



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 857 of 2001

CHEMAGRO LIMITED.....1ST PLAINTIFF

HENRY OGOLA.....2ND PLAINTIFF

MERAB APUNDI OGOLA.....3RD PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA.....DEFENDANT

RULING

This is a Chamber Summons application dated 7th July, 2008 brought under Order IXB Rule 8 of the Civil Procedure Rules and sections 3A and 63(e) of the Civil Procedure Act. The Applicant seeks four orders. The first order is moot. The other orders sought are as follows:

2. THAT there be a stay of execution of the judgment entered by this court in respect of this suit pending the hearing and determination of this Application.
3. THAT the exparte judgment entered in favour of the Defendant in respect of this matter be set aside and/or vacated and the suit be reinstated for hearing on merit.
4. THAT costs of this application be costs in the cause.

This matter was set down for hearing by the Defendant on the 3rd July, 2008. The Plaintiffs were duly served with a hearing notice. On the morning of 3rd July, 2008 Mr. Arum for the Plaintiffs indicated that he had just come on record for the Plaintiffs. He indicated further that the parties were trying to negotiate a settlement and that they were likely to reach one. Mr. Ojiambo for the Defendant opposed the application for adjournment on the grounds that the previous Advocate had ceased acting for the Plaintiffs one year before and that the Plaintiffs had had sufficient time to get an Advocate to represent them. Mr. Ojiambo however conceded that the parties had been trying to negotiate an out of court settlement. Mr. Ojiambo urged the court not to adjourn the matter as the Defendant was desirous of proceeding with the case. Having heard both parties, the court adjourned the case for hearing at 2.00 p.m. and also urged the parties that if there was any settlement to be reached it must be reached before that time otherwise the case would proceed to hearing. At 2.30 p.m. when this case was called out, only Mr. Ojiambo for the Defendant and his witness were present in court. The Plaintiffs and their Advocate were absent. Since the time allocation had been given in the presence of the Plaintiffs' Advocate the court decided to proceed with the case. The court therefore dismissed the Plaintiffs case for non-attendance and for lack of prosecution. Since the Defendant had a counterclaim the court proceeded to hear the Defendant's witness. In the middle of that hearing, Mr. Arum for the Plaintiffs walked in flashing a letter which he described as a consent from his clients. After the two parties consulted each other, they entered a consent in the following terms:

1. The interim orders granted on 27th September, 2001 be and are hereby discharged.
2. The Plaintiffs are given 45 days from today to sell the suit properties with proceeds to the loan account subject to a

reserve price to be determined by the Defendant Bank.

3. The case be mentioned on 18th September, 2008 for further orders.

It is subsequent to this consent order that the Plaintiffs filed the instant application seeking to stay the execution of the judgment and to set aside the *ex parte* judgment entered in favour of the Defendant and to reinstate the Plaintiffs' suit for hearing on merit. In his submissions, Mr. Arum for the Plaintiffs urged the court to set aside its orders of dismissal of the Plaintiffs' case made for the non-attendance of the Plaintiffs. Mr. Arum pointed out that the Plaintiffs were late to come to court and that in any event the parties in the suit had recorded a consent on the same day. Mr. Arum also submitted that the Plaintiffs had an intention to settle the matter and that if the Plaintiffs were allowed to go to full trial, they would have an opportunity to place their whole case before the court for determination. Counsel also submitted that the application was made expeditiously and that the Defendant will suffer no prejudice if the suit was reinstated.

Mr. Ojiambo for the Defendant opposed the application. He relied on the replying affidavit dated 25th July, 2008 and grounds of opposition. Mr. Ojiambo submitted that the consent order entered by the parties on the 3rd July, 2008 compromised the entire relief sought in the Plaintiffs' plaint. Mr. Ojiambo submitted that the plaint was seeking four prayers which he interpreted correctly. The Plaintiffs were challenging the right of the Defendant to sell the suit property and to deny them their right of redemption. Mr. Ojiambo submitted that the consent order entered by the parties allowed the suit property to be sold by the Plaintiffs within 45 days and to give the proceeds of the sale to the Defendant. It was Mr. Ojiambo's view that reinstating the suit would have the effect of contradicting the said consent order.

Mr. Ojiambo raised issue with grounds (c) and (d) cited on the face of the Plaintiffs' application in which the Plaintiffs deny their liability to the Defendant. Mr. Ojiambo submitted that those grounds contradicted the consent of the parties allowing the Plaintiffs to sell the suit property and to pay the proceeds to the Defendant which in effect meant the proceeds were introduced to reduce the Plaintiffs' indebtedness to the Defendant.

I have considered all the submissions by both parties, the application and the pleadings. The Plaintiffs were not in court on 3rd July, 2008 when the case came up for hearing. The court gave the Plaintiffs up to 2.30 p.m. to present themselves to the court and to prosecute their case. They failed to do so as a consequence of which their case was dismissed under order IXB rule 8 of the Civil Procedure Rules. When Mr. Arum for the Plaintiffs finally came to court, he came flashing a consent order but without any of the Plaintiffs. At the time Mr. Arum did not seek to have any adjournment nor did he explain the absence of his clients. He was content in entering the consent order which compromised the Plaintiffs claim as against the Defendant.

I have carefully considered the supporting affidavit sworn by Mr. Arum, Advocate. Nowhere was an attempt made to explain why the Plaintiffs did not attend the court on the date of the hearing. The only paragraph in Mr. Arum's supporting affidavit which tends to explain the whereabouts of the Plaintiffs on the material day is paragraph 10 where he states:

“That the failure to attend court by the Plaintiffs and counsel was inadvertent and substantially occasioned by the counsel's failure to reach court on time.”

That paragraph can in no way be regarded as an explanation for the failure by the Plaintiffs to attend court. In any event the three Plaintiffs or any one of them, ought to have filed an affidavit explaining their absence in court on the date of the hearing. At the end of the day, therefore, the Plaintiffs have not excused their absence on the date of the hearing, neither have they given any explanation whatsoever for that absence. The prayer sought by the Plaintiffs is discretionary. The Plaintiffs should have come with clean hands in order to persuade the court to exercise its discretion in their favour. I fail to see any clean hands on the Plaintiffs part. If anything, I see a clear demonstration by the Plaintiffs to obstruct the due process of the court and to delay the hearing and disposal of the instant suit for no good reason. I find that no good cause has been shown in support of the application. I am not persuaded that I should exercise my unfettered discretion in favour of the Plaintiffs as that would be tantamount to giving them a right to prolong the disposal of this matter unnecessarily.

I have also considered that the consent was entered by the parties after the dismissal of the Plaintiffs' case and in their Advocate's full knowledge in that consent order, the interim order issued earlier over the suit property was lifted by consent and the parties allowed the Plaintiffs to sell the suit property at a reserve price to be given by the Defendant and to submit the proceeds of the said sale to the Defendant. The parties were to come back for the mention of this case on 18th September, 2008. I am yet to be informed what has transpired regarding that consent. That notwithstanding, the consent took care of all the prayers in the Plaintiffs' plaint. Prayer (a) and (b) sought to injunct the Defendant from selling the suit property and from denying the Plaintiffs their right to exercise the equity of redemption. These two prayers have been taken care of by consent of the parties and were resolved in the Plaintiffs' favour. It will serve no

useful purpose to reinstate the suit for these two prayers to be prosecuted. Prayer (c), (d) and (e) sought an order for the taking of accounts in order to determine the actual sums due to the Defendant or the sums which the Defendant should refund to the Plaintiff.

In the Defendant's counterclaim, the Defendant seeks to be paid certain sums of money which he claims are due to it from the Plaintiffs. The Plaintiffs have filed a defence to the counterclaim which is on record and which the court did not dismiss at the time that the Plaintiffs' suit was dismissed. The Plaintiffs interest therefore, in regard to the accounts will also be taken care of in the determination of the Defendant's counterclaim against them.

Regarding damages, the Plaintiffs pleaded in paragraph 7, a claim for damages on grounds that the Defendant conducted himself in an improper and fraudulent manner, in breach of the Defendant's duty to the Plaintiff. The particulars of fraud were not pleaded as required neither were the particulars of the alleged breach. Without particulars, the Plaintiffs were not going to gain anything from that prayer. I am therefore satisfied that the Plaintiffs will not suffer any prejudice if the application is dismissed and that in any event the reinstatement of the suit will serve no useful purpose. The Plaintiffs conduct has been very poor. The Plaintiffs have malingered with this case and have demonstrated clearly that they have no intention of prosecuting it in the near future. Having failed to attend the court for the hearing of their case and for no good cause, and having failed to give any explanation for that failure they do not deserve the orders sought in this application.

For these reasons, I find no merit in the Plaintiffs' application dated 7th July, 2008. The same is dismissed in its entirety with costs to the Defendant.

Dated at Nairobi this 17th day of October, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

N/A for Mr. Arum for the Plaintiffs/Applicants

Mr. Ojiambo for the Defendant/Respondent

LESIIT, J.

JUDGE