



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Suit 525 of 2003

MURAD EBRAHIM MURAD.....1ST PLAINTIFF

HAMID MURAD.....2ND PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD. 1ST DEFENDANT

ANNE WANGUI MWICHARO.....2ND DEFENDANT

RULING

The application under consideration is the one dated 18th June 2009 brought under Order IXB Rule 8 of Civil Procedure and it seeks to set aside the orders of this court made on 8th June 2009 dismissing the Plaintiff's application dated 25th March 2008 and the other order setting down 3rd July 2009 as date for a ruling for the application dated 19th October 2007. It also seeks the reinstatement of the application dated 25th March 2008 and that an order be made that the said application be heard together with the application dated 19th October 2007.

The application is based on the following grounds.

- (a) On the 8th June, 2009 the case High Court Civil Case 525 of 2003 was listed in the Milimani Nairobi High Court Cause List, as cause No. 7 under Notices of Motion for hearing by Honourable Lady Justice Lesiit.**
- (b) The Plaintiffs' application which was dismissed raises serious issues of law on which the Plaintiffs ought to be given their day in court.**
- (c) The non-attendance of counsel for the Plaintiffs when the matter was apparently called on for hearing and was dismissed is no fault of the Plaintiff.**
- (d) The non-attendance of counsel for the Plaintiffs when the matter was called on for hearing was due to circumstances beyond the counsel's control and for excusable and pardonable reasons.**
- (e) Order IXB rule 8 of the Civil Procedure Rules gives the court power, on an application by summons, to set aside or vary an order of dismissal.**

(f) Much in the suit is pegged on the decision on the Plaintiffs' application of March 25th 2008

I have considered the application together with the grounds cited on the face of it and those set out in the supporting affidavits of Stephen Mwenesi, Michale Mubea, Angela Njeri, Eddy Ahuga, Joseph Mwita and Joseph Ndung'u.

The 1st Defendant has filed grounds of opposition to the applications which are dated 29th June 2009. The grounds cited are two; one that the application has no merit and should be dismissed and; two the application is incompetent and should be struck out with costs as the plaintiff's advocate through whom it has been presented has never placed himself properly on record. I have considered these grounds of opposition.

The 2nd Defendant has sworn a further affidavit dated 25th June 2009. The affidavit challenges the truthfulness of certain averments in some of the affidavits sworn in support of this application. I have considered this affidavit.

I have considered submissions by counsel for all three parties to this suit. I need not write much in this application since I am reminded to allow the application only on one ground, that the party who stands to suffer in this case are the Plaintiffs who were innocent parties as they instructed counsel to handle the matter for them and were comfortable and honestly believing that their counsel was diligently handling their matter. Unfortunately counsel was not diligent enough and from the affidavit sworn in support of the application, he is busy mourning that the trial judge did not wait for him to arrive in court at time indicated. I must mention for Mr. Mwenesi's benefit, that the other counsels, Mrs. Guserwa and Mr. Mutua did not leave court from 9.00 a.m. when the court was called to order that morning until 10.45 a.m. when the matter was heard.

The counsel cannot purport to swear to the facts which he was not privy to. The indication he could give was clearly that matter will proceed when reached and that the likely time it may be reached was 11.00 a.m. That did not mean that when the court cleared all matters it had confirmed for hearing before the instant one that it has to leave counsels in court to wait until 11.00 a.m., especially where the two counsels had been waiting in court all along and where the only other counsel in the matter had neither shown up the whole time nor sent any representative or counsel to hold brief. Courts are not there to wait for counsel and that should be very clear. The announcement that hearing would be latest 11.00 a.m. was for the benefit of counsels before the court not those who had not showed up and whose sources of information were invisible in court. Having said that the courts discretion to set aside is wide, there has been a mistake made by counsel for the Plaintiffs in this case. The affidavits sworn in support, in particular that of Mr. Mwenesi may have been made with a very poor altitude. The fact remains that even if counsel never came at all on the material day, that would not disentitle the parties a right to be heard and/or their application to be considered.

I will exercise my discretion and allow the Plaintiff's application dated 18th June 2009 in the following terms.

- 1) That the application dated 18th June 2009 is granted and the orders made dismissing the application dated 25th March 2009 and the other setting down the application dated 19th October 2009 be and is hereby set aside.**
- 2) The Plaintiff will pay thrown away costs to the two Respondent assessed at Kshs.15000/= to each Defendant to be paid within 7 days from date hereof.**
- 3) The proceedings of this court of 8th June 2009 be and are hereby set aside.**
- 4) The Application dated 19th October 2007 and 25th march 2008 shall proceed before a different Judge other than myself on a date to be agreed by the parties.**

5) In the meantime I direct that parties do maintain and preserve the status quo to the extent that unless otherwise ordered by this or other court or unless all parties to the suit agree, the suit property should not be alienated, dealt with in any manner, sold or transferred, charged or mortgaged as to alter the title to any party whatsoever until the pending applications are heard and determined or the court otherwise directs.

Dated at Nairobi this 24th day of July, 2009.

LESIIT, J.

JUDGE

Read and signed in presence of:

Saidi for Plaintiff/Applicant

Ms. Mutua for 1st Defendant

Ms Guserwa for 2nd Defendant

LESIIT, J.

JUDGE

By consent applications dated 19th October 2007 and 25th March 2008 be heard on 30th September, 2009.

LESIIT, J.

JUDGE