



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 361 OF 2015

EQUATORIAL COMMERCIAL BANK LIMITED....PLAINTIFF/APPLICANT

VERSUS

BEAR AFRIC (K) LIMITED.....DEFENDANT/RESPONDENT

RULING

1. The application for consideration is the Plaintiff's Notice of Motion dated 23rd July, 2019 brought under **Section 1A, 3(A) and 63(e)** of the **Civil Procedure Act, Order 51 Rule 15** of the **Civil Procedure Rules, 2010** and all other enabling provisions of the Law. The application seeks the following orders:

- a. *Spent.*
- b. *Spent.*
- c. *THAT this Honourable Court be pleased to set aside the Order of 22 July, 2019.*
- d. *THAT the Defendant's Notice of Motion Application dated 16th April, 2019 be heard on merit.*
- e. *THAT costs of this application be in the cause.*

2. The application is based on the grounds on the face of it and supported by an Affidavit sworn by **KENNETH WILSON**, the advocate seized of this matter on behalf of the Plaintiff, on even date. He deposed that he is aware that the Defendant filed an application dated 16th April, 2019 seeking for orders that the money held in the joint account No. (xxxx) in the names of the Plaintiff and Defendant's Advocates on record be transferred to court. The Plaintiff opposed the said application through the Replying affidavit of John Wageche sworn on 30th April, 2018.

3. He averred that on 15th of July, 2019, this Honourable Court gave orders to the effect that the Plaintiff and the Defendant do negotiate on a neutral financial institution where the monies held in the joint account were to be transferred failure to which the court would make a determination on which institution the monies should be deposited. That the Court also directed that the Plaintiff Bank files the statement of account of the impugned joint account. As such, on 19th July, 2019, the Plaintiff through its senior Legal Manager filed a further affidavit attaching the bank statements of the joint account as directed by the court.

4. It was averred that thereafter, the matter was scheduled for mention on 22nd July, 2019 to confirm compliance with the orders of 15th July, 2019 and for further directions. He contended that although he was within the court precincts on the said date, he had two matters in different courts being this matter and *ELC No 361 of 2016: Francis Ngigi Waweru Versus Joseph Waara Kithindi and 5 Others* before Hon. Justice Loice Komogoi as evidenced by the annexed cause list. He stated that by the time he went to attend to this matter, he found that it had already been called out and ex parte orders issued directing that the monies held in the joint account be transferred to a joint account in KCB Bank Limited. Be that as it may, he was granted indulgence to address the court although the court advised that it had already penned down its Order hence he needed to move the Court formally.

5. Further, he deposed that the failure to attend court was not intentional or deliberate but was an inadvertence which is highly regretted and therefore believes that the Plaintiff should be given an opportunity to be heard before the monies are transferred. It was further his contention that the Plaintiff has a bona fide response against the Defendant's application seeking to transfer the funds from the joint account.

6. Additionally, he averred that this application has been brought without undue delay and noted that the Defendant will not suffer any prejudice if the ex-parte orders issued on 22nd July, 2019 are set aside and that any such prejudice, if at all, can be adequately compensated by way of costs. He also believes that this court has the power to grant the Orders as sought.

7. In response, the Defendant filed Grounds of Opposition dated 2nd December, 2019. It was contended that the parties having agreed by consent to deposit the subject matter to a neutral Bank, the Plaintiff now seeks a second bite at the cherry by calling upon the Court to sit on its own appeal. It was stated that the Application dated 16th April, 2019 was compromised by consent orders of 15th July, 2019 and not as alleged by the Applicant. Further, that the present application has been made in defiance of the Court orders issued on 24th July, 2019 and 20th July, 2019 requiring the transfer of the monies held in the Plaintiff to Kenya Commercial Bank.

8. It was further stated that the Orders of 22nd July, 2019 only gives effect to the consent Orders of 15th July, 2019 which are still in force. That the Orders of 15th July, 2019 directed the parties to agree on a neutral institution where the subject matter will be deposited failure to which the Court would make that determination. The Plaintiff refused to agree hence the Orders of 22nd July, 2019. Further, that the Applicant was to transfer the funds within 7 days but has failed to do so to date.

9. The Defendant contended that this application is a delaying tactic by the Plaintiff who despite holding and trading with the subject matter condemns the Respondent to pay penalties over the same. It was noted that the Application does not meet the requirements for setting aside of consent orders granted on the 15th July, 2019 and further, that the Plaintiff has not demonstrated any prejudice suffered as a result of orders issued on 24th July, 2017 and 26th July, 2019 as the court only ordered for the transfer of the subject matter to a neutral financial institution.

10. Further, it was argued that the application as couched seeks review of the orders of this court without meeting the criteria under **Section 80** of the **Civil Procedure Act** and **Order 45** of the **Civil Procedure Rules**. In the Defendant's view therefore, the Application is an abuse of the Court process and should be dismissed with costs.

11. The Application was disposed of by way of written submissions. The Plaintiff was represented by learned counsel, Mr. Kenneth Wilson whilst the Defendant was represented by learned counsel, Mr. King'ara.

12. In his oral submissions before this court, Mr. Kenneth reiterated that the matter was mentioned in his absence whereupon the court unilaterally directed that the money in the escrow account be transferred to KCB Bank. He urged that the Plaintiff should be granted an opportunity to state why the monies should not go to KCB as part of its right to a fair hearing so that it can defend the application dated 16th April, 2019. He therefore prayed that the application be allowed.

13. On his part, learned counsel, Mr. King'ara submitted that they had filed an application for orders that the money be released to the court because the money in the bank was not earning any interest. However, on 15th July, 2019, Nzioka, J said that the money could not be deposited in court because it would also not earn any interest. Counsel stated that the learned judge requested that they compromise their application which they did and entered into a consent whereby parties agreed that the money would leave Equatorial bank but did not agree on the actual bank where it would go.

14. Mr. King'ara submitted that when the matter was mentioned on 22nd July, 2019, he proposed that the money goes to Credit Bank but the court disagreed and ordered that the money goes to KCB bank as it is a stronger financial institution. He argued that as such, the Plaintiff ought to comply with the order before being granted a right of audience. He also noted that the money is supposed to be kept in the bank in good faith since the Plaintiff bank in which the money was had liquidity issues.

15. In rebuttal, Mr. Kennedy denied recording any consent on 15th July, 2019 stating that he only sought time to seek instructions. He also argued that if the money is moved before this application is heard then their application dated 15th July, 2019 would be rendered academic.

Analysis and Determination

16. I have carefully considered the Plaintiff's application, the Grounds of Opposition and parties' rival submissions. The issue arising for consideration therefrom is whether **there is a basis for this court to exercise its discretion to set aside the ex parte order of 22nd July, 2019.**

17. I have perused the court's ruling of 15th July, 2019. Indeed, at paragraph 28 thereof, the court categorically stated as follows:

“Further, the parties negotiate and agree on the alternative neutral institution where the funds can be deposited and report back to court within the period of seven (7) days of this order. In the absence of any agreement, the court will decide on the same...”

18. The Court record also shows that on the said date, parties consented to the matter being mentioned on 22nd July, 2019 for further orders regarding the aforestated order. However, there was no representation for the Plaintiff when the matter mentioned on 22nd July, 2019. What the court has to determine therefore is whether the explanation given by the Plaintiff's advocate for non-attendance of court on the said date constitutes sufficient cause.

19. **Order 51 Rule 15** of the **Civil Procedure Rules**, 2010 under which this application was brought provides that the Court may set aside an order made *ex parte*. This means that the Court has unfettered discretion to set aside any *ex parte* order so long as it is done upon such terms as are just although such discretion must be exercised judiciously and not arbitrarily. This is in line with the principle set out in the

case of **Shah vs. Mbogo [1967] EA 116** that:

“The discretion is intended to be exercised to avoid injustice or hardship resulting from 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.”

20. In the instant case, the Plaintiff’s advocate averred that he had another matter in the Environment and Land Court on the said day and that by the time he availed himself for the mention of this matter, he found that *ex parte* orders had already been given. In proof of this, he has attached a copy of the cause list for the said Court for that day where the matter has been enlisted. Whereas I think counsel for the Plaintiff should have also annexed an extract of his or the firm’s diary for the 22nd July, 2019 as well as a certified copy of the proceedings in the ELC matter for the said date to confirm that he was in the other matter, I appreciate that the Defendant’s advocate has not controverted the same and thus I have no reason to question or doubt that position.

21. Needless to say, the right to be heard is a well-protected right under Article 50 of the Constitution of Kenya and is also the cornerstone of the rule of law. (See **Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 Others [2013] eKLR**). **It should not be denied where a party shows sufficient cause for non-attendance of court. Further,** it is a fundamental principle of natural justice 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. (See **Wachira Karani vs. Bildad Wachira [2016] eKLR**).

22. The upshot is that I am satisfied that the counsel for the Plaintiff has advanced a plausible and excusable explanation for his absence in court on 22nd July, 2019 when the impugned orders were given. His non-attendance was neither negligent nor deliberate. Further and in any event, the Defendant has not demonstrated any prejudice that it stands to suffer if the *ex parte* order is set aside but in case of any inconvenience, I have no doubt that the same can be compensated by an award of costs.

23. Consequently, the orders of this court made on 22nd July, 2019 are hereby set aside. However, I decline to order the hearing of the Defendant’s application dated 15th April, 2019 on merit as that issue had already been dealt with by Nzioka J. pursuant to the Orders of 15th July, 2019. I direct that parties do agree on an alternative neutral institution where the funds can be deposited within fourteen (14) days of this order. The matter shall be mentioned on 22nd April, 2021 for further Orders and Directions. The Plaintiff shall bear the costs of this Application. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 8TH APRIL, 2021

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Kenneth Wilson for the Plaintiff/Applicant.*
2. *Kingara h/b for Mirie for the Defendant/Respondent.*