



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAMIRA**

**CIVIL CASE NO. 1 OF 2019**

**THE KENYA ALLIANCE INSURANCE CO. LIMITED...PLAINTIFF/1<sup>ST</sup> DEFENDANT TO COUNTERCLAIM**

**- VERSUS -**

**EUNICE NYABOKE NYARIBARI..COUNTERCLAIMING DEFENDANT/RESPONDENT**

**NIC BANK LIMITED.....2<sup>ND</sup> DEFENDANT TO COUNTERCLAIM/RESPONDENT**

**RULING**

Before me is the plaintiff/1<sup>st</sup> defendant to the counter claim application in the Notice of Motion dated 15<sup>th</sup> February 2021 filed herein on 18<sup>th</sup> February 2021 seeking firstly to arrest the judgement that was scheduled to be delivered on 4<sup>th</sup> March 2021 and secondly to reopen its case so that it can call evidence to rebut the defendant/plaintiff to counterclaim's counterclaim. The gist of the application is that the plaintiff/1<sup>st</sup> defendant to the counterclaim was prevented from attending court to lead its evidence by the conduct of its advocate one Mr. Odoyo who not only failed to attend court but did not diarize the case and whose services have as a result been terminated; that the application is brought in good faith; that the 1<sup>st</sup> defendant to the counterclaim's defence raises triable issues and it ought to be given an opportunity to ventilate it and further that the 1<sup>st</sup> defendant to the counterclaim stands to suffer a grave miscarriage of justice should it be condemned unheard but the plaintiff to the counterclaim will on her part not suffer any prejudice that cannot be compensated by an award of thrown away costs. The application is supported by the affidavit of Kiongo Murimi Advocate sworn on 15<sup>th</sup> February 2021 and a supplementary affidavit sworn by the same advocate on 5<sup>th</sup> March 2021.

In opposition to the application, Counsel for the defendant/plaintiff to the counterclaim filed an affidavit sworn by himself on 23<sup>rd</sup> February 2021. In the replying affidavit Counsel deposes inter alia that the application is merely intended to frustrate and delay the just determination of this case; that the applicant has previously made all manner of excuses in an effort to obstruct and derail the case and that the applicant was duly served with a notice but nevertheless failed to avail its witness and to present its evidence. Further, that when this court issued the date for judgement on 11<sup>th</sup> February 2021 he sent an email to Counsel for the applicant notifying him of the date and it is clear that the applicant has through its advocate all along been aware of the on-goings in this matter but have struck a common accord to frustrate it's just and expeditious determination in contravention of the express provisions of **Sections 1A and 1B of the Civil Procedure Act**. Counsel deposes that justice delayed is justice denied and the case should be allowed to proceed uninterrupted. Counsel also points out that communication in the case is sent to the official e-mail of the applicant's Advocate and Mr. Odoyo Advocate is merely being used as a scape goat. Counsel continues that the plaintiff and its advocates have self to blame and should not be allowed to exact further pain and hardship on the 1<sup>st</sup> Defendant who is a very old and ailing woman who has been painfully dragged to court to compel the Plaintiff to perform its contractual obligations which it has blatantly and flatly refused to discharge for no reasons; that the application dated the 15<sup>th</sup> day of February 2021 is replete of bad faith, lack of honesty and full of unclean hands. Counsel further deposes that at any rate, the negligence on part of the plaintiff's Advocates is now well taken care of by professional indemnity cover and it is just to allow the negligence to fall where it lies without making the innocent 1<sup>st</sup> Defendant to be a victim of the same. Counsel urged the court not to find any merit and/or favour with the instant application as it is an exemplary study case of an abuse of the court process for which this court should invoke its inherent power to prevent and refuse the perpetrators to partake of the benefit of such mischief. Further, that litigation must be allowed to come to an end.

The application proceeded by way of written submissions. I have carefully considered the rival submissions and the principles laid out in the cases cited thereat. There is no case that is exactly like the other hence the principle that each case must be decided on its own facts and merits.

In this case this court is faced with a very delicate balancing act between the rights of the applicant who to me has given a plausible explanation for not turning up in court when its case was scheduled for hearing and those of the respondent who has a right to have her case determined in a timely, expeditious, fair and just manner. It is also never the intention of a court of law to throw out a party from the seat of justice and doing the best I can in the circumstances the order that best commends itself to me is to allow the application so that the applicant/1<sup>st</sup> defendant to the counterclaim can adduce its evidence. That way the case will be decided having heard both parties. The application is therefore granted but taking into account the circumstances and the previous conduct of the applicant, I hereby order that the applicant/1<sup>st</sup> defendant to the counterclaim shall pay to the respondent/plaintiff in counterclaim thrown away costs of Kshs. 100,000/= (one hundred thousand shillings only) before the hearing date. It is so ordered.

**RULING SIGNED, DATED AND DELIVERED AT NYAMIRA ELECTRONICALLY VIA MICROSOFT TEAMS THIS 15<sup>TH</sup> DAY OF APRIL 2021**

**E. N. MAINA**

**JUDGE**