

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 373 of 2008

HIGHFIELD PHARMACEUTICALS LTD....1ST PLAINTIFF

COUNTRYSIDE SUPPLIERS.....2ND PLAINTIFF

JOHN MICHAEL NJENGA MUTUTHO.....3RD PLAINTIFF

VERSUS

EURO BANK LIMITED

(IN LIQUIDATION).....DEFENDANT

RULING

On 18th November 2008, this court allowed the plaintiffs' application which sought to restrain the defendant by itself or its agents from selling by way of public auction or otherwise advertising for sale or in any manner whatsoever interfering with the plaintiffs' ownership, possession and enjoyment of their parcels of land known as LR. Nos. Mulango/Kasivuni/646, Kitui/Municipality Block 111/176, LR. No.9517/22 and Naivasha LR. No.337/1282 Mavoko pending the hearing and determination of the suit. The application was allowed *ex parte* after the court was satisfied that the defendant's counsel had been served with the hearing notice of the application for the date it was scheduled to be heard. Mr. Kurgat, counsel for the plaintiffs had made representations to the court to the effect that the defendant had not filed any replying affidavit or grounds in opposition to the application.

On 1st July 2009, the defendant filed an application pursuant to the provisions of **Order IXA Rules 10 & 11** of the **Civil Procedure Rules** seeking to set aside the said orders of this court issued on 18th November 2008. The defendant stated that the plaintiffs had obtained the said order after failing to disclose to the court that one of the parcels of land i.e. LR. No.9517/22 had already been sold. The defendant pleaded with the court to set aside the said order so that the issues in dispute between the plaintiffs and the defendant may be determined on its merits. The defendant was of the view that no prejudice would be occasioned to the plaintiffs if the application is allowed. The application is supported by the annexed affidavit of Mohamud Ahmed Mohamud, the liquidation agent of the defendant. Among the reasons he deponed in the said affidavit for the defendant's counsel's failure to attend court on the day that the application was scheduled to be heard, is that its advocate had fallen ill and was admitted in hospital at the time and was therefore unable to attend court.

The application is opposed. Gordon Ogola, the advocate of the plaintiffs swore an affidavit in reply and opposition to the application. He deponed that the defendant and its counsel had not given cogent reasons for their failure to attend court on the day the application was scheduled to be heard. He was skeptical that the plaintiffs' advocate was ill on the particular day. He wondered why the advocate did not ask another counsel to hold her brief and inform the court of her indisposition. He denied the allegation by the defendant that the plaintiffs had concealed material facts from the court at the time the application was argued. He maintained that the application was incurably defective, incompetent and bad in law. He urged the court to dismiss the application with costs.

At the hearing of the application, I heard submissions made by Mrs. Mwenesi for the defendant and by Mr. Ogola for the plaintiffs. I have carefully considered the said submissions. I have also read the pleadings filed by the parties herein, in support of their respective opposing positions. In considering whether or not to allow an application to set aside an *ex parte* order, this court has discretion to maintain or set aside such order. The principles to be considered by this court in setting aside an *ex parte* order are similar to the principles the court takes into consideration when deciding whether or not to set aside an *ex parte* judgment. The overriding principle is that the court ought to take into account the entire circumstances of the case so as to do justice to the parties. This court is required, in most cases, to make decisions that will result in the matters in dispute being determined on its merits and not on mere technicalities. (See **Patel vs E. A. Cargo Handling Services Ltd [1974] EA 74**).

In the present application, it is not disputed that the defendant's counsel was served with the hearing notice when the application was listed for hearing. It is further not disputed that the said counsel failed to attend court on the scheduled date. Counsel explained that she was taken ill and was admitted in hospital on the material date. However, she did not supply any evidence in the nature of documentary evidence to support her claim to support her claim that she was in fact admitted in hospital at the material time. I have perused the pleadings filed by the parties herein. It is evident that the matters in dispute in the application should be heard and determined on its merit. The subject matter of the suit is an alleged debt owed by the plaintiffs to the defendant. The defendant wishes to secure payment of the said debt by realizing securities charged to it. The plaintiffs' counsel was not candid with the court on the day the ex parte orders were issued. He informed the court that the defendant had filed no pleadings in opposition to the application. This statement is factually incorrect since the true position is that the defendant filed grounds in opposition to the application. The defendant had also filed a replying affidavit in opposition to the said application. It was apparent that one of the factors that the court took into consideration in allowing the application that is being impeached was the fact that the court formed the impression that the application was indeed unopposed.

In the circumstances of this case, despite the fact that counsel for the defendant failed to give cogent reason for her failure to attend court on the day the application was scheduled to be heard, the interest of justice demands that the said ex parte order be set aside. I therefore allow the defendant's application. I set aside this court's order issued on 18th November 2008. The application dated 4th July 2008 shall be heard on merits. The defendant shall pay thrown away costs which I assess at Kshs.5,000/=. The same shall be paid within fourteen (14) days of today's date or in default thereof, the orders granted herein shall stand automatically vacated. It is so ordered.

DATED AT NAIROBI THIS 13TH DAY OF NOVEMBER 2009

L. KIMARU

JUDGE