



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CORAM: A. C. MRIMA, J.

CIVIL SUIT NO. 12 OF 2018

(Formerly Migori ELC NO. 102 of 2018)

BETWEEN

JOYSTAR CEREALS COMMODITIES LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

GROFIN SGB KENYA LIMITED.....DEFENDANT/APPLICANT

RULING

1. This ruling is in respect to the Notice of Motion dated 08/10/2018 filed by Defendant/Applicant on 15/10/2018 (hereinafter referred to as '**the application**') which seeks the following orders: -

1. THAT the Honourable Court be pleased to set aside the ex parte orders granted by this Court on 17th September 2018.

2. THAT costs be in the cause.

2. The application is premised on the 15 grounds appearing on its face and is supported by the Affidavit of **Betty Kageni**, an Advocate of the High Court of Kenya, sworn on 08/10/2018.

3. The application is opposed by the Plaintiff by way of a Replying Affidavit sworn on 02/11/2018 by one **Anne Wangechi Michael** who is a Director of the Plaintiff.

4. The background of the application is that on 30/08/2018 the Plaintiff filed **Migori ELC Case No. 102 of 2018** against the Defendant alongside a Notice of Motion dated 27/08/2018 (hereinafter referred to as '**the Motion**') which Motion sought conservatory orders restraining the Defendant from auctioning, selling, transferring, alienating and/or in other way interfering with the substratum of the suit being **L.R. No. Bukira/Buhirimono/1109** pending the hearing and determination of the case. Since the High Court and the Courts of equal status were on recess the file was placed before the Duty Judge then sitting in Kisii where the Court (**J. Mutungi, J.**) issued interim conservatory orders and fixed the *inter-partes* hearing of the Motion for 17/09/2018.

5. The application was then placed before the ELC Judge in Migori (**G. Ong'ondo, J.**) on 17/09/2018 where the Motion was allowed as prayed and parties ordered to comply with **Order 11** of the **Civil Procedure Rules** towards the full hearing and determination of the case. The record shows that on the same day at around 12:35pm Counsel for the Defendant **Miss B. K. Kageni** appeared before the Judge and indicated that she had been instructed by the Defendant to appear on its behalf and that morning she had been informed at the Registry that the file was still in Kisii and that Counsel was to be informed once the file was received only to realize later that the file had been placed before Court and proceeded *ex parte*. Since the Plaintiff's Counsel was then not before Court the Court fixed the matter for directions on 15/10/2018.

6. The Defendant then filed the application seeking to set-aside the *ex parte* orders of 17/09/2018. By way of the Supporting Affidavit, Counsel for the Defendant narrated the events that led to her non-appearance before Court as expected. The Plaintiff vehemently oppose the application on grounds that the file was before Court as expected and was called out in the absence of the Defendant whose representative was absent and that the Defendant did not show any sufficient cause for the non-appearance.

7. Counsels for the parties proposed, and with the concurrence of this Court, the application was heard by way of written submissions where both parties complied and thereafter highlighted on the submissions. Both Counsels referred to several decisions in support of their rival submissions.

8. I have certainly perused and understood the contents of the application, the Replying Affidavit, the parties' submissions and the decisions referred thereto. Although the application did not indicate the provisions of the law under which it was taken out, it is not in doubt that the power of this Court to deal with the application is donated by **Order 12 Rule 7** of the **Civil Procedure Rules** (hereinafter referred to as '**the Rules**').

9. As settled in diverse jurisprudence, the core consideration in applications for setting aside of *ex parte* decrees or orders is two-fold. Either, the Applicant was not properly notified of the matter or that sufficient cause has been demonstrated why the Applicant's failed to attend Court.

10. In this case there is no contest that the Applicant was timeously served with the application. The Affidavit of Service sworn by one **Benson Mutinda**, a Process Server, confirm that the Defendant was served on 05/08/2018 with *inter alia* the application and the Order fixing the application for hearing on 17/09/2018. Indeed, the Defendant concedes service. That therefore leaves the seconds issue for consideration as to whether the Defendant has demonstrated sufficient cause.

11. My Sister **Aburili, J.** in **Gideon Mose Onchwati vs. Kenya Oil Co. Ltd & Another (2017) eKLR** after considering a chain of decisions rightly so summed up what sufficient cause is in the following words: -

36. sufficient cause is thus the cause for which the defendant could not be blamed for his absence.....

12. The sufficient cause must hence be demonstrated by the Defendant and it all depends on the circumstances of a case. In the words of the Learned Judge in the **Gideon Mose Onchwati** (supra) '**.....sufficient cause is a question of fact and the court has to exercise discretion in the varied and special circumstances in the case at hand. There cannot be a strait-jacket formula of universal application. Therefore, that the defendant must demonstrate that he was prevented from attending court by a sufficient cause...**'

13. In exercise of the discretion in setting-aside applications, a Court must always endeavour to strike a balance between the calling in **Article 50** of the **Constitution** not to impede on a fair trial on one hand and on the other hand the calling that a Court must always promote the expeditious delivery of justice in line with **Article 159(2)(b)** of the **Constitution**. That delicate balance is always dependent on the particular circumstances of a case.

14. In this case Counsel for the Defendant contend that she was informed at the Registry in the morning of the day the matter was set for hearing that the file was still in Kisii and that she was to be informed once it was received. Whereas the reason seems convincing for the onset it must nevertheless be put on a weighing scale. The starting point when one is notified of a date in a matter is the Cause List. The judiciary in embracing technology as an enabler of justice maintains an electronic Cause-List system through the Kenya Law. Unless otherwise proved all Cause Lists are deemed posted online well in advance. Apart from the online Cause List, Courts also maintain daily Cause Lists which are displayed on the Notice Boards and which are readily available at the Customer Desk as well. As a matter of fact, Counsel for the Defendant did not indicate that the matter was not in the day's Cause List. On its part, the Plaintiff confirm, and in consonance with the record, that the matter was called out in the ordinary manner and accordingly dealt with way before Counsel for the Defendant appeared in Court at 12:35pm.

15. A Counsel as an Officer of the Court aids in the administration of justice including ensuring that parties are always given an opportunity to present their cases before Courts. If it is true Counsel for the Defendant was in Court early enough nothing restrained her from raising the matter with the Court for appropriate directions. Further, the Plaintiff satisfied the Court through the Affidavit of Service sworn by one **Benson Mutinda** that the Defendant had been served for the hearing. The Affidavit of Service was filed on 17/09/2018 meaning that the Court file had always been available.

16. Upon carefully weighing the Defendant's Counsel explanation of her absence, and with tremendous respect, I am not convinced by the said explanation to the effect that the Court file was not available as alleged. Given that Counsel spent in Kisumu on the eve of the hearing there is a high likelihood that she arrived in Court late. The foregone is fortified by the address of the Counsel for the Defendant when she appeared before Court and stated that she had earlier on asked another Counsel to find out the availability of the Court file and who informed her that she had been informed that the file was still at Kisii. The other Counsel however did not swear an affidavit to that end.

17. I must now ask myself whether on one side declining the application will curtail fair hearing on the part of the Defendant or on the other side whether allowing the application will unreasonably delay the hearing and determination of the case. First, by the time the Motion was heard on 17/09/2019 the Defendant had not filed any opposition thereto despite of service on 05/08/2018. That is a period of 12 days and there is no explanation why the Replying Affidavit was not filed before the day of the hearing. Second, the matter revolves around the realization of a security by the Defendant. The matter was placed before the Court in the first instance and the Court was satisfied that there were *prima-facie* reasons to carry out an enquiry into the parties' relationship and hence issued interim *ex parte* orders.

18. Third, the Court had on 17/09/2018 directed the parties to comply with **Order 11** of the **Civil Procedure Rules** towards settling the matter for hearing. Fourth, the suit was instituted on 30/08/2018 and by now one year has already lapsed while parties are still dealing with proceedings relating to the Motion, which is the first interlocutory application filed together the Plaint, over a year ago. Unfortunately, this suit has by now become part of the backlog. Fifth, the overriding objective of the law is to facilitate the just, expeditious, proportionate and affordable resolution of disputes and this Court is duty-bound and may even opt not to entertain any interlocutory applications. In declining an application for extension of time, the Court of Appeal in **Stephen Boro Gitihia vs. Family Finance Building Society & 3 Others (2009) eKLR** expressed itself thus: -

.....I must warn litigants and counsels that the courts are now on the driving seat of justice and the courts in my opinion have a new call to weed out as far as practicable the scourge of civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes. If then often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the 'new broom' of overriding objective to bring cases to finality, by declining to hear unnecessary applications and instead to adjudicate on the principal issues in a full hearing if possible....

19. Sixth, the issues for consideration at the interlocutory stage and during the main hearing of the suit are more or less similar. Both parties will therefore have an opportunity to present their cases and non will be prejudiced.

20. I by now believe that the foregone discussion has chatted the best way forward in this matter. Despite the Defendant failing to demonstrate any sufficient cause for non-attendance still the scales of justice herein favour the approach of hearing the main suit once and for all. I will wholeheartedly settle for that approach.

21. Having considered the application and with a view to foster a quick resolution of this matter I hereby issue the following orders: -

(a) The Notice of Motion dated 08/10/2018 is hereby dismissed with costs.

(b) Parties shall comply with **Order 11** of the **Civil Procedure Rules** within 30 days and this matter is hereby fixed for Pre-Trial Conference on .../11/2019.

Orders accordingly.

DELIVERED, DATED and SIGNED AT MIGORI this 19th day of September 2019

A. C. MRIMA

JUDGE

Ruling delivered in open Court and in the presence of: -

Mr. Kiingati, Counsel instructed by the firm of Kiingati Ndirangu & Associates Advocates for the Defendant/Applicant.

Mr. Mariaria, Counsel instructed by the firm of Mariaria & Company Advocates for the Plaintiff/Respondent.

Evelyne Nyauke – Court Assistant.