



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL CASE NO. 395 OF 1997

KENYA COMMERCIAL BANK.....PLAINTIFF

VERSUS

DAVID KIPKEMOI ROTICH.....1ST DEFENDANT

KIBET ARAP RUTO.....2ND DEFENDANT

KIPKEMOI ARAP LESANG.....3RD DEFENDANT

RULING

By an application dated 5th November, 2003, the defendants prayed for stay of the decree herein and the subsequent warrant of arrest issued pending the hearing and determination of the suit. The defendants also urged the court to review and set aside the orders of 4/10/2000 and 30/10/2003 and set aside the warrant of arrest as well as the judgment.

The application was made on the grounds that the Plaintiff had obtained default judgment against the defendants and subsequently obtained a warrant of arrest. It was stated that the defendants' advocates previously on record did not have authority to proceed with hearing and taxation. It was further stated that the suit was prematurely instituted before sale of the piece of land known as Nakuru/Olenguruone/Chepakundi/1206 and Nakuru/Olenguruone/Chepakundi/540 was done and that under Section 74(3)(C)(II) of the Registered Land Act this suit should not have proceeded until sale of the two properties had been effected. The application was supported by an affidavit sworn by the first Defendant on 1st December, 2003.

He deponed that on 15/5/93 he applied for a loan of Kshs.300,000/- from the plaintiff and he was advanced Kshs.200,000/- secured by a legal charge over L.R. NO. NAKURU/OLENGURUONE/CHEPAKUNDI/1206. He also secured a further legal charge over the land known as NAKURU/OLENGURUONE/CHEPAKUNDI/540. The first plaintiff also secured a further guarantee of Kshs.200,000/- for the second Defendant.

When the suit was filed, the defendants instructed M/S Kipkenei & Co. Advocates to file a defence but the said advocates ceased to have his instruction after filing the defence, he stated. He claimed that after the matter came up for hearing he was not notified of the date and so he did not attend court. His advocate did not offer any evidence and did not cross-examine any witness.

After judgment was entered in favour of the Plaintiff and a bill of costs was filed and served upon the said advocates, they taxed the same by consent in the sum of Kshs.75,000/-.

Mr. Odhiambo submitted that M/S Kipkenei & Company Advocates were doing all that when they knew that they had no authority to proceed with the hearing. He therefore urged the court not to punish the

defendants/applicants for a mistake which was not of their own making. Mr. Githua opposed the application. He submitted that an application to set aside the judgment under Order IXB Rule 8 could not be entertained because the defendants were represented in court by an advocate who was present. He cited the Court of Appeal decision in **HERMAN MUGACHIA VS HAMISI MWAKIBUNDU & ANOTHER (1982 -88) 1 K.A.R.** 666 . He said that there had been no formal withdrawal of instructions from the advocate by the defendants because they had not filed a notice of intention to act in person neither had the advocate filed an application for leave to cease from acting for them.

Regarding the issue of review, Mr. Githua submitted that there was nothing in the affidavit that showed that a review of the judgment was warranted. He submitted that the judge exercised his discretion in the matter properly and if the defendants were dissatisfied they should have appealed against the decision. He therefore urged the court to dismiss the application with costs. It is not in dispute that the court has a wide discretion to set aside ex parte judgments but that discretion has to be exercised judiciously. That discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a party who has deliberately sought to obstruct or delay the course of justice as was stated in **SHAH VS MBOGO & ANOTHER [1967] E.A.116.**The judgment now sought to be set aside was entered on 4/10/2000 but the defendants took no steps to set it aside until November, 2003 when the present application was filed. No reason was given for the Defendant's inactivity for a period of more than 3 years. When the matter came up for hearing, no reason was offered by the defendants' advocate as to why the defendants were not in attendance. The advocate merely stated that he was not ready to proceed with the matter and he wanted to withdraw from acting. When the judge refused the oral application, the defendants' advocate chose not to participate in the trial any further. He even failed to cross-examine the only witness for the Plaintiff who had testified or even make submissions. As Mr. Githua rightly submitted, an application to set aside the judgment under Order IXB Rule 8 cannot be appropriate in the circumstances since the defendants' advocate was present in court. My view is that the defendants' conduct has caused obstruction or delay in the course of justice and even if there was a mistake, or negligence on the part of the defence counsel, the defendants should have moved the court at the earliest opportunity, realising that delay defeats equity.

However, one issue that the Plaintiff seems to have over looked is systematic compliance with the provisions of Section 74 of the Registered Land Act regarding chargee's remedies. Sub-section one thereof provides that if default is made in payment of the principal sum or any interest or any other periodical payment and such default continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing. If the chargor does not comply within three months of the date of service of the notice aforesaid the chargee may either appoint a receiver of the income of the charged property or sell the charged property.

Section 74(3) stipulates the conditions under which a chargee may sue for recovery of the money secured by the charge and sub-section (3)(c)(ii) gives the court discretion to stay a suit for recovery of the money secured by the charge until the chargee has exhausted all his other remedies against the charged property.

The Plaintiff did not produce any notice which it had served upon the defendants, if any. The plaintiff also did not show whether he made any effort to appoint a receiver of the income of the two charged properties, if any, neither did it show that it attempted to sell the charged property before commencing suit for recovery of the money

A chargee should ordinarily exhaust all other remedies against the charged property before he can proceed to institute suit against the chargor. The Plaintiff did not make any effort to sell the charged property and if it did, it did not state so either during the hearing of the suit or of the defendants' application. The chargee should first sell the charged properties or make effort to do so upon compliance with all the necessary legal steps prior thereto before it can proceed to taking any other step against the chargors and/or the defendants.

For reasons aforesaid I hereby stay execution of the decree obtained herein and all other consequential orders thereto. This order of stay shall remain in force until the Plaintiff sells the charged

property or satisfies the court that he has made unsuccessful attempts at selling the same.

The costs of this application shall be in the cause.

DATED at Nakuru this 1st day of October 2004.

DANIEL MUSINGA

AG. JUDGE

1/10/2004