

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 211 of 2007

OL KALOU FARMERS SACCO BANK LTD.....1ST APPLICANT/DEFENDANT

CO-OPERATIVE BANK OF KENYA LIMITED.....2ND APPLICANT/DEFENDANT

VERSUS

JAMES K. MWAURA.....RESPONDENT/PLAINTIFF

RULING

The respondent in the instant application, **James Karanja Mwaura** instituted this suit against the applicants herein, **Co-operative Bank of Kenya Limited** and **OI Kalou Farmers Sacco Bank Limited** seeking a declaration that the charge over **Nyandarua/Upper Gilgil/582** is illegal, null and void and that the 2nd applicant be ordered to unconditionally release the original title to the suit property to the respondent. The suit also seeks to restrain permanently by an order of injunction the 2nd applicant from selling the suit property.

Simultaneously filed with the plaint was chamber summons for temporary restraining orders. An *interpartes* hearing date was fixed for 22nd October, 2007 and the applicants duly served. On that day, there was no appearance either for the applicants or their counsel and the matter proceeded *ex parte*. Thereafter, the court (Koome, J) granted the orders sought. Two months later, on 18th December,

2007, the 2nd applicant brought the present application praying that the *ex parte* order of injunction in question be discharged, varied and/or set aside and laying the blame for its failure to attend court on the date set for the hearing on its erstwhile advocates. It further contents that the *ex parte* injunction was obtained by concealment and misrepresentation of material facts.

In reply, the respondent has averred that the application has been brought late, otherwise the rest of the 23 paragraphed affidavit deals only with the merit of the suit.

I have considered the application, submissions and the authorities cited. The court has unfettered discretion to discharge or vary or set aside, under **Order 39 rule 4** of the **Civil Procedure Rules**, any order for an injunction, or application by any party dissatisfied with the order. The only consideration in such application calling for the exercise of the court's discretion is whether the 2nd applicant was prevented from attending the court for the hearing of the application by a good and sufficient reason.

The 2nd applicant has averred that its erstwhile advocates M/s. Njeri Wamithi and Company Advocates failed to attend. In its supplementary affidavit, the 2nd applicant has annexed an affidavit sworn by Irene Njeri Wamithi in which she avers that she inadvertently failed to diarize the date of 22nd October, 2007 as a result of which she did not attend the court on that day. A mistake

can be committed by even the most diligent lawyer as mistake is to human.

The respondent has not challenged or rebutted that averment by showing that the applicant was reckless or deliberately failed to attend court. The applicant timeously brought this application, only two months after the *ex parte* order was made. There will be no

prejudice to the respondent and costs will be sufficient compensation. Indeed the ends of justice will be served by giving the parties equal chance to ventilate their respective positions in the application.

In the result, this application succeeds with costs to the respondent. The *ex parte* orders of 22nd October, 2007 are accordingly set aside.

Dated, Signed and Delivered at Nakuru this 9th day of June, 2010.

**W. OUKO
JUDGE**