



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO. 185 OF 2001

TRUST BANK LIMITED PLAINTIFF

VERSUS

AJAY SHAH 1ST DEFENDANT

PRAFUL SHAH2ND DEFENDANT

NITTIN CHANDARIA3RD DEFENDANT

VINOD CHAUDRY4TH DEFENDANT

ARUN JAIN5TH DEFENDANT

JIGNESH DESAI6TH DEFENDANT

RENUKA SHAH7TH DEFENDANT

PRAVIN MALKAN8TH DEFENDANT

AZIM JAMAL VIRJEE9TH DEFENDANT

SAMVIR TRUSTEES LIMITED10TH DEFENDANT

RULING

1. This is the plaintiff's notice of motion dated 27th February 2012. It is brought under order 12 rule 7 and order 51 rule 1 of the Civil Procedure Rules. The plaintiff prays that the order of court of 16th February 2012 dismissing the suit be set aside. It also prays that the suit be reinstated for determination on merits. There is annexed an affidavit of Desterio Oyatsi, the plaintiff's counsel, in support of the application.

2. In the deposition, it is averred that the deponent was unable to attend court on 16th February 2012 for two main reasons: that he was bereaved which made it difficult to prepare for trial; and that after that he travelled out of jurisdiction on 14th February 2012 he only returned on 18th February 2012. Mr. Oyatsi had thus deputized his law partner to seek an adjournment to the 20th February 2012 which application

was opposed by the defence and disallowed by the court. The plaintiff submitted that it has been keen to prosecute the suit as detailed in six letters marked “D03” dated between 16th December 2005 and 19th October 2011. In those letters, the plaintiff was inviting the defendants to fix dates for hearing. The plaintiff avers that it has not slept on its rights and the matter failed to proceed for hearing earlier for genuine reasons. The plaintiff further avers that a grave injustice will be visited upon it as it is under liquidation and seeking to make recovery from the defendants to pay its creditors. Lastly, learned counsel for the plaintiff placed reliance on the decision in Maina Vs Mugiria [1983] KLR 78 for the proposition that the court has wide discretion to set aside *an ex parte* judgement.

3. The motion is contested by the defendants. The 1st defendant submitted that it was erroneous for Mr. Oyatsi to say that his non attendance at the trial was a genuine mistake that should not be visited on the plaintiff. It was submitted that since neither the plaintiff nor its witnesses attended court, the court was entitled to dismiss the suit. The 1st defendant contended that in any event, the plaintiff was represented by Mr. Ohange advocate at 9.00 am on the material day and by Mr. Wananda advocate at 10.30 a.m when the matter was called out the second time. Initially the court was told Mr. Oyatsi was in the Hague. The issue of his bereavement was only raised at 10.30 am when the matter had been confirmed for hearing. Reliance was also made on the averments in a replying affidavit of the 1st defendant filed on 7th March 2012.

4. The 2nd defendant and 4th defendant relied on the grounds of opposition dated 9th March 2012. The primary ground is that even if Mr. Oyatsi were present in court on 16th February 2012, the suit could not have proceeded as no witnesses were present. The defendants contested the plaintiff’s assertion that creditors of the plaintiff would be prejudiced. The defendants contended that there was no such evidence before the court. In response, the plaintiff submitted that its lawyers, Mr. Wananda and Mr. Ohange had no instructions to proceed and were to apply for adjournment in view of the absence of Mr. Oyatsi. It was also submitted that no prejudice would be suffered by the defendants if the suit was reinstated. Lastly, the plaintiff replied that the deponent to the supporting affidavit had indicated that he had instructions of the liquidator. Accordingly, the deponent was entitled to state about the grave injustices that would be visited upon the plaintiff’s creditors.

5. I have heard the rival arguments. On 13th December 2011 the suit had been set down for hearing. Mr. Oyatsi applied for a date in the new year to enable parties comply with the new Civil Procedure Rules 2010. In particular, the plaintiff sought to file and serve a witness statement. By consent of all counsel, the suit was fixed for hearing on 16th and 20th February 2012.

6. On 16th February 2012, at 9.00 am, the matter was called out. Mr. Ohenga was holding brief for Mr. Oyatsi. He sought adjournment on grounds that Mr. Oyatsi was in the Hague, The Netherlands. The defence opposed that application. The court, for reasons on the record, declined to grant the adjournment and ordered the matter to proceed at 10.30 am. At 10.30 am, Mr. Wananda now held brief for Mr. Oyatsi. He now sought a further adjournment on the new ground that Mr. Oyatsi was bereaved. He had no witnesses to call. The court, having declined an adjournment earlier in the morning disallowed the second attempt at adjournment. In the absence of witnesses and the fact that the defendants were not admitting to any part of the claim, the court dismissed the suit with costs to the defendants.

7. The plaintiff has now brought this motion under order 12 rule 7. Order 12 rule 3 allows a court to dismiss a suit for non-attendance. Rule 7 then allows the aggrieved party to set aside that order and reinstate the suit. The decision of Maina Vs Mugiria [1983]KLR 78 reaffirms this court’s wide and unfettered discretion to set aside an *ex parte* judgment and to do substantial justice to the parties. The case cited with approval the decision in Shah Vs Mbogo [1967] E A 116. The latter decision hold that the discretion is to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but not to assist a party who has deliberately sought to obstruct or delay the course of justice.

8. It is important to state that the plaintiff was represented by two counsels: Mr. Ohange at 9.00 am on 16th February 2012 and Mr. Wananda at 10.30 a.m on the same date. Those two lawyers are partners or

associates in the firm of Mr. Oyatsi. The suit was thus not being dismissed for non-attendance by counsel. The suit was dismissed because the plaintiff's counsel did not present witnesses or tender evidence at 10.30 a.m when the matter was called out for hearing. The first application for adjournment was on the basis that Mr. Oyatsi was in the Hague, the Netherlands. In real fact, and as per the travel documents of Mr. Oyatsi annexed to his affidavit, he was in United Kingdom. The matter of bereavement did not arise as a ground for adjournment until at 10.30 am. The court, for reasons on the record declined the second attempt at adjournment. I am of the view that even if Mr. Oyatsi had attended court on 16th February 2012, in the absence of witnesses, the reasons for dismissal would have applied in equal measure.

9. Since the plaintiff was represented by two advocates from Mr. Oyatsi's firm on the material day, it is not right to say that Mr. Oyatsi's travels or absence is a mistake that should not be visited on the plaintiff. The matter was not dismissed for his non-attendance or that of an advocate for the plaintiff. To that extent the decision in Maina Vs Mugiria (supra) is not on the point.

10. The affidavit in support of the motion has been sworn by Mr. Oyatsi. He depones at paragraphs 23,24 and 25 as follows;

"23 The Plaintiff Company which is or was a Bank is in liquidation and the claim herein is against former officers of the Bank as part of an effort by the Liquidator to recover the assets of the Plaintiff so as to pay its creditors.

24. Although the suit is in the name of the Plaintiff in liquidation, the claim is infact for the benefit of thousands of depositors of the plaintiff Company who lost their deposits when the bank was placed in liquidation.

25. It will cause grave injustice to the said thousands of creditors of the Plaintiff if the order for dismissal is not set aside or varied especially on the grounds stated above which clearly show or prove that the dismissal was not caused by them".

11. In my view, those are the kind of matters best left to the plaintiff. Its counsel is ill placed to depone to them conclusively. True, counsel depones at paragraph 3 that he is authorized to swear the affidavit on behalf of the plaintiff. I also appreciate that in interlocutory proceedings such averments may as well pass under order 19 rule 3 of the Civil Procedure Rules. But that is an exception to the general rule. In particular, counsel must desist from deponing to contentious matters such as the ones at play in this application. See M'kiara M'mbijiwe Vs Frankline Mugambi and others [2007] e KLR, Small Enterprises Finance Company Limited Vs George Gikubu Mbutia Nairobi High Court case 3088 of 1994 (unreported) Salim Alhamed Ali and another Vs Emag Ag Nairobi, High Court case 1806 of 2000 (unreported). I find that Mr. Oyatsi is ill placed to depone to the matters above. I am alive that the claim in the plaint has been lost by virtue of the dismissal. There is on the face of it prejudice to the plaintiff. But the ground put forth does not persuade me to set aside the dismissal. Justice is a two way street. This suit was filed way back in the year 2001. It is now nearly 12 years later. The date of 16th February 2012 was taken by consent of the parties on 13th December 2011. On 16th February 2012, the plaintiff had no witnesses or evidence to proceed. It had not even filed a witness statement that I earlier referred to and that was the basis of adjournment on 13th December 2011. From the record of the court and despite the averments by Mr. Oyatsi, this suit has *never* proceeded. The court, as settled long ago in Mukisa Biscuit Manufacturing Company Vs Westend Distributors [1969] E A 696 has inherent power to dismiss the suit. True, the plaintiff would wish to have the suit determined on the merits. But the flipside of that coin is that the defendants are entitled to freedom from that inert grip by the plaintiff in this suit for the last 12 years. The dictates of justice in this case point me in a different direction: not to exercise my discretion in favour of the plaintiff.

12. In the result, I find that the plaintiff's notice of motion dated 27th February 2012 lacks merit. I dismiss it with costs to the 1st, 2nd and 4th defendants.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 19th day of April 2012.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Mr. Ohenga for Oyatsi for the plaintiff.

Mr. Billing for the 1st Defendant.

Mr. Gitonga for the 2nd Defendant.

Mr. Billing for Mr. Were for the 4th Defendant