



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MURANG'A

CIVIL CASE NO. 2 OF 2020

[FORMERLY MURANG'A ELC NO. 12 OF 2020]

PETER MURIUKI NDEGWA.....PLAINTIFF

VERSUS

LETSHEGO KENYA LIMITED.....1ST DEFENDANT

ROSE NYAMBURA NGATUNYI.....2ND DEFENDANT

RULING

1. The 1st defendant is a Micro Finance Bank. It presented a Notice of Motion dated 18th August 2020 seeking to set aside or discharge the injunction granted on 14th August 2020. According to the applicant, the order stopped the auction sale of the property known as *Title Number Ntima/Igoki/6031*.

2. I think the description of the property is *defective* because the dispute in the suit is in fact over land known as *Ithanga/PhaseVI/314* registered in the name of the 2nd defendant. It is correctly identified in the original replying affidavit by the 1st defendant's legal officer, *Winnierohi Wafula*, sworn on 10th August 2020 as well as the letters of offer and charge between the 1st and 2nd defendants.

3. The history of the dispute will help to put the matter in perspective. The 1st defendant advanced the 2nd defendant a loan secured by a charge over her title known as *Ithanga/PhaseVI/314*. Unknown to the bank, the 2nd defendant had sold the land to the plaintiff for Kshs 1,250,000 vide a sale agreement dated 29th May 2012.

4. The plaintiff states that he paid the full purchase price in the year 2013 or thereabouts and took possession. He has since made extensive developments on the property for an upcoming hotel, *Dreamland Resort*.

5. The title was never transferred to the plaintiff for the obvious reason that it was encumbered. The plaintiff states that the 2nd defendant "misled" him that the title was lost. He said that owing to their "cordial relations", he agreed to be a guarantor to the 2nd defendant's loan of Kshs 3,000,000 from the 1st defendant. He claims he was deceived by the 2nd defendant.

6. The retort by the 1st defendant is that the plaintiff was named as a "next of kin" or "partner" in the lending instruments; and, that the two had "been friends for over 10 years". As the main suit is still pending, the less I say the better.

7. When the 2nd defendant defaulted in repayment of the loan, the 1st defendant sought to realize its security. When the sale was advertised by its auctioneers, the plaintiff initially filed a suit at the Environment and Land Court (hereafter, *the ELC*) at Thika as *ELC Case Number 49 of 2020* seeking injunctive relief. On 21st July 2020 the learned ELC Judge (*Gacheru J*) certified the matter urgent and directed that it be *transferred* to the ELC at Murang'a for hearing interparties on 3rd August 2020. The latter court was not sitting on that date. It is material that the file was issued with a new number as *Murang'a ELC Case Number 12 of 2020*.

8. Since the sale was slated for 19th August 2020, the plaintiff lodged a fresh certificate of urgency and the file was transmitted to the Nyahururu ELC on 3rd August 2020. On the same date, the learned ELC judge at Nyahururu (*Oundo J*) relying on the decision of the Court of Appeal in *Co-operative Bank of Kenya Ltd v Patrick Kangethe Njuguna & 5 others*, Mombasa, Civil appeal 83 of 2016 [2017] eKLR, found the ELC lacked jurisdiction in a matter challenging a charge debt. The learned judge therefore referred the dispute to the High Court sitting at Murang'a. It is also material that the file was issued with yet another number as *Murang'a HCCC Number 2 of 2020*.

9. The file was then placed before the vacation judge at Kerugoya (*Gitari J*) on 11th August 2020 who re-certified the matter urgent and fixed it for hearing interparties on 14th August 2020. On the latter date, the respondents did not appear despite being served two days earlier. The application was heard in their absence and the impugned injunction was issued pending the hearing and determination of the suit.

10. It is those orders that have precipitated the instant motion. The motion is fervently opposed by the plaintiff through a replying affidavit sworn on 17th September 2020.

11. Learned counsel for the plaintiff, *Mr. Mungai*, argued that the applicants had been served and were all along aware of the hearing date. He submitted that the present application does not reach the threshold of setting aside the impugned order. Furthermore, it would be unjust to expose the plaintiff to the risk of an irregular or unlawful auction. I was implored to dismiss the motion with costs.

12. The 2nd defendant, who remains the registered owner of the suit land, did not file a reply.

13. On 21st September 2020, I directed that the application be canvassed through written submissions. The 1st defendant and the plaintiff filed their submissions on 9th and 10th February 2021 respectively. On 13th April 2021 I heard some brief arguments from learned counsel for the two parties.

14. In view of the orders that I propose to grant, I must refrain from commenting on the merits of the original Notice of Motion or to delve too deep into the submissions.

15. The key issue for determination is whether the applicant has met the *threshold* for setting aside an *ex-parte* order. The law on that subject is well settled. This court has wide and *unfettered* discretion to set aside an *ex-parte* order. See *Shah v Mbogo (No. 1)* [1967] E.A 116, *Mbogo and another v Shah* [1968] E.A 93.

16. However, and as succinctly captured by *Harris J*, in *Shah v Mbogo (No. 1)* [supra], the discretion-

“is intended so 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”

17. See also *Kimani v Mc Connell* [1966] E.A 547, *Patel v East African Cargo Handling Services* [1974] E.A. 75, *Magunga General Stores v Pepco Distributors Limited* [1987] 2 KAR 89, *CMC Holdings Limited v James Mumo Nzioki*, Court of Appeal, Nairobi, Civil Appeal 329 of 2001 [2004] eKLR, *Wachira Karani v Bildad Wachira*, Nyeri HCCC No. 101 of 2011 [2016] eKLR.

18. In addition, the court must pay heed to the overriding objective to do justice to the parties. See *Harit Sheth Advocate v Shamas Charania* Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR, *Stephen Boro Gititha v Family Finance Bank & 3 others*, Nairobi, Court of Appeal, Civ. Appl. 263 of 2009 (UR 183/09) [2009] eKLR.

19. When I juxtapose those principles against the facts here, I find as follows. The applicant contends that it is the victim of the *confusion* that arose from constant transfers of the court files to *three* ELC registries and *two* High Court registries; the *re-numbering* of the cause; and, the fact that its replying affidavit by the 1st defendant’s legal officer, *Winnierohi Wafula*, sworn on 10th August 2020 was *not* considered. That affidavit was on the record when the impugned order was made on 14th August 2020.

20. On 14th August 2020, the learned Judge (*Gitari J.*) while granting the injunction stated as follows-

“They [defendants] have not appeared in court and have not filed any response to oppose the application. I therefore allow the application as prayed in prayers 3 & 4. I make no orders on costs”

21. As I have stated, the 1st respondent had already filed a replying affidavit by its legal officer, *Winnierohi Wafula*, sworn on 10th August 2020 and *filed on 17th August 2020*. I endeavoured earlier to demonstrate the constant *movement* or *renumbering* of the court file across registries at Thika ELC, Murang’a ELC, Murang’a High Court and Kerugoya High Court. It is not lost on me either that it was largely during the gazetted court recess. I also take judicial notice of the partial disruption of the court operations by *Covid-19 pandemic*.

22. To emphasize the issue, the original file folder now before me consists of *three* different court files involving the same parties: *Thika ELC No. 49 of 2020* opened on 17th July 2020; *Murang’a ELC 12 of 2020* opened on 21st July 2020; and, *Murang’a High Court 2 of 2020* issued on 20th August 2020.

23. Granted those facts, it is clear that the 1st defendant’s counsel was *partially* to blame for failure to attend court at Kerugoya on 14th August 2020. She does not dispute that she was served. But she faults it on her *honest belief* that the matter was before the *ELC Kerugoya* which was not sitting. She claims she was referred to the *Nyahururu ELC* Registry. She then avers, which I find strange, that *“counsel went to Murang’a Registry where they learnt of the current file number 2 of 2020 (as opposed to 12 of 2020) was proceeding in open court at Kerugoya High Court”*. Those matters are detailed at length in paragraphs 3 to 17 of the affidavit of *Angela Muhua* sworn on 18th August 2020.

24. In the end, I am unable to say that the mistake by counsel for the 1st defendant was *deliberate* or meant to *delay or obstruct* the course of justice. I have also found that the replying affidavit of the 1st defendant which was on record was not brought to the attention of my learned

sister, *Gitari J*, on 14th August 2020 who then found that the defendants “*had not appeared in court and have not filed any response to oppose the application*”. This may be explained by the fact that the reply was filed in *Thika ELC 49 of 2020* and which had now been renumbered as *Murang’a ELC 12 of 2020*.

25. Granted all of those facts and to ensure that the 1st defendant is not left holding the short end of the stick, I will exercise my *discretion* in its favour and *set aside* the impugned order. It is true that the plaintiff will be prejudiced by the re-opening of the application. But it is also in his interests that the issues be determined on *merit*. Furthermore, I am prepared to grant an order to maintain the *status quo* pending the hearing of the original notice of motion interparties.

26. My final orders shall be as follows-

- a) That I set aside the whole of the *ex-parte* order of injunction issued by the High Court at Kerugoya on 14th August 2020 which restrained the 1st defendant or its agents from auctioning the property known as *Ithanga/PhaseVI/314* and suspended the Redemption Notice and Notification of Sale both dated 9th June 2020.
- b) That the original Notice of Motion by the plaintiff dated 16th July 2020 shall now be heard interparties on a date convenient to the parties and that I shall now set on *priority*.
- c) That in the interests of justice, and pending that hearing interparties, the *status quo* now obtaining shall be maintained.
- d) That I grant the plaintiff costs of this application in any event.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG’A this 4th day of May 2021.

KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

No appearance by counsel for the 1st defendant/applicant.

Mr. Mungai for the plaintiff/respondent.

No appearance by the 2nd defendant.

Ms. Dorcas Waichuhi & Susan Waiganjo, Court Assistants.