



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

Civil Case 205 of 1999

KESHAVJI JIVRAJ SHAHPLAINTIFF

VERSUS

KANWAL SARJIT SINGH DHIMAN.....DEFENDANT

RULING

The Defendant has brought a Chamber Summons dated 16th November, 2006. That Chamber Summons is brought under Order XLIV Rules 1 and 2 and Order IX Rule 10 of the Civil Procedure Rules. That application seeks the following orders:-

- **The Honourable Court be pleased to review and set aside its exparte judgement of 16th June, 1999 and subsequent decree dated 16th September, 1999.**
- **All consequential orders ensuing thereafter be set aside.**
- **The Defendant be granted leave to defend the suit out of time.**
- **The draft defence attached hereto be deemed as properly filed upon payment of requisite filing fees.**

In support of that application the Defendant swore an affidavit. He stated that this suit was filed against him on 28th February 1999. The suit sought judgement for the following:-

- (a) **Kshs.13,813,132/25 plus interest at 36% per annum from 1st February, 1999 till payment in full.**
- (b) **An order for sale of my property Plot No.209/8192/8 by public auction and in the event of a deficit a personal decree against the defendant for the balance.**
- (c) **Costs of the suit and interest thereon at court rates from the date of filing suit**
- (d) **Interest on the decretal amount at the rate of 36% per annum from date of judgement till payment in full.**

That suit was based on an agreement signed between the Plaintiff and the Defendant dated 17th December, 1996 by which the Defendant borrowed from the Plaintiff Kshs.7 million. The Agreement provided for interests to be charged on the loaned amount at the rate of 36% per annum. This the Defendant said was unconscionable and untenable in law because the same was exorbitant, excessive and oppressive. The Defendant stated that the Plaintiff was not authorized under the law to charge interests as provided in that agreement. The Defendant stated that the Plaintiff took undue advantage of his then desperate need for money and in so doing set terms that were extortionist by nature. That the Defendant was in dire need of money at the time he signed the agreement. He then stated that on being served with summons and Plaintiff in this action he and the Plaintiff commenced negotiations for settlement out of court. That exparte judgement was entered against him in default of appearance but that he was not given notice of the entry of that judgement. He therefore, concluded that the suit was tainted with irregularities from the beginning and for that reason the judgement entered against him should not stand. After the decree was served on the Defendant he stated that he entered into negotiations with the Plaintiff whereby he paid the Plaintiff Kshs.3 million. That despite that payment the Plaintiff continued to insist that the Defendant would vacate his property and as a result the Defendant says that he has now realized that the Plaintiff's intention all along was not to have the debt paid but was to acquire the Plaintiff's house. The Defendant said that he engaged the services of an advocate previous to the one representing him now and that advocate failed to challenge the judgement entered against him. The property which was now being transferred to the Plaintiff in execution of the decree herein he says is his matrimonial home

and therefore, that the court should exercise its discretion to set aside judgement so that he may he may not lose his matrimonial home. The Defendant was of the view that the defence annexed to his application presents a good defence to the Plaintiff's claim. He stated that the end of justice is better served by the *ex parte* judgement being set aside. In advancing his defence the Defendant said that it is trite law that individuals or institutions cannot operate like banks unless so authorized by the law. That accordingly that the interest charge by the Plaintiff in this action could not be supported by the law and was not recoverable. The Defendant said that the Plaintiff had obtained eviction orders against him and his family from the matrimonial home which is valued at Kshs.30 million. That the eviction order was signed by the Honourable Mr. Justice Mutungi who at that material time was on leave.

The application was opposed by the plaintiff who filed a replying affidavit. The Plaintiff accepted that summons were served on the Defendant and judgement was entered in default of appearance. That this case was set for formal proof on 16th September, 1999. Notice of that formal proof was served on the Defendant on 28th July, 1999. The judgement was entered after the formal proof. Thereafter the Plaintiff obtained certificate of taxation in respect of the costs recoverable. The judgement that he obtained after the formal proof was for the recovery of the amount due from the Defendant and also for sale of the property that had been given as security by the Defendant namely L.R. NO. 209/8192/8 Nairobi. That property was advertised for sale and before the sale could take place the Defendant entered into an agreement to pay the auctioneers fees and that agreement was annexed to the replying affidavit. That since judgement was entered in this matter the Defendant has not made payments at all of the amounts due to the Plaintiff. That on 11th August, 2006 after the Plaintiff had successfully bid for the property aforesaid, the court issued the Plaintiff with the certificate of sale. By the court's order the property has already been vested on the Plaintiff and that vesting Order has been registered in the Lands department in favour of the Plaintiff. The Plaintiff stated that the Defendant has previously filed other applications seeking to stop the sale of the property and seeking for orders to pay in installments and by the present application he has not brought any new matter before the court. The Plaintiff therefore, sought the Defendant's application be dismissed with costs.

The Plaintiff after successfully purchasing the aforesaid property at an auction sought by an application that the court do issue a certificate that the sale has become absolute under the provisions of Order XXI Rule 83 of the Civil Procedure Rules. Further the Plaintiff sought for vacant possession of that property amongst other orders. The ruling of that application was delivered by the Honourable Mr. Justice Mutungi on 13th June, 2006. The Judge granted the Plaintiff the orders sought and it is pertinent to note a comment made by the Judge in the said ruling:-

“Reading through the pleadings, and the annexures, thereto, especially by the Plaintiff/Decree holder, I have formed the opinion that the Judgement Debtor/Respondent, is a person who is very economical with truth, and denies existence of facts even where the same is unquestionably documented”.

In support of the Defendant's application the Defendant did rely on the following cases and the passage stated thereafter:-

(1) Civil Appeal No.39 of 1971 (EALR) Broadways construction Co. –vs- Kasule & Others

“No money paid under an illegal contract may be recovered”.

(2) Civil Appeal No.53 of 1984 (KLR) Orero –vs- Seko

“Review may be sought on the following grounds:

i. ...

ii. Where there is a mistake or error apparent on the face of the record, and

iii. For any other sufficient reason”.

(3) HCCC No.1487 of 2002 (Milimani) (EALR) National Industrial Credit Bank Ltd -vs- Mutinda

“The court has a wide discretion under Order IXA, rule 10 but the discretion must be exercised judicially. The right to defend ought to be cherished and a very high premium placed on it, it ought not be taken away lightly. Mbogo v Shah [1968] EA and Kimani v McConell [1966] EA 547 followed.

(4) HCCC No.1079 of 1980 (KLR) Maina –vs- Muriuki

§ The court has a wide discretion to set aside *ex parte* judgement on such terms as are just and that power does not cease to apply because a decree has been extracted.

§ The discretion to set aside *ex parte* judgement is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a party which has deliberately sought to obstruct or delay the course of justice.

§ Before *ex parte* judgement can be set aside, it must be satisfied that there is a valid defence.

(5) Civil Appeal No.329 of 2001 (KLR) CMC Holdings Limited -vs- Nzioki

§ *In an application before a court to set aside an ex parte judgement, the court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and judiciously.*

§ ...

§ *In law, the discretion on whether or not to set aside an ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of, among other things, an excusable mistake or error.*

§ *It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong in principle.*

(6) HCCC No.258 of 2000 (KLR) Rapando –vs- Ouma & 6 Others

§ *There should be no limits or restriction on the judge’s discretion to set aside ex parte judgement except that if he does vary the judgement he does so on such terms as may be just. The main concern of the courts is to do justice to the parties and the Court will not impose conditions on itself to fetter the wide discretion given by the rules save that discretionary power must be exercised judicially and not arbitrarily in order to safeguard the interest of both parties.*

§ ...

§ *The power to set aside ex parte judgement does not cease and/or extinguish because of the duration and or age of the decree.*

The Defendant in bringing this application has stated that there are irregularities in two ways. Firstly the Defendant has stated that the interest charged by the Plaintiff in agreement signed by both parties was exorbitant and against the law. The Defendant did not state what law he referred to but if the Defendant was of the view that the Plaintiff was caught by the provisions of the Banking Act or the Central Bank Act, the court would respond that the Plaintiff does not receive deposits from members of public so as to be defined as a bank or a financial institution. The Plaintiff therefore, is not caught by the provisions of those Acts. The Defendant also stated that there were irregularities in respect of the process in this case. The Defendant did not deny being served with summons and Plaintiff in this matter. The Defendant did not also deny being served with the Notice of the formal proof. After hearing the evidence of the Plaintiff at the formal proof the Court entered judgement for the amount claimed and also granted leave to the Plaintiff to sell the Defendant’s property. Subsequently by an order of the court the Plaintiff was granted leave to bid at the auction of the defendant’s property. The court has gone through the process of this case and is unable to find any irregularity which would justify the setting aside the judgement obtained herein. As stated before the Honourable Mr. Justice Mutungi granted the orders to the Plaintiff to have the Defendant’s property vested in plaintiff’s name. Evidence was presented before this court which showed that that property is already registered in the Plaintiff’s name. The present application to my mind seems to be Defendant’s desperate act to save his property. The Defendant in saying that the eviction orders herein were signed by Honourable Mr. Justice Mutungi when he was on leave is rejected by the court. The Defendant did not get evidence from the said Judge that he was not the signatory of that eviction order. The court record shows that this file was returned from the Central Registry Nairobi on 14th November, 2006. It therefore, does seem that the file was in Central registry Nairobi where the Honourable Justice Mutungi sits when the eviction order dated 11th August, 2006 was signed. Therefore, nothing turns on that argument. The Defendant proposed defence is on the basis that the interest charged by the Plaintiff is illegal. This defence has already been rejected by the court since the Defendant has not proved to court that the Plaintiff was acting as a bank or a financial institution. The Defendant’s argument that the agreement between the parties is illegal is rejected because the Defendant fails to prove the illegality. The court having examined all the issues raised by the Defendant finds that there is no basis for review or setting aside the judgement entered herein on behalf of the Plaintiff. The court therefore, rejects the Defendant’s application dated 16th November, 2006 which is hereby dismissed with costs to the Plaintiff. Orders accordingly.

MARY KASANGO

JUDGE

Dated and delivered this 18th day of December, 2006.

MARY KASANGO

JUDGE