



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 1216 of 2000

RHODA CHELANGAT KANDIEPLAINTIFF

V E R S U S

DAIMA BANK LIMITEDDEFENDANT

R U L I N G

There has been considerable delay in the preparation and delivery of this ruling. The same was occasioned by my serious illness in the year 2006 and the long attendant recuperation. The delay is regretted.

The application under consideration in this ruling is the chamber summons dated 1st October, 2004. By it the Plaintiff seeks the main order that the judgment of this court given on 21st November, 2003 (Njagi, J), and the subsequent decree and orders, be set aside to enable the suit to be heard *inter partes*. By that judgment the court awarded to the Defendant against the Plaintiff, upon its counter-claim, the sum of KShs. 12,424,467/00 with interest thereon at the rate of 37% per annum from 20th February, 2000 until payment in full. The Defendant was also awarded costs of the counter-claim.

The Plaintiff's claim had earlier been dismissed for non-attendance by either herself or her counsel. The Plaintiff had claimed against the Defendant, *inter alia*, a refund of KShs. 8 million, the same being the purchase price paid for property in a public auction, together with interest at 30% per annum from the date of payment till the date of full refund. The Defendant then proceeded *ex-parte* to prove its counter-claim.

The application is essentially brought under Order 9B, rule 8 of the Civil Procedure Rules (the Rules). Under that rule, the court has an unfettered discretion to set aside or vary the judgment in question upon such terms as are just. It is nonetheless a judicial discretion that must be exercised judicially and upon settled principles.

Two grounds are set out on the face of the application: one, that the Plaintiff was not aware that the case was scheduled for hearing on 8th October, 2003 and, two, that unless the judgment is set aside the Plaintiff's interests both in the present case and in **Nairobi HCCC No. 796 of 1998** will be prejudiced. There is a supporting affidavit sworn by the Plaintiff.

The Defendant has opposed the application as set out in the replying affidavit sworn by one **SIMON C. A. NG'ENY**, the statutory manager of the Defendant, filed on 1st of November, 2004. The grounds of opposition emerging therefrom are:-

1. That hearing notice for 8th October, 2003 was duly served upon the Plaintiff's advocates.
2. That the court lawfully proceeded to hearing *ex parte* under Order 9B, rule 4 of the Rules.
3. That the subject-matter in Nairobi HCCC No.796 of 1998 is not the same as herein.
4. That the Plaintiff is guilty of unreasonable delay in bringing the application.
5. That the application otherwise lacks merit.

There is a supplementary affidavit sworn by the same SIMON C. A. NG'ENY and filed on 5th April, 2005 pursuant to leave granted by the court on 7th March, 2005. It is, word for word, the same as the replying affidavit. I cannot understand why it was filed.

There is also a supplementary affidavit sworn by the Plaintiff and filed on 15th April, 2005 pursuant to leave granted on 7th March, 2005. It is in response to the Defendant's supplementary affidavit.

I have duly considered the submissions of the learned counsels appearing. I have also read the affidavits sworn in support of and in opposition to the application. Finally, I have also perused the court record.

The principles to guide me in this application are now well established and do not require the quotation of authority. The main concern of the court is to do justice to the parties in order to avoid hardship that may be caused by genuine mistake or inadvertence. However, the discretion of the court is not to be used to aid an indolent litigant or one who has set out, by omission or commission, to obstruct or delay the course of justice. The court must look at all the circumstances, including the conduct of the parties and the nature of the case.

It is the Plaintiff's case that she did not know of the hearing date; that is why she did not attend court. She did not receive any communication from her advocates in respect of hearing of the suit. She did not know that her suit had been dismissed and judgment entered against her in the counter-claim until auctioneers came calling. She then tried to negotiate the matter with the Defendant to settle it out of court. In the meantime her husband died in the year 2002; the effect of that death upon her was profound depression, frustration and confusion which affected her concentration on this matter.

All those facts are not disputed by the Defendant in the replying affidavit. I accept as a matter of fact that the Plaintiff's advocate never advised her of the hearing date, 8th October, 2003. She did not know that the suit was coming up for hearing on that date; that is why she did not attend court. I am also satisfied, the lack of medical evidence notwithstanding, that the death of her husband in the year 2002 so adversely affected the Plaintiff that she was unable to concentrate on this case. That is why she did not discover earlier the *ex parte* proceedings and order of 8th October, 2003 and the *ex parte* judgment of 21st November, 2003.

A large sum of money, which will rise tremendously because of the interest awarded, has been adjudged against the Plaintiff. By dismissal of her claim she appears to have lost a huge sum of money that she paid as purchase price for property in a public auction. She has been condemned unheard, not because of any fault of hers. Njagi, J said the following with regard to the suit in the judgment delivered on 21st November, 2003:

“It is a pity the whole of this case could not be tried owing to the absence of counsel for the plaintiff. In my view, the plaintiff raises some very novel and interesting points of law. Our jurisprudence would be the richer if such points of law were properly researched to facilitate well considered opinions thereon.....”

I have had some anxiety over the fact that the Plaintiff learnt of the *ex parte* proceedings and order of 8th October 2003 and the judgment of 21st November 2003 in May 2004 but did not file the application until about 4 months later. However, in the circumstances of this case, I do not consider that delay to be inordinate.

Justice demands that this case be heard and disposed off on merit, unless the parties can reach settlement out of court. It is also to be noted that the case is intimately connected with the other case that has already been mentioned, Nairobi HCCC. No. 796 of 1998.

For all the above reasons I will allow the application. The *ex parte* proceedings of 8th October, 2003 (including the order dismissing the Plaintiff's claim) and the judgment delivered on 21st November, 2003, and the consequential decree and orders, are hereby set aside. The Plaintiff's suit and the Defendant's counter-claim shall proceed to hearing in the normal course of events. The Defendant shall have the costs of this application as well as all the thrown-away costs occasioned by the judgment and decree now set aside. Those shall be the orders of the court.

DATED AT NAIROBI THIS 16TH DAY OF AUGUST, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 17th DAY OF AUGUST, 2007