



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1512 OF 1998

THRIFT HOMES LIMITED..... PLAINTIFF

VERSUS

KAYS INVESTMENTS LIMITED..... DEFENDANT

RULING

This is the defendants application for orders that the interlocutory judgment entered herein be set aside and consequential orders stayed and that costs of the application be provided for.

The application is supported by the affidavit of Mr. Joseph Njoroge Mbogua - the advocate for defendant who deposes in paragraph 8 that failure to file defence was not willful but solely due to tight court schedules which he had at the material time. The application is vehemently opposed by the defendant.

The suit was filed on 8.7.98. An application for interlocutory injunction was filed together with the plaint. An ex parte injunction was granted on the same day pending the hearing of the application inter partes on 16.7.98. Plaintiff asserts, and defendant does not dispute, that plaintiffs counsel served the summons to enter appearance, the application and the court order on the defendant on 9.7.98. The affidavit of service sworn on 15.7.98 verifies so. This fact is not disputed by the defendants. Defendants advocates filed Notice of appointment of Advocates on 16.7.98 - on the day of the hearing of the application for interlocutory injunction. The application was adjourned to 22.9.98 at the request of defendants advocate to enable him to file necessary documents. Plaintiffs advocates filed a request for judgment in default of appearance dated 27.7.98. On 11.8.98 the Deputy Registrar entered interlocutory judgment in default of Appearance. On 14.9.99, defendants advocates filed three documents - a memorandum of Appearance, a Defence and grounds of opposition A replying affidavit to the application for interlocutory judgment was filed on 22.9.98 on the scheduled date for the hearing of the application. On 12.8.98 the suit was set down for assessment of damages for 27.10.98. The suit was listed for hearing of the interlocutory application on 22.9.98 and Mr. Mbogua for defendant attended.

The application was adjourned generally as interlocutory judgment has already been entered. ON 29.9.98 plaintiff filed an application for an order that the defence filed out of time be struck out. The present application was filed on 12.10.98. The defence was struck out on 3.11.98 but on 9.12.98, the Defence was treated as a draft defence for purposes of the application to set aside the ex parte judgment.

I have studied the authorities regarding the principles for setting aside ex parte judgment relied on by both counsels. It is not necessary to consider each of them individually for the principles of law are clearly stated in the cases of Patel versus East Africa Cargo Handling services ltd 1974 EA 75 and the case of Pithon Waweru Maina versus Thuku Mugira - (1982 - 88) 1 KAR 171.

There is no limit or restriction on the Judges discretion except that if he does vary the judgment he does so on such terms as may be just. The discretion is intended to be exercise in order to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it not designed to assist a party who has deliberately sought whether by evasion otherwise to obstruct or delay the course of justice. But the discretion should not be exercised arbitrarily but judicially taking in account all the relevant facts and circumstances of the case. But as it was said in Patels case, where there is a regular judgment, the court will not usually set aside the judgment unless it is satisfied that there is a defence on merits-that is a triable issue. Further, as it is clear from Patels case where there is a regular judgment, the court will in exercising its discretion consider whether there is a possible defence to the action and reasons for delay although those considerations are not conditions precedent to the exercise of the discretion.

The Judgment under consideration is a regular judgment entered after defendant failed to enter appearance within the prescribed time. Defendant was served with summons to enter appearance on 9.7.98 and interlocutory judgment was entered on 11.8.98 more than a month from date of service.

The appearance was not entered until 14.9.98 - more than two months from date of service. Mr. Mbugua explains in the supporting affidavit that defendant instructed him on 14.7.98 and handed over the Chamber Summons without summons to enter appearance which were forwarded to him on uncertain date but about a week later. Mr. Mbugua further explains that, as had several hearing in different courts in Nairobi and elsewhere, the Idea of entering appearance and filing defence completely escaped his mind and that failure to file necessary papers was not willful but solely due to the tight court schedules which he then hand Mr. Machira for plaintiff submits that, from Mr. Mbuguas explanation, there was no error, mistake or oversight but conduct intended to obstruct the cause of justice by employing delaying tactics. He has referred to cumulative delays apparent on the record. These include filing grounds opposition on 14.9.98 when application was served on 9.7.99 and filing the present application on 13.10.98 when it was drawn on 1/10/98 and after service of the application to strike out defence on 5.10.98.

The record shows that the replying affidavit to the application for injunction was filed on 22.9.98 over 2 1/2 months from date of service. Plaintiffs counsel submits that all those delays show total lack of interest in the case.

All Mr. Mbugua is saying is that because he was so busy in courts with other cases he forgot to file necessary documents. I agree with submissions of the plaintiff's counsel that the explanation by Mr. Mbugua does not show any excusable mistake inadvertence or error. Mr Mbugua appeared in court on 22.9.,98 and learnt that interlocutory Judgment had been entered. Yet he did not file the present application until 12.10.98. Indeed, he filed the present application after being served with plaintiffs application to strike out the defence on 5.10.98. The letter heads of M/s Mbugua & Mbugua Advocates annexed to the affidavit to support application for injunction show that there are several advocates in the firm.

The explanation for delay is not candid. It shows deliberate inaction in favour of more urgent matters. When considered together with other omissions referred to above, it indicates deliberate delaying of the course of justice and is not excusable.

Plaintiffs Counsel referred to the plaint and the draft defence and submitted that the intended defence is so shallow and so unmerited that it would not warrant interferring with a regular judgment. Applicants Counsel, on the other hand, submitted that, there is no requirement to show defence on the merits and that, in any case, draft defence shows a solid defence. As there is a regular judgment and as the discretion must be exercised judicially, whether or not defendant has shown a triable defence is a material consideration in exercising the discretion.

I have perused the plaint the draft defence, and the documents annexed to the affidavit to support the application for interlocutory injunction. There is no dispute that:

(i.) Defendant agreed to sell 60 acres of land to plaintiff to be exercised from L.R. No. 13136/11 at a

consideration of shs 12 million

- (ii) Plaintiff paid the required deposit of shs 1.2 million before the execution of the Agreement for sale.
- (iii) The 60 acres were excised and necessary consent and deed plan obtained and forwarded to plaintiffs advocates
- (iv) When plaintiffs advocates called for Title Deed in order to prepare and complete the Agreement, defendants advocates, by a letter dated 3.9.97, refused to forward the title Deed saying that: (i) The Title Deed was in terms of para 2 of the special conditions to be supplied upon payment of balance of purchase price.
- (ii) Agreement has expired by effluxion of time as Agreement was to be completed within 15 days of receipt by plaintiffs advocates of the deed plan and letter of consent
- (v) Plaintiffs advocates replied by a letter dated 5.9.97 inter alia that
 - (i) Agreement was subject to Law Society conditions of sale and under clause 9 of those conditions, defendant was obliged to deliver the title Deed within 14 days of Agreement which clause defendant breached.

ii Purported cancellation was not effective as transfer could not be done and Agreement completed without title documents.

Defendant does not allege that plaintiff is unable to complete. Indeed plaintiff contends that time was not of essence and that notice to complete was not served. That allegation is not denied by defendant. Plaintiffs advocates letter dated 18.9.97 (exhibit 17 to the affidavit) shows that plaintiff was keen to complete. I have perused the agreement of sale dated 1.3.97. The dispute will largely depend on the construction of that Agreement and the Law Society conditions of sale. The defences raised by defendant will have to be considered in the light of the Agreement. The sale was subject to Law Society conditions of sale. By Special conditions no 3 the actual amount of purchase price was to be calculated after actual subdivision of the property and was to be at the rate of shs 200,000 per acre. Defendant does not say that this had been done by the time it rescinded the Agreement.

There is no clause in the Agreement which requires any money to be paid before date of completion except the deposit of shs 1.2 million which was paid before execution of the agreement. Indeed special condition no. 2 shows that the balance of purchase price was to be paid on the actual date of completion. In short, the defence raised in paragraphs 3, 4, 5, and 6, of the draft Defence and in the replying affidavit of Christine Wambui Pratt sworn on 21.9.98 in reply to the application for injunction are not supported by the Agreement for sale.

The draft defence and the said replying affidavit do not prima facie disclose any genuine triable issues to the claim for specific performance of the Agreement for sale. Applicant also opposed the application on ground that the application is fatally defective in that applicants does not pray for leave to file defence in time. After Respondents counsel exhausted his submissions in reply to the application, applicants counsel made an oral application for leave to amend the application to include a prayer for leave to file defence out of time. That oral application was strongly opposed. Court has discretion to allow the oral application although it has been made belatedly. But allowing the application at this stage with prejudice the respondent in that it denies the respondent its defence to the application. It is an error which should have been discovered long before the application was prosecuted.

The glaring error displays the defendants lack of seriousness in the dispute. Applicants counsel submitted that the application can be made after the conclusion of this application I have indicated that the delay by defendant is in excusable and that there is no prima facie defence I decline to allow the application.

Lastly, it was submitted that defendants should not be punished for errors of its advocate, the courts duty being that of doing justice. I have read the decisions cited. There is no absolute principle of law that errors of advocates will always be excused. It depends of the nature of the case and the kind of error committed. In some cases, the court will not pardon the error and the litigant will be left with the remedy of recovering damages from his advocate for professional negligence.

I have considered all the circumstances of the case and in particular whether or not refusal of the application will cause injustice to the defendant This is a dispute between two companies. They entered into agreement of sale of land. Plaintiff alleges that defendant intends to sell the land to another buyer at a higher price Defendant has denied that. Defendant has not said that there is any special circumstances which makes completion impossible. Defendant will not suffer any injustice if sale is completed. It will receive the balance of purchase price which a very large sum of money.

In all the above circumstances, it is no just to exercise courts discretion in favour of the defendant. Consequently I dismiss the application with costs to the plaintiff.

E. M. Githinji

Judge

16.5.2000

Miss Manek holding brief for Mr. Regiru present

Mr. Machira present

Miss Manek

I apply for leave to appeal I also pray for stay of execution.

E. M. Githinji

Judge

Mr. Machira

Leave to appeal not required There is no intended execution suit is still proceeding

E. M. Githinji

Judge

Miss Manek

I also apply for copies of proceedings and Ruling

Ruling

Leave to appeal is not required and if it is required I give it. There is no execution as proceedings are not completed. If what Miss Manek is asking is for stay of proceedings, there is still time to file a formal application proceedings and ruling to be typed and supplied as prayed.

E. M. Githinji

Judge

16.5.2000