REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 1928 of 2000

PETER NG'ANG'A MUIRURI……...…… …….PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LTD….1ST DEFENDANT

TAIFA AUCTIONEERS (a firm)……2ND DEFENDANT

R U L I N G

The application under consideration has been made by the Plaintiff in this suit. It is a Notice of Motion dated 3rd August, 2007, expressed to be brought under **Order XLIV, rule 1, 2 and 3** and **Order IXB rule 4 and 8** of the **Civil Procedure Rules** and **Section 3A** of **Civil Procedure Act.**

The substantive prayer in the application is prayer 2 in which the Plaintiff seeks to have the ruling and order given on 13th July, 2007, dismissing the Plaintiffs suit, be set aside and or reviewed. The other prayers are:

1. THAT there be an order for maintenance of status quo pending hearing and determination of this application.

3. THAT consent order made herein on 25th October 2000 be

reinstated pending hearing and determination of the suit.

4. THAT the Defendant's application dated 13th August 2002 be heard inter partes.

5. THAT the Honourable be pleased to make any orders deemed appropriate for the ends of Justice.

6. Costs hereof be provided for.

The grounds relied upon for the application are that there was error, mistake, prejudice or inadvertence on the face of the record and hardship and injustice in the events. The application is supported by the affidavits of **PETER NG'ANG'A MUIRURI**, the Plaintiff and **FREDRICK N. WAMALWA**, the Plaintiff's Advocate.

The application is opposed through a replying affidavit sworn by the Advocate acting for the 1st Defendant in this suit.

The suit was dismissed for want of prosecution on 13th July 2007, after a successful application to the court to do so under the provisions of **Order XVI rule 5(d)** and **Order L. rule 1** of the **Civil Procedure Rules**. It is the court's ruling and order of 13th July, 2007, which the Plaintiff seeks to review in this application.

Order XLIV rule 1 of Civil Procedure Rules stipulates as follows: -

"*O.XLIV r1 (1) Any person considering himself aggrieved –*

(a) by a decree or order from which an appeal is allowed, but from which no appeal ahs been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the fact of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

Mr. Wamalwa relied on the ground that there was an error and mistake on the face of the record in that the sub rule under which the application to dismiss the suit was based could only be invoked where the suit had been set down for hearing and had been "stood over generally". Mr. Wamalwa argued that the Defendant did not satisfy the requirements of Order XVI rule 5(d) of Civil Procedure Rules and therefore the order dismissing the suit was made in error.

Ms. Githinji for the Respondent admitted that indeed the suit had never been set down for hearing or adjourned. Ms. Githinji however argued that the sub rule invoked by the Respondent in its application applied even in instances where the suit had never been set down for hearing.

Order XVI rule 5(d) stipulates:

"*5. If within three months after-*

a)……..

b)……...

c)……..

(d) the adjournment of the suit generally, the plaintiff, or the court of its own motion on notice to the parties does not set down the suit for hearing."

Issue is whether the rule applies where suit was stood over generally after it had been set down for hearing or where the suit is adjourned generally without a hearing date?

The answer to this question lies within rule 5 itself Under rule 5 sub rule (a) it provides for dismissal where pleadings have closed and suit is not set down for hearing three months after close of pleadings. Rule 5 sub rule (b) was repealed.

Rule 5 sub rule (c) provides for dismissal on application after three months from the date the suit was removed from the hearing list.

Rule 5(d) can only make provisions for situations not covered under subrules (a) and (c). The sub rule provides for situations where the suit has been adjourned generally, whether or not it was ever listed for hearing. If under rule 5(c) a suit can be dismissed three months after it is removed from the hearing list, which means it had been set down for hearing, sub rule (d) should apply to cases where no dates have been taken for the hearing of the matter but where the case otherwise stood adjourned. Looking at the record of this case, I find that after the suit was filed, the Plaintiff/Applicant made an application under Order X rule 11 and 23 of the Civil Procedure Rules for discovery of certain documents to be made by the 1st Defendant. The application was dismissed by Mbaluto, J. on 20th December, 2002.

Subsequently, the Plaintiff/Applicant herein filed an application dated 24th April 2003 in which he sought for extension of time to seek leave to file appeal against the ruling of 20th December, 2002. He also sought leave to appeal against the said ruling and for stay of proceedings pending the outcome of the intended appeal. Waki, J. as he then was, dismissed the Plaintiff's application on 27th May, 2003.

After the ruling was read, no further action was taken in the matter until 6th October, 2005 when in the presence of Ms. Muriithi for the Defendant and Mr. Wamalwa for the Plaintiff, Ransley J. marked the application dated 13th August, 2002 withdrawn with no orders as to costs. After that, both parties took exparte dates for the hearing of the suit on 24th

January, 2006 and 17th June 2006, but the suit was not listed for hearing both times. It is subsequent to all these activities that the 1st Defendant set down the application dated 13th August, 2002 for hearing on 7th June, 2007.

The date was taken at the registry on 4th April, 2007.

For purposes of answering the question posed, this suit can be regarded to have been adjourned generally as from 27th June 2006, when it was taken out of the hearing list, and 4th April 2007 when the application for dismissal was set down for hearing. Looking at it critically, the 1st Defendant had the option of moving the court to dismiss the suit under Order XVI rule 5(c) of the Civil Procedure Rules as the most appropriate one, or under rule 5(d) which provision could still apply.

The next issue to consider is whether there was an error on the face of the record. The error argued by Mr. Wamalwa is no error at all as demonstrated in this ruling. The case was adjourned generally at the time the application was filed and heard. There is however an error apparent on the face of the record which I noted as I perused the file in preparation of the ruling.

The application which led to the dismissal of the suit is the one dated 13th August, 2002. That is the same application which, on 6th October, 2005 was marked withdrawn with no order as to costs. Having perused the record, I do not see any record to prove that the application was ever reinstated. That being the case, it was an error apparent on the face of the record for the court to give the withdrawn application a hearing date, and for the court to entertain it and subsequently allow it.

The application did not exist at the time **Ms. Githinji** argued it on 7th June 2007. Consequently the proceedings of that day and the subsequent orders were defective and a nullity. What the Defendant should have done was to file a fresh application and to argue it. Arguing a withdrawn application did not give it life. The orders made there under were of no effect whatsoever.

I heard Ms. Githinji's argument that the decree annexed to this application was a draft. It is my view that by annexing a draft decree to the application in the circumstances of this case substantively complied with the requirement that the Applicant should annexe to the application the decree from which he is aggrieved.

In Nyamogo and Nyamogo Advcoate vs. Kogo [2001] 1 EA 173, 174 Gicheru, Tunoi and Lakha JJA held: -

"*An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to e established by a long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record."*

The error apparent on the record in this case stares me in the fact as explained above and there can be no two opinions regarding it. Even though the error noted by the court is not the same one identified by the Applicant's advocate, under the inherent powers of this court donated by **Section 3A** of the **Civil Procedure Act**, nothing would stop this court from making such order as may be necessary for the ends of justice to be met. Having come to the conclusion I have of this matter, I do find merit in the Plaintiff's application dated 3rd August, 2007. I will allow the same in the following terms:

1. That the application dated 3rd August, 2007 be and is hereby allowed with costs to the Applicant

2. The suit herein is reinstated to same position it was prior to 13th July 2007.

3. The Plaintiff should set down the suit for hearing within 60 days of the date herein in default of which the suit will stand dismissed with costs.

Dated at Nairobi this 13th day of June, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Wamalwa for the Plaintiff

Mr. Makoni for the Defendant

LESIIT, J.

JUDGE

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