REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 1250 OF 2002

COMMERCIAL BANK OF AFRICA LIMITED..... PLAINTIFF

VERSUS

MARTIN FARES MIYESA..... DEFENDANT

RULING

This is an application by the Defendant/Applicant to set aside the proceedings and consequential orders of 1.9.2004. The application is supported by the affidavit of DONALD B. KIPKORIR Counsel for the Applicant. The application is opposed and there are Grounds of Opposition filed by the Plaintiff's Advocates.

What came up for hearing on 1st September, 2004 was a Notice to Show Cause why execution should not issue. The decree holder/plaintiff had sought the issuance of a prohibitory order against L.R. No.209/8336/7.The decretal amount sought to be recovered at the time of the issuance of the Notice to Show Cause was shown as shs 3,180,392.99. The Notice to Show Cause was duly served upon the Applicant who handed it to his Advocates. He swore a Replying Affidavit in response to the Notice to Show Cause which affidavit was sworn on 27th August 2004 and filed on 30th August, 2004.

However, when the Notice to Show Cause was called out for hearing neither the Applicant nor his Counsel was present with the result that the Deputy Registrar ordered for the issue of the prohibitory order prayed for in the Notice to Show Cause.

The present application is made on the grounds that:

> *(1) although the Defendant had filed a Replying Affidavit to which he had annexed a copy of the Certificate of Title No. L.R. No. 27319 showing that it was registered in his name and that of his wife jointly, the Deputy Registrar still ordered that the prohibitory order, be issued*
>
> *(2) the Applicant's Counsel mistakenly thought tha t the Deputy Registrar would deal with the Notice to Show Cause later than 9.00 a.m. and when he arrived at 9.05 a.m. the Prohibitory Order had already been issued,*
>
> *(3) a Prohibitory Order cannot issue under Order XXI Rule 18 of the Civil Procedure Rules and*
>
> *(4) it is just and equitable that the orders sought be granted.*

Counsel for the applicant recited what was in the Chamber Summons and the supporting affidavit of DONALD B. KIPKORIR aforesaid. Counsel expressed his belief that had the Applicant been represented

at the hearing of the Notice to Show Cause the status of the title could have been urged before the Deputy Registrar and the prohibitory order could probably not have issued because of the joint tenancy.

Counsel submitted that the prohibitory order was issued ex-parte as a result of an act of omission or commission by the Applicant's Counsel. This mistake of Counsel should not be visited upon the Applicant. For this proposition Counsel relied upon the case of Shabir Din –v- Ram Parkash Anand (l955) E.A.C.A.Vol. 22 page 48.

In support of the plea that representation at the hearing of the Notice to Show Cause by Counsel would not have been a mere formality Counsel cited Hulsbury's Laws of England 4th Edition Volume 39 paragraph 529 on incidents of joint tenancy where the Learned authors state that in case of leasehold possession is vested in all; none holds any part to the exclusion of the other.

Counsel further relied upon the English decision of Gill –v- Lewis and Another (l956) Vol.1 ALL E.R. page 844 for the proposition that orders against joint tenants can only be effective if made against both tenants.

Counsel emphasized that although there has been some delay in bringing this application, the Plaintiff can be compensated by an award of costs which the Applicant was prepared to pay.

The Plaintiff has not filed a Replying Affidavit. Counsel however relied on the Grounds of Opposition filed. She emphasized that the Plaintiff decree holder has a judgment for a sum now over shs 7 million. The Defendant was served with the Notice to Show Cause why execution should not issue against him. He failed to attend and offered no reason for the failure.

Counsel submitted that the Defendant's Advocate on his own admission was aware that the prohibitory order was issued minutes after the Notice to Show Cause had been heard on 1st September 2004. Yet this application was filed 4 weeks after on 27th September, 2004. The Applicant is therefore guilty of inordinate delay and this application is intended to delay execution. Counsel submitted that the Defendant had not made out a case for setting aside the proceedings of 1st September 2004 and the Order that was issued.

Responding to the submissions made in respect of the joint tenancy status of the title, Counsel argued that this per se could not prevent the issuance of the prohibitory order. She cited Halsbury's Laws of England 47th Edition Re-issue Vol.17(1) paragraph 164 for the proposition that execution can issue against joint property.

Regarding the submission that Counsel's mistake should not be visited on his client the Plaintiff's Advocate argued that this depended on the facts of each individual case. In Counsel's view the cases of Shabir Din –v- Ram Parkash Anand supra and Gill & Another –v- Lewis and Another supra are irrelevant as they dealt with different situations.

In the premises Counsel prayed for dismissal of the application. In the event that the prayers sought are allowed the same should be on terms that a substantial part of the decretal amount be paid by the Applicant.

In a short reply Counsel for the Defendant objected to the terms proposed by the Plaintiff's Advocates as no challenge is made against the judgment. Counsel maintained that costs will be an adequate remedy for the Plaintiff.

Having set out the rival submissions I take the following view of the matter. This is a simple application to set aside an order made in default of attendance by Counsel. In such an application the Court has an unfettered discretion. However such discretion is to be exercised in order to do justice as between the parties. In exercising this discretion the Court has to consider inter alia, the reasons for the default, the conduct of the parties, whether any propose will be served by re-opening the matter and whether the respondent can be compensated by costs.

Bearing the above in mind I have found as follows.The proceedings and orders of 1st September 2004 were ex-parte thanks to the default of the applicant's Counsel. He has explained in his affidavit filed in support of the application that he mistook the time the application would be called out for hearing by the Deputy Registrar. Failure to attend when the Notice to Show Cause was considered was therefore not deliberate.Indeed the facts as presented by the Applicant's counsel were not controverted by the Plaintiff or its Counsel. I ask myself whether a litigant who has duly instructed an Advocate in these circumstances, should be penalized because of the default of his Advocate. In my view, cases belong to the parties. In normal circumstances, it would be strange justice if the sins of Advocates were visited on the parties. This is not intended to be a general proposition to be applied all the time. I am aware that there are circumstances in which an Advocate's mistake will be visited on his client. I am however, satisfied that this is not one of those cases.

I have also considered the conduct of the Applicant. He was served with the Notice to Show Cause. He did what a reasonable litigant would do. He handed the Notice to Show Cause to his Advocate – the expert. He was not bound to attend at the hearing of the Notice to Show Cause. His conduct was not to obstruct the cause of justice. The delay by Counsel to file this application may not have been explained. But it was only 4 weeks. I do not think that the Applicant should be punished for this delay by his Counsel.

I have also found that the setting aside of the default proceedings and Orders is not an exercise in futility. Both Advocates addressed me at length on the consequences of joint tenancy. I am not dealing with the controversy now. However, it is an issue that will have to be determined if the Notice to Show Cause can be re-opened. I have also found that the Plaintiff can be compensated with costs for any delay that might be caused in the finalization of the Notice to Show Cause as a result of granting the orders sought.

In the result I am inclined to exercise my discretion in favour ofthe Applicant by ordering that the ex-parte proceedings of 1st September, 2004 and the consequential orders be and are hereby set aside. The Plaintiff's Notice to Show Cause should be set down for hearing afresh.

The Defendant shall pay the Plaintiff's costs of this application. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 14th DAY OF OCTOBER 2004.

F. AZANGALALA

AG. JUDGE

Read in the presence of: