



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CIVIL CASE 141 OF 2011

SHADRACK WEGULO JUMA.....PLAINTIFF

VERSUS

1. AGRICULTURAL FINANCE CORPORATION

2. JOHN KURIA WANGUSI.....DEFENDANTS

3. NAPHTALLY MBIYU KIGAMBA

4. ELIUD MAKHAKA KHAEMBA

R U L I N G

The Notice of Motion dated 3.11.11 seeks orders:-

1. That this Honourable court be pleased to set aside Orders of the Honourable Court made on the 25th October, 2011 and all consequential orders thereon.
2. That this Honourable Court be pleased to grant the 1st Defendant herein leave to file its Replying Affidavit in response to the Application dated 17th October, 2011 and direct that the said Application be heard and determined inter-partes.
3. That the costs of this Application be provided for.

The orders dated 25.10.11 allowed the application dated 17.10.11 in the absence of the Defendants who had been served but were absent and no papers had been served in opposition to the application.

The application is premised on the grounds set out in the application and is supported by the affidavit of the Applicant/1st Defendant's Corporation Secretary, ROSE OCHANDA, sworn on 3.11.11.

The main grounds of the application is that the applicants failure to file a reply in time is attributed to a logistical default and inadvertence in the manner of handling communication between the applicants Turbo branch office and the head office in Nairobi leading to the pleadings being received late from the head office consequently instructions to their advocates were delayed.

It is the applicant's case that there are valid and credible issues that need to be ventilated at the inter-partes hearing of the application dated 17.10.11. According to the applicant, no prejudice could be suffered if the instant application is allowed as they will have the opportunity to canvass the application dated 17.10.11 inter-partes.

The application is opposed as per the grounds of opposition dated 25.1.12 filed by the Plaintiff and the grounds of opposition dated 31.1.12 filed by the 2nd, 3rd and 4th Defendants.

The Plaintiff's contention is that the applicant was duly served and that the applicant has offered no good grounds for failure to respond to the application and that there is no evidence of delay between the applicant's Turbo branch and its head office.

The stand by the 2nd, 3rd and 4th Defendants is that the issues raised by the application for injunction that is sought to be reinstated can best be dealt with during the hearing of the main suit and that the setting aside of the ex-parte orders would serve no useful purpose.

There is no dispute that the application dated 17.10.11 was served. The 1st Defendant/Applicant is therefore not entitled to have the ex-parte orders set aside as a matter of right.

The affidavit in support of the application does not give any details of the logistical problems that led to the delayed communication between the branch office and the head office. Counsel for the applicant attempted to explain the said Logistical Problems in court. However, that is evidence from the bar and does not add value to the applicant's case. The counsel for the applicant has also argued that service was improper. Whether service was effected on the Principal Officers of the applicant corporation or not is a question of fact which is not supported by affidavit evidence.

To answer the question whether setting aside the ex-parte orders would serve any useful purpose, I have looked at the proposed replying affidavit to the application dated 17.10.11 (annexure "RAO1"). The said application makes no mention of the receipts purportedly issued by the 1st Defendant/Applicant to the Plaintiff/Respondent (annexure "SWJ 3A, B & C") for payments made to the 1st Defendant/applicant for the purchase of the suit property to offset the Loan owed to the 1st Defendant/Applicant by one ELIUD SACHIDA WANGUSI. This raises questions in view of the assertion in the supporting affidavit that the Plaintiff is a total stranger to the 1st Defendant/Applicant and that the Defendant/Applicant never transacted with him.

With the foregoing, this court's conclusion is that no useful purpose would be served by the setting aside of the orders dated 25.10.11. Consequently, the application is dismissed with costs.

Delivered, dated and signed at Kakamega this 15th day of March, 2012

B. THURANIRA JADEN
J U D G E