



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 332 OF 2010

JOYCE MUMBUA MUTISYA.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK.....DEFENDANT

RULING

1. This is a Ruling arising from the plaintiff's Notice of Motion dated 12.10.2018 seeking for the following Orders:

a) spent

b) That the orders of 8.10.2018 dismissing the suit and all consequential orders and/or proceedings be set aside and the matter be reinstated for full hearing.

c) That an appropriate order on costs be made.

2. The grounds supporting the application are contained in the affidavits of **Thomas Odhiambo Atego** and **Lawrence Obonyo, Advocate** who both describe themselves as advocates of the High Court. The same are grounds also set out on the face of the application.

3. It is deponed that on the 8.10.2018 this suit was dismissed due to failure by the Plaintiff to comply with the courts directions as to the filing of witness statements, list of bundle of documents list of witnesses as agreed in this matter issued on the 13.6.2018.

4. It is deponed further that the directions issued on the 13.6.2018 were complied with on the 5.10.2018 and the said documents served upon the Respondent. However, the said document were never placed in the Court file as the Court file had been taken to the Honourable Judge In preparation for the matter that was coming up on the 8.10.2018.

5. It is added further that the said pleadings were retained at the registry to be placed in the Court file when the matter was to be called out. Unfortunately, on the 8.10.2019, the Counsel requested to hold brief did not make it on time to Court and as a result the Court was not informed that there had been compliance of its directions issued on the 13.6.2018 leading to this suit being dismissed for failure to comply with its directive issued on the 13.6.2018.

6. Counsel avers that it was an honest mistake on his part and the same should not be visited upon his innocent client. Further, it is deponed that the subject property Kwale/Ukunda/3680 belonging to the Plaintiff is at risk of being sold via auction and the Plaintiff has not yet had her day in Court and it is in the interest of Justice that the Plaintiff is not to be condemned unheard.

7. The Defendant/Respondent opposed the Application by its grounds of opposition dated 23.11.2018. It was stated that the Plaintiff's Application is bad in law, incurably defective, lacks merit, and is a gross abuse of the Court process in that this Court having issued final orders in this case, the Court is *functus officio* and the Applicant's Application is solely meant to delay the conclusion of the matter and put the Defendant at ransom.

8. The parties filed submissions in support of their respective arguments on the application. After consideration of the notice of motion, written submissions and authorities cited, I am of the view that the only issue for determination in the present application is whether there is a basis for the court to exercise its discretionary power to set aside the order of 8/10/2018 and reinstate this suit.

Determination

9. **Section 3A** of the Civil Procedure Act gives this court inherent jurisdiction to make such orders as may be necessary for the ends of justice

to be met. Order 51 Rule 15 of the Civil Procedure Rules gives the court power to set aside any order made *ex parte*. The court's discretionary power should, however, be exercised judiciously, with the overriding objective of ensuring that justice is done to all the parties.

10. The guiding principle in the court's exercise of this judicial discretion was laid down in **Mbogo & Another Vs Shah EALR 1908** to the effect that court's discretion to set aside an *ex-parte* order in the nature of a dismissal order is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error. In the same vein, the discretion is not intended to assist a litigant who has deliberately sought to obstruct or delay the course of justice.

11. In the present suit, the Court's directions were issued within the framework of Order 11 Rule 3(2) (j) and (o) (i) of the Civil Procedure Rules, 2010 where under which the court is empowered to among other things; give any suitable directions to facilitate expeditious disposal of the suit or any outstanding issues; make any such orders as may be appropriate including striking out the action or defence.

12. The orders 13.06.2018 were out of concession by the defendant's advocate by which it abandoned the pursuit of an application to dismiss for want of prosecution so as to help move the suit forward. The abandoned application was invited by the plaintiff's failure to take steps to prepare the suit for hearing. As a result of such concession and taking into account the age of the case the plaintiff was tasked with the duty to file its papers, which were in fact due for filing with the plaintiff, within a set timeline and time made to be of essence. Those orders were by agreement of the parties.

13. After the Court adopted the said consent by the parties and the Defendant Application was abandoned, it directed the Plaintiff to file and serve its witness statement and documents within 30 days from the 13.6.2018. The Defendant had concurrent leave to file and serve witness statements and documentation within 30 days after service by the Plaintiff. It was further directed that within 90 days from the 13.6.2018 or 30 days after the 13.8.2018, parties would settle and file a list of agreed issues and would then attend Court on the 8.10.2018 for case conference. Time was to be of the essence.

14. When the matter came up in court on 8.10.2018, both the plaintiff and its advocate were absent despite being aware that the matter was slated for case conference. Furthermore, it was brought to the attention of this Court that the Plaintiff had not complied with the directions of this Court issued on the 13.6.2018 for which reason the Defendant prayed that the suit be dismissed with costs. Consequently, the Court dismissed the Plaintiff's claim on account of failure to comply with the directions of the Court calculated to move the suit forward, it being held that the defendant and counsel had breached their obligation to Court.

15. I have deeply reflected on the legal ramifications of locking the plaintiff out of the seat of justice on account of her failure to comply with the pre-trial direction issued on the 13.6.2018. The question is whether the Plaintiff herein is entitled to a favourable exercise of discretion by this court despite his omission and bearing in mind that it had been indicated to the parties that time was to be of the essence.

16. Njagi, J (as he then was) in **Kahumbu v National Bank of Kenya E.A.L.R (2003) 2 E.A 475-484**. Referred to the ruling of **Hytex Ltd v Coventry City Council [1977] 1 WLR 1666** in which Ward, LJ held;

“An unless order is an order of last resort. It is not made unless there is a history of failure to comply with other orders. It is the party's last chance to put his case in order. Because that was his last chance, a failure to comply will ordinarily result in the sanction being imposed.”

In dismissing the application by the defendant in the suit, Njagi, J held *inter alia*;

“A defaulter can only escape the consequences of judgment given against him if he can demonstrate that there was no intention to flout or ignore a court order and that the failure to obey was due to extraneous circumstance.”

17. Clearly, the Plaintiff in the Application for reinstatement has not given any satisfactory reason for the failure to comply with the orders issued on the 13.6.2018. It is startling that the Plaintiff maintains that the said orders of the 13.6.2018 were complied with and that their only mistake/oversight was not having the said documents in the Court file and the non-attendance of their counsel when the matter came up for case conference on the 8.10.2018.

18. An attempt was however made by the Plaintiff counsel to explain the reason for the delay. Unfortunately, the said attempt was in the Plaintiff written submissions at paragraph 4 where it is stated that the Plaintiff had a seizure disorder that caused her memory impairment. It is trite law that submissions cannot take the place of evidences. In the circumstances, it would not be far-fetched for this court to opine that her advocate failed her by treating the issues of compliance with this Court's direction in a very casual manner especially where it was clearly stated that time was of the essence.

19. **Order 11 Rule 7(3)** of the *Civil Procedure Rules* provides that;

“Any party or his advocate who willfully fails or omits to comply with the provisions of this Order shall be deemed to have violated the overriding objective as stipulated in Section 1A and 1B of the Act and the court may order costs against the defaulting party unless for reasons to be recorded, the court orders otherwise”.

20. From the foregoing, it is not satisfactorily explained why the Plaintiff was unable to comply with the directions issued on 13.6.2018 and I do find that there was a clear failure to meet the duty to court. The time given to the applicant, to my mind, was sufficient and ample, and the applicant should have been able to comply with the orders. This is an old matter, having being filed in 2010. It would have been in the best interest of all concerned parties to have the matter expeditiously heard and determined.

21. The inherent jurisdiction vested in this court is meant to ensure the ends of justice are achieved. The Court's discretion to enlarge time as provided under **Section 95** of the *Civil Procedure Act*, and in furtherance of the overriding objectives as provided under **Section 1A and 1B** of the same Act, cannot, in light of the foregoing circumstances, be exercised to extricate the Plaintiff from its own deficiencies. See *Karuturi Networks Ltd & Anor. Vs. Daly & Figgis Advocates, Civil Appl. NAI. 293/09.* **This court differently constituted had the following to say:**

“The jurisdiction of this Court has been enhanced and its latitude expanded in order for the Court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective..... and its principal aims. In our view, dealing with a case justly includes inter alia reducing delay, and costs expenses at the same time acting expeditiously and fairly. To operationalize or implement the overriding objective, in our view, calls for new thinking and innovation and actively managing the cases before the court, including the granting of appropriate interim relief in deserving cases.”

22. The Plaintiff having failed to comply with the Court's directions and Orders of 13.6.2018, she is **deemed** to have violated the overriding objective as stipulated in Section 1A and 1B of the Act. Consequently, the Plaintiff is not deserving of discretionary reliefs from the court. As a result the application dated 12.10.2018 lacks merits and is hereby dismissed, with costs to the Defendant.

Dated, signed and delivered at Mombasa this 13th day of December 2019

P J O OTIENO

JUDGE