



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI MILIMANI COMMERCIAL COURTS
COMMERCIAL AND ADMIRALTY COURT
CIVIL SUIT NO 12 OF 2013

AGRICULTURAL FINANCE CORPORATION.....PLAINTIFF

VERSUS

CONSOLIDATED INSURANCE BROKERS LIMITED.....1STDEFENDANT

MONARCH INSURANCE COMPANY LIMITED.....2ND DEFENDANT

RULING

INTRODUCTION

1. When the matter came up on 18th September 2013, counsel for all parties consented to the two (2) applications be heard together. The ruling herein will therefore be in respect of the said two (2) applications.

1ST DEFENDANT'S CASE

2. The 1st Defendant's Notice of Motion application dated and filed on 12th June 2013 was brought under the provisions of Order 10 Rule 10 and 11, Order 40 Rule 7 of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act, Cap 21 (Laws of Kenya) and all the enabling provisions of the law. It generally sought orders for:-

- a. **for the setting aside and stay of execution of the interlocutory judgment that was entered against it on 26th March 2013**
- b. **unconditional leave to defend the suit,**
- c. **extension and enlargement of time for filing of its Defence and that its Defence dated 26th March 2013 and filed on 4th April 2013 be deemed as duly filed and served.**

3. The said application was premised on the grounds that it was unable to file its Defence on 26th March 2013 as the court file could not be traced and that it also had to retrieve crucial documents to enable it file the said defence. It was supported by the Affidavit of Andrew Gitau Mureithi, the 1st Defendant's Executive Director. It was sworn on 29th May 2013.

4. He pointed out that the 1st Defendant filed its Memorandum of Appearance and Defence on 12th

February 2013 and 4th April 2013 respectively. He stated that the 1st Defendant had a meritorious Defence which had raised triable issues and that it would suffer irreparable and irredeemable loss if its application was not allowed.

5. In its written submissions dated and filed on 27th May 2014, the 1st Defendant contended that its Defence was still on the court record as it had not been expunged from the court record and that the court was enjoined to look at the same irrespective of how irregularly it had come on record. It referred the court to several cases in this regard- **See Joseph Kanake vs Caltex Oil Kenya Limited [2006] eKLR, Joseph Biegon vs Charles Too & 3 Others [2005] eKLR.** The latter case was also referred to by the 2nd Defendant.

6. It also placed reliance on the case of **Rogers vs Wood [1948] 1 ALL ER 38** where the holding was that a party who had appeared but defaulted in filing its pleadings ought not to be barred from defending its case and urged the court not to consider technicalities as was held in the case of **Rongai Workshop & Transporters Limited vs Fredrick Wanjala & Another [2006] eKLR.**

7. It said that it filed its application timeously and that it was in the interest of justice that the application be allowed as apportionment of liability also involved the 2nd Defendant.

2ND DEFENDANT'S CASE

8. The 2nd Defendant's Notice of Motion application dated and filed on 5th June 2013 was filed pursuant to the provisions of Order 12 Rule 7, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law. ***It also sought for the setting aside and stay of execution of the judgment that was entered against it on 26th March 2013.***

9. The said application was premised on the ground that it was apprehensive that it would not have a chance to defend the claim if its application was not allowed and that its advocates filed a Memorandum of Appearance on 15th February 2013.

10. In its Supporting Affidavit sworn by advocate, Zehrabanu Janmohamed, the 2nd Defendant stated that the Defence was not filed due to an inadvertent error on her part. She contended that her mistake should not be visited upon the 2nd Defendant.

11. The 2nd Defendant admitted that there was inadvertent delay in its advocates filing a defence on its behalf but that its draft defence and counter-claim raised triable issues.

12. It stated that there were questions as to whether the Plaintiff could claim monies under the policies. It referred the court to the case of **Ceneast Airlines Limited vs Kenya Shell Limited (2000) 2 EA** where the Court of Appeal held that the main concern for the court is to do justice to the parties and not to impose conditions that would fetter its wide discretion.

13. It was its argument that any prejudice that would be suffered by the Plaintiff could be compensated by way of damages. It placed reliance on the case of **Sebei District Administration vs Gasyali (1968) EA 300** where this question was considered.

14. In response to the two (2) said application, the Plaintiff's Company Secretary, Rose Ochanda swore two (2) similar Replying Affidavits on 24th September 2013. The same were filed on 25th September 2013. She averred that the 1st and 2nd Defendants failed, refused and/or neglected to file their Defences within the stipulated period as a result of which the Plaintiff proceeded to obtain interlocutory judgments against them and served them with the Notices of Entry of Judgment.

15. She stated that the 2nd Defendant never raised the issue of referral of the matter to arbitration and that its defence was a sham, full of mere denials and an afterthought. She also averred that the 1st Defendant

could not purport that it could not trace the court file as record keeping at the registry had improved tremendously. It was her contention that there had been inordinate delay in the filing of the 1st Defendant's application and that it was informed by the Plaintiff on 4th April 2013 that judgment was entered against it.

16. She refuted the 1st and 2nd Defendants' claims that they would suffer prejudice and stated that the families of the deceased persons had suffered a great deal as a result of the Defendants' failures, neglect and refusal to settle the claims under the Insurance policy.

17. In its two (2) sets of written submissions dated 6th June 2014 and filed on 9th June 2014 and those dated 25th October 2013 and filed on 29th October 2013, the Plaintiff submitted that the 1st and 2nd Defendants were guilty of inordinate delays and laches. It argued that the court had to be satisfied that a defence that was filed was merited which was not the case herein as the 1st and 2nd Defendants' defences were mere denials.

18. It was its argument that this was a classic case of deliberate delay designed to defeat justice. It submitted that the court's discretion was to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake. It referred the court to the case of **Shah vs Mbogo & Another [1967]EA 116** to buttress its point.

19. It therefore prayed for the dismissal of the 1st and 2nd Defendants' applications.

LEGAL ANALYSIS

20. The Plaintiff contended that that the essence of Order 42 Rule 6 of the Civil Procedure Rules, 2010 was that an applicant seeking a stay of execution had to prove the following:-

- a. **Substantial loss may result to the applicant unless the order was made;**
- b. **The application was made without unreasonable delay; and**
- c. **Such security as the court orders for the due performance of such decree or order as may ultimately binding on him has been given by the applicant.**

21. The Plaintiff also raised the importance of an applicant showing an arguable appeal when applying for a stay of execution pending appeal. The court does not find this argument and that under Order 42 Rule 6 of the Civil Procedure Rules, 2010 to have been relevant in the circumstances of this case. The stay of execution that had been sought by Defendants was not the one that was contemplated under the said order as was alleged by the Plaintiff. The Plaintiff had already served the Defendants with Notices of Entry of Judgment hence the request for a stay of execution of the interlocutory judgments. It will therefore not consider the same.

22. What is of concern to this court is whether or not the 1st and 2nd Defendants had demonstrated a good case to persuade this court to exercise its discretion in their favour and set aside the *ex parte* interlocutory judgments that were entered against them on 26th March 2013.

23. Complying with court orders is an issue that should be taken with the seriousness that it deserves. Indeed, Section 1A (3) of the Civil Procedure Act Cap 21 (laws of Kenya) provides that:-

“A party to civil proceedings or an advocate for such party is under a duty (emphasis court) to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the court.”

24. It is therefore evident from Section 1A (3) of the Civil Procedure Act that the 1st and 2nd Defendants were enjoined adhere to the court processes and file their pleadings within the periods that had been

stipulated and provided for in the Civil Procedure Rules, 2010. The said provisions have been placed there, not for the sake of it but rather to maintain order. Failure to adhere to court procedures is not a technicality that a party would hope to cure by invoking the provisions of Article 159 (2)(d) of the Constitution of Kenya, 2010. There are consequences for failing to adhere to the said procedures unless an extension of time, within which to comply, has been granted.

25. The importance of adhering to time lines is an issue that has been considered by many courts. In the case of **Peter Kamau Ikigu vs Barclays Bank of Kenya Limited [2008] eKLR**, Kimaru J held that the failure by the defendant therein to file a Defence within the period that was extended by the court sealed his fate. In the case of **Kenya Road Transporters Limited vs Kinyoro Gichuki [2007] eKLR**, Mutungi J (as he then was) observed that there had been no record showing that the appellant therein applied for the extension of the court's orders after he discovered that the orders could not be complied with.

26. It therefore follows that even where there are no time lines given by the court but the same have been clearly set out in the Civil Procedure Rules, 2010, the competence of pleadings on record cannot be taken lightly. The 1st Defendant could not go out on a frolic of his own and file its Defence more so when interlocutory judgment had been entered and then seek to have the court regularise its irregularity. It cannot be properly on record as adverse action had already been taken against it.

27. A draft defence is attached to an application seeking orders to set aside an *ex parte* judgment to give the court a feel of what such a party's case is all about. Perusal of the Defence by 2nd Defendant shows that the suit herein was filed in 2013 in respect of Group Life Covers taken by the Plaintiff in 2008-2009. The issue of apportionment of blame between the 1st and 2nd Defendants is one that should be ventilated in a full trial.

28. The role of the 1st Defendant in respect of the said covers and the privity of the contract between the Plaintiff and the 2nd Defendant in which it merely acted as a link between them as raised in the 1st Defendant's Defence are also issues that would require to be interrogated further.

29. In view of the number of cases in the Commercial & Admiralty Division, it is unlikely that the main suit would have been heard by now bearing that the case herein was filed in 2013. In considering this issue, the court is unable to see any prejudice that would be suffered by the Plaintiff and cannot be compensated by way of costs if the matter herein was to be heard on merit. It is the concern of courts to hear matters on merit and not merely to allow matters to be finalised on mere technicalities, such as failure to file pleadings through accidents, omissions or excusable mistakes.

30. Notably, both the 1st and 2nd Defendants had filed their respective Memorandum of Appearances. Their advocates may have been negligent in filing their respective defences. However, the court does not find that such negligence should be visited upon the parties.

31. As was held in the case of **Shah vs Mbogo** (Supra), discretion should be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake. It is not far-fetched for an advocate to inadvertently fail to file a pleading on behalf of his client or to go to the registry and find a file missing and therefore not file pleadings leading to catastrophic consequences.

32. Having carefully considered the pleadings herein, the affidavit evidence and the written submissions and the case law in support of the parties' respective cases, it is the view of the court that disallowing the Defendants' applications would actually cause injustice, prejudice and hardship to them as they would be denied an opportunity to access the court, a right that is enshrined in Article 50 of the Constitution of Kenya, 2010, if their respective applications were not allowed.

33. The court is thus persuaded that this is a proper case where it should exercise its discretion and hereby sets aside the *ex parte* interlocutory judgments that were entered in favour of the Plaintiff against the 1st and 2nd Defendants. The new constitutional dispensation enjoins the court to administer justice without undue regard to technicalities. For this reason, the court is more inclined to accord the Defendants an

opportunity to have their day in court.

34. The above notwithstanding, as has been stated hereinabove, parties should not be allowed to disobey court procedures. These must be adhered to without fail. If that were not so, it would be a recipe for chaos and promote a culture of impunity and non-adherence to law and order.

35. The Plaintiff has suffered inconveniences by being set back due to the omissions by both counsels for the 1st and 2nd Defendants. The Defendants cannot therefore go scot free. They must be condemned to pay costs to compensate the Plaintiff.

DISPOSITION

36. Accordingly, the upshot of this court's ruling is that:-

- a. **The 1st Defendant's Notice of Motion application dated and filed on 12th June 2013 was merited and the same is hereby allowed in terms of Prayer No 4 therein.**
- b. **The 2nd Defendant's Notice of Motion application dated and filed on 5th June 2013 was merited and the same is hereby allowed in terms of Prayer No 3 therein.**
- c. **The 1st Defendant's Defence dated 26th March 2014 and filed on 4th April 2014 is hereby struck out and expunged from the court record.**
- d. **The court hereby grants leave to the 1st and 2nd Defendant to file and serve upon the Plaintiff their respective Defences and Counter-Claim within fourteen (14) days from the date of this ruling.**
- e. **The court hereby grants leave to the Plaintiff to file and serve its Reply to Defence and Defence to Counter-claim, if any to the 1st and 2nd Defendants' defences within fourteen (14) days from the date of service of the 1st and 2nd Defendant's Defences.**
- f. **The 1st and 2nd Defendants shall each pay to the Plaintiff thrown away costs in the sum of Kshs 30,000/= within fourteen (14) days from the date of this ruling.**
- g. **In the event the 1st and 2nd Defendants shall fail to comply with order 36 (f) hereinabove, the Plaintiff will be at liberty to move the court for appropriate orders.**
- h. **Costs in the cause.**

37. It is so ordered.

DATED and DELIVERED at NAIROBI this 29th day of September 2014

J. KAMAU

JUDGE