



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

LAND CASE NO.55 OF 2013

DORICE ACHOLA ODERO.....PLAINTIFF

STEPHEN KARANJA T/A/ DALALI TRADERS

v/s

FIRST COMMUNITY BANK LTD.....DEFENDANT

RULING

This is a ruling on a Notice of Motion dated 17/4/2013 brought under Order 51 rule 15, Order 2 Rule 15(1) of Civil Procedure Rules and Sections 1A, 1B and 3A of Civil Procedure Act, and all other enabling provisions of law.

The court is asked to, among others, set aside irregular orders given on 22/3/2013 and issued on 21/3/2013; that the Notice of Motion dated 12/3/2013 and the plaint of even date be struck out and the suit be dismissed with costs. Provision for costs is also asked for.

The grounds advanced stipulate that no hearing date was served on the defendant; that summons to enter appearance together with the application and suit were served on the bank (2nd defendant) on 19/3/2013 while the plaintiff was able to dispose off the application on 21/3/2013. It is stated that it would not have been practical for the defendants to have instructed counsel to enter appearance within 2 days.

The application that was allowed is said to be misconceived and an abuse of the court process. The suit is also said to be frivolous and without any basis in law. The application has a supporting affidavit which reiterates much of what is already stated on the face of the application itself.

There is a replying affidavit dated 15/5/2013. It states, inter alia, that the defendants/respondents were served but ignored court process.

This matter has a short history. The suit was filed on 13/3/2013. Contemporaneously with it was filed an application – Notice of Motion-dated 12/3/2013.

It is clear that the defendants were served with both the plaint and the application on 19/3/2013.

On 21/3/2013, Anyul for plaintiff/applicant was in Court saying they had served the defendants side, which had failed to appear despite service. The court was told of the affidavit of service dated 19/3/2013. The court believed Anyul and allowed the application.

About a month later counsel for the applicant/defendant in the instant application was in court

seeking, inter alia, the setting aside of the orders granted on 21/3/2013 allowing the application dated 12/3/2013.

The court has carefully gone through the court file and Kenyawiri for the applicant in this application is right.

Anyul was being less than honest when he purported to show that the defendants were served to appear in court on 21/3/2013 for the hearing of the application dated 12/3/2013. The truth of the matter is that the defendants had been served a mere two days earlier (19/3/2013) and that service had nothing to do with appearance in Court on 21/3/2013. Had the court been seized of the information it has now, it would not have allowed the application dated 21/3/2013.

But its not too late to act since this application by Kenyariri is meant precisely to rectify what went wrong.

The court would like to point out that counsels have a duty to tell the truth. Anyul was telling a lie when he made it appear that the defendants were to appear in court on 21/3/2013. Surely, the defendants had not even had time to organize and respond, having been served only 2 days earlier.

For these reasons, the application dated 17/4/2013 is allowed **BUT ONLY** to the extent of prayer 2 which is setting aside the orders given on 22/3/2013 and issued on 21/3/2013. Costs of the application are also granted.

But prayer 3, which is for striking out the application dated 12/3/2013 and dismissing the suit with costs is not granted. It appears to the court that Kenyariri felt that Anyul was trying to play hard ball by misrepresenting matters to Court on 21/3/2013. Prayer 3 looks suspiciously like a retaliatory measure. It seems like Kenyariri's hard ball. This prayer is not granted.

The court would like to see the matter proceed on the basis of truth and honesty from both sides. That will help much in achieving fairness.

A.K. KANIARU – JUDGE

31/7/2013

31/7/2013

A.K. Kaniaru – Judge

Roseline O. - Court clerk

No party present

Nyamweya for Kenyariri for defendant/applicant

Ogone for Anyul for plaintiff/respondent

COURT: Ruling on application dated 17/4/2013 read and delivered in open **COURT**.

Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

31/7/2013