



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 90 OF 2019

1. EMMA WANJIRU NDIGURI

2. BRENDA WANGUI NDIGURI.....PLAINTIFFS/RESPONDENTS

-VERSUS-

EQUITY BANK KENYA LTD.....DEFENDANT/APPLICANT

RULING

1. Before me is an application dated 22/1/2020 taken by the Defendant/Applicant pursuant to Sections 3A, 1A & 1B and 63e of the Civil Procedure Act 2010, Orders 40(7) and Order 51 (1) of the Civil Procedure Rules 2010 and all other enabling provisions of the law. In this application the Applicant is seeking the following orders: -

a) Spent;

b) That this Honourable Court be pleased to discharge and/or set aside the orders issued by Honourable Court on 20th November, 2019;

c) That upon grant of order 2 herein above, the Honourable Court do direct that the Plaintiff's application dated 11th November, 2019 be heard on merit;

d) That the cost of this application be provided for.

2. The application is premised on fifteen (15) grounds on its face which are explicated in the supporting affidavit of **Roy Akubu, the Defendant's Legal manager** sworn on 22/1/2020.

3. The Plaintiffs/Respondents are opposed to the application and in doing so have filed a replying affidavit sworn on 2/3/2020 by **Emma Wanjiru Ndinguri**, the 1st Respondent herein.

4. Directions were taken that the application be canvassed by way of written submissions and both parties complied with the Applicant filing its submissions on 28/7/2020 while the Respondents filed theirs on 27/11/2020.

Defendant/Applicant's case

5. The Applicant's case is that the Plaintiffs had filed a Notice of Motion application dated 11/11/2019 seeking to restrain the Defendant/Applicant and/or its agents from selling suit properties Known as PLOT NO. MN/SECTION 1/6032 MOMBASA COUNTY AND KILIFI/KAWALA 'A'/KADZONZO and/or attaching or repossessing Motor Vehicle registration number KCF 841G pending the hearing and determination of the suit and the court granted the ex-parte orders on 20/11/2019.

6. It is the Defendant/Applicant's contention that on 20/11/2019 when the ex-parte orders were granted, it was unrepresented because there was a communication error leading to the non-attendance of its advocates. It is averred that the failure to attend court was inadvertent and occasioned by a mistake of counsel which should not be visited on an innocent client.

7. Be that as it may, it is deponed that the orders were obtained through material non-disclosure, concealment of facts and misrepresentation to the court, particulars thereof being that the Plaintiffs failed to disclose to the court that similar application had been conclusively and substantially determined vide a ruling dated 18/11/2019 delivered in Mombasa E.L.C Case No. 181 of 2017.

8. According to the Defendant/Applicant, East Africa Cargo Logistics Ltd obtained a charge facility of USD 1,050,000/= and part of the security therein was a charge created over the suit property. Thus the issue as to whether the Defendant/Applicant is entitled to exercise its power of sale was substantially dealt with in the E.L.C Case and the allegations on company dispute between the Directors of the East Africa Cargo Logistics Ltd are extraneous to the loan agreement.

9. The Applicant further contends that the Plaintiffs are neither the Chargors nor the owner of the suit properties and do not have any cause of action against the Defendant. As such, it is averred that the orders granted by this court on 20/9/2019 are prejudicial to the Bank since they restrain it from realizing a security upon default in repayment of the loan facility.

10. Finally, the Defendant deponed that Justice should be done to both parties and the Plaintiffs should not be let to enjoy interim orders at the expense of the Defendants.

11. In its submissions, the Applicant submitted that it has established a case to warrant the exercise of the court's discretion under **Order 40 Rule 7 of the Civil Procedure Rules** to discharge and set aside the orders issued on 20/9/2019. Reliance was also placed on the case of **Shah –vs- Mbogo & another [1967] E.A** to canvass the point that the court will always exercise that discretion to avoid injustice or hardship due to an advertent and excusable mistake. The excusable mistake in this case is said to be the mistake of the counsel in failing to attend court on the material day when the orders were granted.

12. Further, the Applicant states that the Plaintiffs were under an obligation to make the fullest possible disclosure of all material facts within their knowledge to the court, and failure to make such disclosure, then the Plaintiffs cannot have advantage from any proceedings and they ought to be deprived the injunctive orders they have obtained. These Submissions were buttressed by an excerpt from the case of **Bahadurali Ebrahim Shamji-vs- Al Noor Jamal & others [1998] eKLR**.

13. It is further submitted that the application was against the doctrine of *res judicata* for raising issues which have been dealt with by a court of competent jurisdiction.

14. Finally, it is submitted that the orders could not issue in any manner for the reasons that the conditions precedent to grant of injunctions as set out in the case of **Geilla –vs- Cassman Brown & Co. Ltd [1973] E.A 358** were not met.

Plaintiffs/Respondents

15. The Plaintiffs' in the replying affidavit concedes that they failed to disclose that a similar application had been handled by the E.L.C Court but avers that their cause of action was entirely different. However, they maintained that the application was duly served upon the Defendant's manager but they failed to appear. Consequently, the orders in question were legally issued by a competent court for non-appearance of the Defendant.

16. According to the Plaintiffs, they had disclosed all their interests and indeed the Applicant is guilty of delay in bringing the instant application. That being the case, the Plaintiffs aver that equity does not aid the indolent and in any event, the Applicant has not shown what prejudice it might suffer if in the circumstances the case proceeds for hearing.

17. In their submissions filed on 5/8/2020, the Plaintiffs argued that East Africa Cargo Logistics Limited secured the loan facility from the Defendant and gave out as security several properties including **Plot No. MN/Section 1/6032 Nyali** which the Plaintiffs describe as their family house. It is averred that here was no resolution passed by the shareholders for the company to take any loan and as such the legal instruments created thereof are bad in law.

18. Further, the Plaintiffs submitted that the setting aside of the ex-parte orders is a discretionary exercise and can only be granted upon an explanation of sufficient cause for the non-attendance in court by the Applicant. To buttress the submissions, reliance was placed in the case of **Patel-vs- East Africa Cargo Services Limited Civil Appeal No. 2 of 1974** and **Wachira Karani-vs- Bildad Wachira [2016] eKLR**.

Analysis and Determination

19. I have very carefully considered the application, the Replying Affidavit and rival submissions by the parties. In my view, I find the sole issue arising thereto for consideration is whether or not the application meets the threshold for setting aside the ex-parte orders issued on 20th November, 2019.

20. For purposes of this application, I must state for record purpose that the Plaintiffs/Respondents filed an application dated 11/11/2019 on even date seeking for inter alia orders that the Defendant herein be restrained by itself, its servants and/or agents from selling, disposing, transferring and/or alienating the suit properties known as PLOT NO. MN/SECTION 1/6032 MOMBASA COUNTY and KILIFI/KAWALA "A"/KADZONZO/36 by way of public auction pending the hearing and determination of this suit. The grounds upon which the orders were sought are that the Defendant had advertised the properties for sale on 28/11/2019 in clear breach of the law and further, that the Plaintiffs were not in arrears.

21. The application was first placed before court on 11/11/2019 and the court directed the same to be served for inter-parties hearing on 20/11/2019. The Defendant was duly served but failed to appear before court and/or sent representative to explain their absence, in court. Similarly, no response had been filed and the court allowed the prayers in the application as prayed on basis that it was not opposed.

22. Now the Defendant/Applicant avers that it was a mistake of its counsel in failing to appear before court on 20/11/2019 and the mistake should not be visited on it. It was further reiterated that the orders were obtained on material non-disclosure and should not warrant the exercise of this court's discretion in setting aside the interim orders.

23. **Order 40 Rule 7 of the Civil Procedure Rules 2010** provides that: -

"Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order."

24. As regards material non-disclosure, I will walk on the path followed by others before me. In the case of Republic **v Kenya Medical Training College & another Ex-Parte Kenya Universities and Colleges Central Placement Service [2015] eKLR** (Onguto J.) stated at paragraph 21 that: -

"Before summarizing the relevant legal principles and safeguards relevant to the instant issues, I must state and emphasize the high duty of candour fixed upon any applicant to court, appearing ex parte. A party appearing before the court without notice to the other (ex parte) must exhibit a high quality and degree of sincerity and honesty. He must be guileless. He must be frank. He must be open. He must keep nothing that touches on the matter away from the court. He must act in utmost good faith. If he does not so act, he does so at his own risk."

25. Further, the gravity of non-disclosure was expressed in the case of **Bahadurali Ebrahim Shamji vs. Al Noor Jamal & 2 Others Civil Appeal No. 210 of 1997** where the Court of Appeal stated that; *"There is a compelling duty on the applicant "to make a full and fair disclosure of all material facts."*

26. Lastly, in the case of **Nahashon Njage Nyaggah V Savings & Loan Kenya Limited & another [2006] eKLR** Kasango J. in discharging interim injunctive reliefs stated that:-

"When a party approaches a court for such a remedy they are expected to be even handed in the presentation of evidence before court. The court requires such a party to act uberrima fide in seeking for an injunction order. A party should not suppress the truth nor should such a party tell untruths with a view to persuading the court to grant an injunction."

27. The foregoing emphasizes the need for parties to come to court with honesty and integrity. In my view, Parties should not take advantage of the absence of the other party because when they finally come, the truth will always come out and when this happens then the offending party will have to shoulder the consequences of the dishonesty.

28. In the instant case, the Defendant/Applicant submitted that the question as to whether an injunction can issue against itself restraining the sale of the suit properties has been dealt with substantively and conclusively in **E.L.C Case No. 181 of 2017** vide rulings delivered on 21/3/2018, 18/9/2019 and 18/11/2019 respectively. As such, the instant application offends the doctrine of res judicata and the injunctive orders would not have been granted had the court been disclosed with all material facts.

29. The Plaintiffs in their Replying Affidavit are not opposed to the fact that there were proceedings regarding the subject suit properties in E.L.C 181 of 2017. However, it is averred that the Plaintiffs have disclosed the relevant facts as regards their claim. In my view, what the Plaintiffs appear to be saying that they were not duty bound to disclose that the issues under consideration were once tried in E.L.C Case No. 181 of 2017 and that might explain why they did not mention E.L.C Case No. 181 of 2017 at any point in this suit.

30. I have taken the liberty to confirm that indeed the three rulings delivered by the E.L.C Court substantially addressed the question as to whether an injunction could issue against the Defendant and its agents herein restraining the sale of PLOT NO. MN/SECTION 1/6032 MOMBASA COUNTY and KILIFI/KAWALA 'A'/KADZONZO/36. The court applied its mind in determining whether an injunction could issue against the Defendant/Applicant herein but the Plaintiffs chose to conceal these facts from the reach of this court. I therefore find the Plaintiffs are culprits of the concept of non-disclosure of material facts and therefore not entitled to the exercise of the court's discretion in their favour. I will therefore vary the orders granted on 20/11/2019 with an order that the application 11/11/2019 to be rescheduled for interparties hearing.

31. Consequently, the Orders for injunction issued by this court on 20/11/2019 restraining the Defendant herein by itself, its servant and/or agent from selling, disposing, transferring and/or altering the suit properties known as PLOT NO. MN/SECTION 1/6032 MOMBASA COUNTY and KILIFI/KAWALA 'A'/KADZONZO/36 by public auction pending the determination of this suit are hereby vacated.

32. The Plaintiffs shall move the court by fixing a hearing date for their application dated 11/11/2019. The Defendant is at liberty to respond to the said application.

33. The Defendant/Applicant shall have costs of this application.

It is so ordered.

Dated, Signed and Delivered at Mombasa this 9th day of February, 2021.

D. O. CHEPKWONY

JUDGE

Order

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by

His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

JUSTICE D.O. CHEPKWONY