. Accordingly, I see no reason whatsoever for this Court to set aside its Orders dated 11th February 2013. As a result, I dismiss the Plaintiff's Notices of Motion dated 5th July 2013 in both **Miscellaneous Applications Nos. 798 and 799 of 2011** with costs to the Defendants.

DATED and delivered at Nairobi this 31st day of July, 2014.

J. B. HAVELOCK

JUDGE