REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 9 of 2000

KONAHAUTHI LIMITED ……..……. PLAINTIFF

Versus

HON. WANYIRI KIHORO ……. DEFENDANT

RULING

The plaintiff filed on 17th January 2000 a claim for Kshs. 322,806 being the rent arrears owed by the defendant. The plaintiff also sought a declaration that it is entitled to vacant possession of the suit property. The defendant filed a defence on 3rd March 2000. In that defence the defendant alleged that he was owed kshs.100,000 by the plaintiff which amount had not been credited to his account. Further the defendant averred that he had tendered his rent to the plaintiff but the plaintiff had declined to accept the rent with the intention of obtaining possession of the premises. The defendant finally averred that he was ready to pay the plaintiffs rent less kshs. 100,000 and accrued interest. The plaintiff filed a notice of motion dated 21st February 2001 seeking summary judgment against the defendant. The affidavit in support of that application stated that the plaintiff leased to the defendant a portion of title no. Nyeri Municipality/ Block 1/69 from 1st August 1997 for rent of kshs. 14,700 per month for 6 years. That since the defendant took possession of the premises he had only paid kshs. 418,000 but had failed to pay the rent of kshs. 554,204 which amount were due as at 1st January 2001. It was stated in that affidavit that the defendant was served on 29th April 1999 with a notice to re enter the premises as per the provisions of section 58 RLA. That the defendant had persisted in his failure to pay the rent that was due and also failed to comply with the notice to vacate. The plaintiff was of the view that the defendant's defence did not disclose a reasonable defence or raise any triable issues. The plaintiff in that affidavit denied owing the defendant kshs. 100,000. The record in this file shows that the defendant was invited through his advocate to fix for hearing that notice of motion. On failing to attend to the fixing of the hearing date the plaintiff obtained an exparte date. The defendant's counsel was served with a hearing notice but on the date of hearing of the notice of motion that is, 6th November 2002 the defence counsel did not attend and there were no papers in opposition to the plaintiff's application for summary judgment. The court after considering that application entered judgment for the plaintiff as prayed in the plaint. The defendant has now brought before court chamber summons dated 30th July 2008 which is the subject of this ruling. That application seeks the setting aside on the judgment entered for the plaintiff and seeks leave to file an amended defence and counter claim. In the affidavit in support of that application for setting aside the defendant stated that after his defence was filed by his counsel he informed his counsel that he did not owe the plaintiff the amount claimed in the plaint. In support of that statement he stated in a letter written to his counsel that he had made the following payments:-

1. 1997 - kshs. 14,400

   - kshs. 58,880

2. 1998 - kshs. 200,000

3. 2000 - kshs. 180,000

4. 2001 - kshs. 150,000

In the letter where he communicated that information he informed his advocates that he had paid kshs. 200,000 to a fund raiser on behalf of Mr. Duncan Ndegwa. In that affidavit he did not explain how that payment was to be credited to his rent arrears. He further stated in his affidavit as follows:-

"5. THAT I later heard sometimes in 2001 that the plaintiff had pursued the matter in this Honourable Court and obtained a summary judgment against me in a hearing which Mr. Ng'ang'a Thiong'o did not attend.

6. THAT I instructed Mr. Ng'ang'a Thiong'o & Co thereafter to appeal against the summary judgment given to the plaintiff but it appears to me that he never appealed, even though all along, I have mistakenly been thinking that he did so and the matter was successfully settled as I had paid all rents.

7. THAT I lost contact with Ng'ang'a Thiong'o and his firm thereafter and understand that the firm has since closed down and he has moved away.

8. THAT I now believe that the firm had handled my defence in a negligent, incompetent and most perfunctory manner without my knowledge.

9. THAT since 2001, I have not heard anything else about this suit and was subsequently pre-occupied with matters including the sickness of my wife who was sick and bedridden for about 4 years in both Nairobi Hospital and Kenyatta National Hospital until she dies in October 2006.

10.THAT I did not know whether the plaintiff remained in contact with Messrs Ng'ang'a Thiong'o & Co after 2001 and genuinely believed this case was sorted out since the director of the plaintiff firm who know me very well never approached me with any suit papers relating to this case."

The defendant also deponed that in July 2008 he was served with a notice to show cause by the plaintiff's advocate. He faulted that service on the basis that the advocate served him with their own hearing notice rather than a notice from the court. In my view there is no basis to fault that service. It was good service. The defendant also filed two affidavits in support of his application to set aside the judgment. Those affidavits were by ID MARIJAN SULEIMAN and DANIEL MURAGE. Both affidavits supported the defendant's contention that the defendant had paid to a fundraiser on behalf of Duncan Ndegwa kshs. 200,000. This fundraiser was in support of the Nyeri Town Education Bursary fund. It was stated in those affidavits that Duncan Ndegwa had stated in public in that fundraising that he would hand over his contribution of kshs.200,000 to the defendant. That application was replied to by the replying affidavit of the plaintiff's director. In that replying affidavit it was stated that the defendant was represented by an advocate who had been served with the summary judgment application. Further that the applicant was also served with the party and party bill of costs filed by the plaintiff. The plaintiff in that affidavit argued that the court's discretion to set aside judgment should not be exercised so as to cause hardship on their party. The plaintiff reiterated that the suit had been filed in the year 2000 and having gone through the process of litigation the plaintiff had incurred costs. Further the plaintiff was of the view that the defendant cannot argue that the entry of judgment against him was due to an accident inadvertency or excusable mistake. This was because the defendant in his own affidavit admitted to having knowledge about the summary judgment application. Further it was argued that even if the plaintiff was awarded costs the defendant who had proved to be unreliable in the payment of rent may fail to pay such costs. The plaintiff in support of that affidavit in reply filed a statement of the defendant's rent repayments.

That statement showed the defendant had paid kshs. 58,800 in September 1997, kshs. 30,000 in November 1997, kshs. 180,000 in October 2000 and ksh. 150,000 in January 2001. That having given the defendant credit for those payments the defendant as at July 2002 owed the plaintiff kshs. 543,315. It is the defendant in his supplementary affidavit for the first time stated that when Mr. Duncan Ndegwa pledged kshs. 200,000 he did so on behalf of Konahauthi limited the plaintiff hereof. The defendant also stated that the plaintiff terminated his lease on 29th April 1999 in support of that contention the defendant relied on a letter written by the plaintiff dated 29th April 1999. I have perused that letter and it is clear that it was giving the defendant notice that in view of the rent arrears which by then was kshs.234,600 that the plaintiff was reserving its right to re enter and stated that it would exercise its rights to sue the defendant. It is clear as stated by the plaintiff that the defendant was not ignorant of the plaintiff application for summary judgment. Judgment on that application was entered on 6th November 2002. The defendant did not move the court to challenge that judgment or to try and set it aside until 30th July 2008. that was 6 years after the entry of judgment. Although the defendant stated that he lost contact with his advocate nothing prevented him from making inquiries at the court on the fate of the plaintiff's application for summary judgment. It should be noted that the defendant is no ordinary citizen but that he is an advocate of the high court of Kenya. It was wrong for the defendant to have assumed that his advocate had dealt with the case. In my view the defendant was careless and negligent in failing to follow up his case. He has in any case not provided any correspondence with his then advocate to show the inquiry he made. The defendant in his defence alleged that the plaintiff owed him kshs. 100,000. The rental payments that were due he alleged that the plaintiff deliberately failed to accept the same because the plaintiff was interested in repossessing the premises. That is the defence which is on record. Bearing in mind that defence, the defendant cannot be heard to say that the plaintiff's directors whom he well knew failed to approach him and to inform him that judgment had been entered against him. In the present application the defendant seeks leave to amend his defence. Although the proposed amendment is headed "amended defence and counter claim" the same does not have a counter claim in the body of that proposed amendment. The only substantial amendment sought is for the striking out of the amount the defendant alleges the plaintiff owes him with the substitution of that amount to kshs.200,000. That is the only amendment the defendant seeks. He does not seek to amend his defence to reflect the payment he alleges he made in his exhibit "WK1" that is the letter dated 31st January 2001. The defence that comes out clearly from the defendant's affidavit is not consistence with the defence on record. Further the defendant fails to show that the amount allegedly pledged by Duncan Ndegwa was indeed payable by the plaintiff. The plaintiff is a legal person being a limited liability company and is thus quite separate from Duncan Ndegwa. Although it is accepted by the plaintiff that Duncan Ndegwa is one of the directors of the plaintiff company the defendant fails to show that Duncan Ndegwa in making the pledge did so on behalf of and as the director of the plaintiff company. There is also no evidence that the amount allegedly so pledge was deductible from the rent due from the plaintiff. The defendant alleged that the plaintiff repossessed the premises in 1999. The defendant does not raise that issue in his defence. That as it may be the plaintiff's claim in the plaint is for kshs. 322,800. Accordingly to the statement produced by the plaintiff that amount was due from the defendant as at August 1999. It therefore follows that the plaintiff's claim relates to the rent due as at that time. The plaintiff does not make claim for a period after August 1999. The court in considering the defendant's application for setting aside judgment is guided by the case of EVANS vs BARTLAM 2 ALL ER 642 where Lord Alking stated as follows:-

"*The discretion is in terms unconditional. The courts however have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that, when the judgment was obtained regularly, there must be an affidavit of merits, meaning that the appellant must satisfy the court that he a prima facie defence ……..…*

The principal obviously is that, unless and until the court has pronounced a judgment upon the merits, or by consent, it is to have the power to revoke the expression of its coercive power when that has been obtained only by a failure to follow any of the rules of procedure."

The court in an application such as the one before it has discretion to set aside judgment. In the case of SHAH V MBOGO & ANOTHER (1967)EA the discretion to be exercised by the court was set in the following perimeters:-

"*Applying the principle that the court's discretion to set aside an exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but not to assist a person who had deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be refused.*"

The plaintiff's judgment entered on 6th November 2002 was a regular judgment. The defendant in making the application to set it aside fails in my view to raise triable issues. The issue that the defendant had paid in total the rent due is not supported by documentation. The allegation that the defendant paid kshs.200,000 on behalf of Duncan Ndegwa and the allegation that that amount is deductable from the rent has no basis. The defendant on the whole fails to raise reasonable triable issues to enable this court to exercise its discretion in setting aside judgment entered. The prayer for the amendment of the defence was not opposed. That as it may be the civil procedure rules only allow an amendment to be made before the entry of judgment. In view of the fact that in the courts view judgment against the defendant will not be set aside the prayer for amendment of the defence will be defeated. The ruling to the court is as follows:

1. *That the chamber summons dated 30th July 2008 is hereby dismissed with costs to the plaintiff.*

2. *The order for stay of execution issued on 15th October 2008 is hereby vacated.*

Dated and delivered this 15th Day of December 2008

MARY KASANGO

JUDGE