



**REPUBLIC OF KENYA**

**ENVIRONMENT & LAND COURT**

**AT MILIMANI**

**ELC CASE NO. 733 OF 2017**

**EDWIN KAGO KAGWI.....PLAINTIFF/APPLICANT**

**VERSUS**

**STANBIC BANK KENYA LTD.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**JOSEPH NG'ANG'A KARIUKI t/a JOSRICK MERCHANTS.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**MICHAEL WAIGWA.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**CHIEF LANDS REGISTRAR.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**HON. ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. Before this Court for determination is the Application dated 26/04/2021 filed under Order 51 Rule 1 of Civil Procedure Rules, Sections 1A,1B & 3A of Civil Procedure Act and all enabling provisions of the law. The Applicant is seeking for the following Orders:-

a. Spent.

b. Spent.

c. THAT this Honourable Court be pleased to stay all Orders & Directions issued and/or taken Out on 14<sup>th</sup> August 2019, 18<sup>th</sup> September 2019, 17<sup>th</sup> October 2019, 21<sup>st</sup> November 2019 and any other Court Attendance thereafter.

d. THAT this Honourable Court be pleased to set aside the proceedings of 14<sup>th</sup> August 2019, 18<sup>th</sup> September 2019, 17<sup>th</sup> October 2019, 21<sup>st</sup> November 2019 and any other Court Attendance thereafter.

e. THAT the costs of this Application and the suit in general awarded to the Plaintiff/Applicant.

**A. THE APPLICANT'S CASE**

2. The grounds of the Application are contained at the foot of the said Application and the Application is further grounded on the supporting affidavit sworn by Edwin Kamau Maina on 26<sup>th</sup> April 2021.

3. For clarity, the deponent to the supporting affidavit has averred as follows;-

(a) The Plaintiff Advocates stumbled upon the instant matter listed for Directions in the 17<sup>th</sup> June 2020 Cause List yet the plaintiff's advocates were neither involved in the fixing of the date nor were they served with a mention date for the same,

(b) The Plaintiff's Advocates made various frantic attempts to secure a link from the Court Registry and officials and the Court Assistant of the Presiding Court proved futile and as such the 3<sup>rd</sup> Defendant's Representative unilaterally proceeded to set the suit for hearing ex-parte without the participation of the plaintiff's Advocates as they were locked out of the Online Meeting in which the date was fixed.

(c) The Plaintiff and more particularly his advocates have been deprived of the opportunity of participating in all the Critical Pretrial Processes herein, despite specific directions by the Presiding Court that the Plaintiff be notified.

(d) The Plaintiff and his Advocates have accordingly not had an opportunity to embark on processes that will enable them to comply with Order 11 and generally finalize on preparations for hearing of the main suit.

(e) The Plaintiff therefore avers that it is in the interest of justice that the orders sought herein be granted otherwise the Plaintiff/Applicant's shall be effectively denied the opportunity to be heard thus irreparably prejudiced in the process.

## **B. THE RESPONDENT'S CASE**

### **The 1<sup>st</sup> Defendant/Respondent**

4. Mr. George Mahugu, counsel for the 1<sup>st</sup> Defendant/Respondent herein swore a Replying Affidavit dated 30/09/2021 in opposition and response to the Applicant's Notice of Motion Application dated 26/04/2021. He states that the application lacks merit and has been overtaken by events and should otherwise be dismissed with costs.

5. The 1<sup>st</sup> Defendant/Respondent avers that it is common knowledge that the court always supply online links in the day's cause list and that the plaintiff is being uneconomical with the truth in that the date mentioned for 13<sup>th</sup> March, 2019 was fixed in Court on 11<sup>th</sup> December, 2018 in the presence of all the parties.

6. It is deponed that the matter was mentioned on 13<sup>th</sup> March, 2019 to confirm filing of submissions by the defendants and take a Ruling date for the plaintiff's application. That therefore the proceedings for 13<sup>th</sup> March 2019 and 13<sup>th</sup> June, 2019 relates to a date for submissions and to take a ruling date for the plaintiff's application and the instant application seeks to challenge the Ruling and the same is akin to appealing against a decision in the same court.

7. Furthermore, the 1<sup>st</sup> Defendant/Respondent averred that the court has jurisdiction to frame issues for determination instead of setting the clock back and the plaintiff's conduct in his own suit demonstrates a clear-cut case of lack of interest in the matter.

8. Finally, the 1<sup>st</sup> Plaintiff/Respondent prays that the application should be dismissed.

## **C. FURTHER RESPONSE**

9. The Plaintiff has not filed a further affidavit in response to the 1<sup>st</sup> Defendant/Respondent's Replying Affidavit dated 30<sup>th</sup> September, 2021. However, during a hearing scheduled for 6<sup>th</sup> October 2021, he prayed for the court to expunge the said Replying Affidavit as he had not been served with the same.

## **D. SUBMISSIONS**

10. Parties have not filed written submissions. The application was canvassed through a hearing in virtual court and the parties relied on the pleadings that have been filed in the matter.

11. The plaintiff/applicant herein has not filed written submissions in opposition to the application dated 24/6/2021.

## **E. ISSUES FOR DETERMINATION**

12. Having considered the Application, the Supporting Affidavit and the 1<sup>st</sup> Defendant/Respondent's Replying Affidavit, the following arise as the issues for determination before this court.

a. whether the Applicant has given a good reason for his failure to attend court.

b. whether the orders and/or directions and proceedings would be set aside or not.

## **F. ANALYSIS**

### **a. Whether the applicant has given a good reason for his failure to attend court.**

13. Overriding objective in **Sections 1A and 1B of the Civil Procedure Act 2010** enjoins the court to ensure there is just determination of the proceedings, in a timely and efficient manner at a cost affordable to the respective parties.

14. In the case of **MWK v JDK (2020) eKLR**, the Court held that: **"the right to be heard is a principle of natural justice, it is also a principle of fair trial and fair trial is one of the rights under the Constitution which cannot be limited as provided under Article 25 of the Constitution also under Article 51 of the Constitution, It is provided; "Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate another independent and impartial tribunal or body."**

15. It is not in dispute that the matter before this court proceeded *ex parte* as the Plaintiff and his counsel did not attend court 13 March 2019, 13 June 2019, 14 August 2019, 18 September 2019. There is no record of court attendance on 21 November 2019 as deponed by the plaintiff/applicant. The reason given for nonattendance was that he was neither involved in the fixing of the dates nor was he served with notices thereon. However, the court link is usually provided for in the daily cause list.

16. Among the proceedings being listed by the Plaintiff/Applicant, the Court notes that a Ruling was issued on 13 June 2019.

17. There is nothing on record to indicate that the defendant/respondent herein deliberately sought by way of evasion or otherwise to delay or obstruct the course of justice. From the proceedings, the Court notes that the court attendances by the 1<sup>st</sup> and 3<sup>rd</sup> defendants was for mention to confirm compliance with regard to filing documents in relation to Application dated 27/11/2017 and thereafter picking a Ruling date after parties had duly filed documents in support or in opposition. By letter dated 19/11/2019, the Plaintiff wrote to the DR requesting the Ruling delivered on 13/6/2019.

**Whether the orders and/or directions and proceedings would be set aside or not.**

18. Njuguna J in FM v EKW (2019) eKLR relied on and cited the case of Kenya Pipeline Company Limited Vs. Mafuta Products Limited (2014) eKLR and that of Shah Vs Mbugo (1967) E.A. 166 in finding that:

***“... the discretion of the court must always be exercised judiciously with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its unique fact and circumstances. Among the factors to be considered is whether the Applicant will suffer any prejudice if denied an opportunity to be heard on merit.”***

19. In Kenya Wildlife Service v James Mutembei [2019] eKLR, the Court stated that stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent.

20. Ringera J in the case of Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000 persuasively stated thus;

***“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously” (emphasis added)***

See also illumination on the threshold for stay of proceedings in the following passages in Halsbury’s Law of England, 4th Edition. Vol. 37 page 330 and 332, that:

***“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”***

***“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”***

***“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”***

21. The Court issued a Ruling dismissing the Plaintiff/Applicant’s Application dated 27/11/2017 which was seeking a temporary injunction against the defendants/respondents herein pending the *inter partes* hearing and determination of the application and the main suit. The court considered the said application as well as the opposition to the same by the 1<sup>st</sup> and 3<sup>rd</sup> defendants and submissions by the 1<sup>st</sup> and 3<sup>rd</sup> respondents and found that the plaintiff/applicant moved to court to file this application after the suit property had already been sold. An injunction can only be given to prevent that which has not happened. It cannot be given where that which is meant to preserve has already taken place.

22. Lastly, in Kenya Wildlife Service (supra), the court found that: ***“it is my considered opinion that it would not be in the interest of justice to exercise court’s discretion and grant stay of proceedings as it will only serve the purpose of delaying the matter that is still pending in the court”.***

23. It is on record that all the parties herein were present in Court when the matter came up on 11<sup>th</sup> December 2018 when parties fixed the matter on 13 March 2019 for mention to confirm compliance by consent. Thereafter, the Plaintiff/Applicant did not show up to court on the said mention date, 13 March 2019 and on the subsequent dates that are the subject matter to the present application. The proceedings/order that may have been prejudicial to the plaintiff/applicant would be the Ruling issued on 13/6/2019. However, the court had found that the suit property had already been sold. Therefore, the order for a temporary injunction could not have been issued for reasons provided in the said Ruling.

## **G. DETERMINATION**

24. The principles guiding in the exercise of the Court's discretion to set aside a default or ex parte judgement or order are now trite. The Court of Appeal in **Macharia vs. Macharia [1987] KLR 61** held *inter alia* as follows:

***“The Court had a very wide discretion to exercise under the relevant order and rule and there were no limits or restrictions on the discretion of the learned judge except that if the judgement was varied it had to be done on terms that were just... This 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 person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice...The matters which should be considered include the facts and circumstances, both prior and subsequent, and all the other respective merits of the parties together with any material factor which appears to have entered into the passing of the judgement, which would not or might not have been present had the judgement not been ex parte and whether or not it would just and necessary, upon terms to be imposed... The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and, finally, it should be always remembered that to deny the subject a hearing should be the last resort of a court... And because it is discretionary power it should be exercised judicially or in a selective and discriminatory manner, not arbitrarily and idiosyncratically for otherwise the parties would become dependent on judicial whim”.***

25. It is not in contention that the plaintiff/applicant attended court on 11/12/2018 when parties fixed the matter for mention and subsequent ruling on the plaintiff/applicant's application dated 27/11/2017. The ruling was delivered in the absence of the plaintiff/applicant. That being the position the next issue is whether in the circumstances of this case the Court should set aside the proceedings of the diverse dates mentioned in the Notice of Motion of the plaintiff/applicant.

26. There were court proceedings and directions given on 14/08/2019, 18/09/2019, 17/10/2019, and 17/06/2020. The plaintiff/applicant through an email dated 16/06/2020 sought to participate in the proceeding but was not able to due to the challenges with the network and the link. There is no affidavit of service to confirm that the plaintiff/applicant was served on the various dates mentioned. It is not lost to the court that there is also no affidavit of service on record for the 1<sup>st</sup> defendant/respondent's replying affidavit dated 30/09/2021.

27. I find that the reason given by the applicant for failing to attend court is one that can be entertained and excusable and that this is a proper case for the court to exercise its discretion in favour of the applicant. In this regard, I find useful guidance in the court of appeal decision in the case of **Richard Nchapai Leyangu vs IEBC & 2 others[ 2013 ] eKLR** where the court expressed itself as follows:-

***“We agree with the noble principles which go further to establish that the courts' discretion to set aside ex parte judgement or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice”***

28. I find the reason offered to be reasonable and excusable. I hold the view that it would be unjust and indeed a miscarriage of justice to deny a party who has expressed the desire to be heard the opportunity of prosecuting his case. The court in the above cited case of **Richard Nchapai Leyangu vs IEBC & 2 others (supra)** proceeded to state as follows:-

***“The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality”***

29. The above case was cited with approval by the Court of Appeal in **Harrison Wanjohi Wambugu vs Felista Wairimu Chege [2021] eKLR** where by the court reinstated an appeal that had been dismissed for non-attendance. A similar position was held by the court of appeal in the case of **Cecilia Wanja Waweru vs Jackson Wainaina Muiruri[2014] eKLR** where the court allowed an application to reinstate an appeal that had been dismissed for want of prosecution. Similarly, I stand guided and persuaded by the decision of the court of appeal in **CMC Holdings Ltd vs James Mumo Nzioka[2004] eKLR** where it was held *inter alia*:-

***“The discretion that a court of law has, in deciding whether or not to set aside ex-parte order such as before us 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 in our mind not be a 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”***

30. I also find help in the position held by the court of appeal in the case of **Wenendeya vs Gaboi[2002]2 EA** where the court in reinstating an appeal that had earlier been dismissed for non-attendance stated that disputes ought to be determined on merits and that lapses ought not necessarily debar a litigant from pursuing his rights.

31. It is also important to mention that the Counsel for the 1<sup>st</sup> Defendant/Respondent does not deny that the plaintiff/applicant was not served by the defendants/respondents when they attended court and orders and directions were made. There is also no record of service filed. The court was denied a golden opportunity to interrogate the issue further when the parties opted to dispose the application by way of written submissions.

32. It appears that the 1<sup>st</sup> defendant/respondent has chosen to engage in a football match and score from the offside location and ask the referee to allow the goal irrespective of the clear rules of engagement in such a match. The failure to serve a party in a matter is an offside goal and it cannot be allowed to stand because the rules will continue to be flouted at will and whim.

33. Section 3A of the Civil Procedure Act provides that 'Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.'

34. The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. It is fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case. If this principle be not observed, the person affected is entitled, *ex debito justitiae*, to have any determination which affects him set aside.

35. Discussing the nature and objects of the inherent powers of the court, Sir Dinshah Mulla in *The Code of Civil Procedure: Act V of 1908* observes that:-

*"the Code of Civil procedure is not exhaustive, the simple reason being that the legislature is incapable of contemplating all the possible circumstances, which may arise, in future litigation, and consequently, for providing the procedure for them. The principle is well established that when the Code of Civil Procedure is silent regarding a procedural aspect, the inherent power of the court can come to its aid to act **ex debito justitiae** for doing real and substantial justice between the parties. The court has, therefore, in many cases, where the circumstances so require, acted upon the assumption of the possession of an inherent power to act **ex debito justitiae**, and to do real and substantial justice for the administration, for which alone, it exists. However, the power, under this section, relates to matters of procedure. If ordinary rules of procedure result in injustice, and there is no other remedy, they can be broken in order to achieve the ends of justice....."*

36. The court is not powerless to grant relief when the ends of justice and equity so demand, because the powers vested in the court are of a wide scope and ambit. The inherent power, as observed by the Supreme Court of India in *Raj Bahadur Ras Raja vs Seth Hiralal 1962 AIR 527, 1962 SCR Supl. (1) 450* "has not been conferred on the court; it is a power inherent in the court by virtue of its duty to do justice between the parties before it." Lord Cairns in *Roger Vs Comptoir D' Escompts De Paris* stated as follows:-

"One of the first and highest duties of all Courts is to take care that the act of the court does no injury to any of the suitors and when the expression 'Act of the court' is used it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole from the lowest court which entertains jurisdiction over the matters up to the highest court which finally disposes of the case."

37. Discretion vested in the court is dependent upon various circumstances, which the court has to consider. It can be exercised on application filed by a party. It could also be exercised in order to stall the dilatory tactics adopted in the process of hearing a suit, and to do real and substantial justice to the parties to the suit.

38. In conclusion, having considered the facts of this case, the affidavits filed by both parties, the submissions by the counsel for the 1<sup>st</sup> defendant/respondent and the relevant law and authorities, I find that this is a proper case for this court to exercise its discretion in favour of the applicant.

39. Accordingly I hereby make the following:

- a) I grant prayer no. 3
- b) I grant prayer no. 4
- c) Parties to appear before the DR on .....for Pre Trial Conference
- d) Each party shall bear its own costs for this application.

Orders accordingly

**RULING DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF OCTOBER 2021**

**MOGENI J**

**JUDGE**

**In the presence of:**

.....for the plaintiff/applicant

.....for the 1<sup>st</sup> defendant/respondent

.....for the 2<sup>nd</sup> defendant/respondent

..... for the 3<sup>rd</sup> defendant/respondent

