REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL SUIT NO. 5 OF 2017

PETER KIPLAGAT RONO.....PLAINTIFF/APPLICANT

VERSUS

FAMILY BANK LIMITED.....DEFENDANT/RESPONDENT

RULING

1. The applicant filed this suit on 29th May 2017. He averred in the plaint that sometimes on or about 13th September 2013, he had taken a loan facility of Kshs.2,000,000/- from the defendant with the title to property No. Kericho Municipality Block 1/355 being used as security. He paid the said Kshs.2,000,000/- plus interest but the title to the property was never returned. He then took a further loan of Kshs.18,000,000/- against the security of the title to property title No. Kericho Municipality Block 5/591. He paid the said loan until August 2015 when he had some financial difficultes. He avers that he has on several ocassions found willing purchasers but the defendant has refused to release the title to the property.

2. He had thereafter received a statutory notice from the defendant demanding that he repays the sum of Kshs.24,187, 536.52 plus arrears of kshs.2,254,152.11/- within 40 days failing which the bank would exercise its statutory power of sale. He contends in his plaint that the amount demanded by the defendant is obscenely hgh and in total contravention of the in duplum rule. He therefore seeks judgment in his favour in terms of the prayers set out in the plaint.

3. Together with the plaint, the plaintiff filed an application brought by way of Notice of Motion dated 29th May 2017 in which he sought the following orders:

> ***(a) That this application be certified as urgent and service of the application be dispensed with in the first instance.***
>
> ***(b) That this honourable court be pleased to issue a temporary injunction compelling the respondent to release the applicant's title registration number Kericho Municipality Block 1/355 pending the hearing and determination of the application and the main suit.***
>
> ***(c) That this honourable court be pleased to issue a temporary injunction restraining the respondent by itself, its agents/servants from selling, interfering or in any way disposing the applicants parcel of land number Kericho Municipality Block 1/355 pending the hearing and determination of this application and the main suit.***
>
> ***(d) That this honourable court be pleased to issue a temporary injunction restraining the Respondent by itself, its agents/servants from selling interfering or in any way disposing the applicant's parcel of land number Kericho Municipality Block 5/591 pending the hearing and determination of this application and the main suit.***
>
> ***(e) That costs of the application be provided for.***

4. The application, which was supported by an affidavit sworn by the applicant on 29th May 2017, was certified urgent and was placed before the Hon. Justice Muya on 29th May 2017 when interim orders were granted.

5. The defendant/respondent entered appearance on 12th June 2017 through the firm of Maina & Onsare Company Advocates. It filed its Grounds of Opposition dated 12th June 2017 and a stetement of Defence dated 20th June 2017. It further filed a Notice of Preliminary Objection dated 7th June 2017 and a Replying Affidavit dated 22nd June 2017. The application was scheduled for hearing on 18th July 2017.

6. On that date, however, the applicant was not ready to proceed with his application as he had not filed his affidavit in response to the respondent's affidavit, though he had been served on time. He was granted time to file his reply and the application was re-scheduled for hearing on 16th October 2017.

7. When the matter came up for hearing as scheduled, Learned Counsel, Mr. Kiprono, who was holding brief for Mr. Achola for the applicant, indicated that the applicant was not ready to proceed with his application and sought an adjournment of the application. The reason advanced was that Mr. Achola's home had been invaded by looters the previous week and he was therefore not able to attend court since he was unsafe.

8. In response, Mr. Onsare, Learned Counsel for the respondent observed that the application was dated 29th May 2017 and had been filed under certificate of urgency. The applicant was enjoying interim orders from 29th May 2017 and had stopped making any monthly payments towards servicing his loan facility. Mr. Onsare contended that the applicant had not treated the application with urgency.

9. Mr. Onsare further informed the court that Mr. Achola had called him the previous week to inform him that he would not be in a position to attend court on the day slated for the hearing of the application as he would be travelling home. Mr. Onsare submitted that the reasons advanced for adjourning the matter were insufficient as there was no attack on Mr. Achola's person. He had travelled all the way from Nairobi and was ready to proceed. In reply, Mr. Kiprono stated that Mr. Achola had been attacked but his office was not attacked. He wa only holding brief for Mr. Achola, and he prayed that the application be canvassed by way of written submissions.

10. Upon considering the reasons advanced by Mr. Kiprono on behalf of Mr. Achola, the court was not satisfied that an adjournment was merited, and it directed that the matter proceeds that day at 12.00 p.m. At 12.20 p.m., neither Mr. Kiprono nor Mr. Achola was present in court, and the application was accordingly dismissed.

11. It is the dismissal of the application dated 29th May 2017 that precipitated the present application dated 17th October 2017 in which the plaintiff/applicant seeks the following orders:

(a) …spent.

(b) That there be stay of dismissal of the application dated 29th May 2017 pending the hearing and determination of the present application inter parties.

(c) That this court be pleased to order that the interim orders of injunction issued on 29th May 2017 be operative and be extended pending the hearing and determination of the present application inter partes.

(d) That the Honourable court be pleased to reinstates the applicant's application dated 29th May 2017 which was dismissed on 16th October 2017, for non-attendance and be settled for hearing inter parte.

(e) That the costs of the application be provided for.

(f) That the costs of the Application be in the cause.

12. The application is brought under section 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, Order 12 Rule 7 and Order 51 of the Civil Procedure Rules, and is based on the following grounds which I reproduce verbatim:

(a) That the application dated 29th May 2017 was scheduled for inter partes hearing on 16th October 2017

(b) That counsel, one Kiprono who was holding our brief took time allocation from the court in which he was to argue the application at 1200 hrs.

(c) That the court allocated 1200 hrs in which the 2 counsels were to be heard by the court.

(d) That immediately after the time allocation the counsel the said, Mr. Kiprono rushed to the Environment and Land Court where he had another matter slated for hearing, in the hope of concluding the same before 1200 hrs.

(e) That unfortunately the matter at the Environment and Land Court proceeded beyond the said 1200 hrs and the counsel could not manage to attend hearing of the application dated 29th May 2017.

(f) That for the interest of justice, the honourable court reinstate the applicant's application as the applicant's land parcel Kericho/Municipality Block 1/355 and Kericho/Municipality Block 5/591 is at risk of being illegally sold by the respondent at any time.

(g) That it is in the interests of justice and the overriding objective of the law that the orders sought herein be granted.

13. The application is supported by the affidavit sworn by the plaintiff/applicant, Peter Kiplangat Rono on 17th October 2017. Mr. Rono deposes in the said affidavit that the application dated 29th May 2017 was scheduled for hearing on 16th October 2017. The Counsel who was holding brief for his advocate had a matter at the Environment and Land Court which he believed would be concluded before 12:00 noon, the time slated for the hearing of his application

14. The said advocate was still engaged in the Environment and Land Court at the time the application was slated for hearing, as a result of which his application was dismissed by this court for non-attendance. He avers that the mistakes of Counsel should not be visited upon the

litigant, and he prays that the court reinstates the application dated 29th May 2017 and sets it down for hearing as his properties Kericho/Municipality Block 1/355 and Kericho/Municiplaity Block 5/591 are at risk of being illegally sold by the respondent. He also prays that the court does stay the orders of dismissal of the application dated 29th May 2017 issued on 16th October 2017 and that the orders of injunction issued on 29th May 2017, be operative.

15. The defendant/respondent filed a replying affidavit sworn by one David Onsare on 14th November 2017. Mr. Onsare deposes that he is the advocate with personal conduct of the matter and therefore has the authority of the defendant/respondent to swear the affidavit on its behalf. He deposes that the application before this court is fatally defective, devoid of merit, vexatious, brought in bad faith and therefore ought to be dismissed. He contends that the applicant has not come to court with clean hands and is therefore not deserving of the reliefs sought.

16. Mr. Onsare denies the assertion by the applicant in paragraph 3 of his supporting affidavit and depones that the plaintiff's lawyer, Mr. Ochola, had instructed another advocate, Mr. Kiprono, to hold his brief and adjourn the matter as he had allegedly been attacked by thugs at his Kisumu home and could not attend court. He deposes further that Mr. Ochola had on 10th October 2017 called him indicating that he would not be in a position to proceed but Mr. Onsare advised him to sort out his issues before the date of the hearing on 16th October 2017, which Mr. Onsare deposes was ample time for him to sort out his issues.

17. Mr. Onsare further deposes that the plaintiff, instead of asserting simply that Mr. Kiprono was attending to a matter before the Environment and Land Court should have gone further to indicate the case number of the matter and the parties involved. He avers that Mr. Kiprono had stated before court on the moring of the hearing that Mr. Achola was not ready to proceed as he had been attacked by thugs at his Kisumu home, which is why the matter had been set for hearing at noon of the same day. Mr. Onsare averred that he had travelled all the way from Nairobi to prosecute the matter. When the matter came up for hearing at noon as scheduled, neither Mr. Kiprono nor Mr. Achola were in court and the court therefore dismissed the matter for non-attendance.

18. Learned Counsel further deposed that the applicant had obtained interim orders in May 2017 but had not, to date, made good the outsatnding loan arrears or taken any steps to expedite the hearing of the matter. He contended that the applicant's conduct was geared towards continued enjoyment of the interim orders in perpetuity while the facility continues to accrue. The applicant had been afforded ample opportunities to present his case but has instead resorted to a cat and mouse game to benefit himself. According to Mr. Onsare, the affidavit in support of the application contains lies calculated to evoke emotion and 'endear the applicant's blatant and utter disrespect for the court' (sic) at the defendant's expense. Mr. Onsare prayed that this application be dismissed with costs.

19. The court directed parties to file submissions in support of their respective cases which they requested the court to rely on in rendering its decision.

The applicant's submissions

20. In his submissions dated 23rd November 2017, Counsel for the applicant, Mr. Achola, submitted that it would be unjust for the court to apportion blame on the applicant and deny the hearing of his application on merit for non-attendance by the applicant's Counsel. He submits that what happened was an inadvertent mistake of the advocate holding brief who honestly believed he could have concluded his matter at the Environment and Land Court. He argues that the mistake was an honest miscalculation and should therefore not be visited upon the applicant.

21. According to Mr. Achola, Order 12 Rule 7 of the Civil Procedure Rules gives the court discretion to set aside or vary a judgment in which a suit has been dismissed under Order 12. He relies on the decision in **Philip Keipto Cemwolo & another vs Augustine Kubende [1986]eKLR** for the principles that should guide this court in exercising its discretion under Order 12 Rule 7. He also cites the case of **CMC Holdings Ltd vs Nzioki [2004] KLR 173** to assert that judicial authority must be exercised judiciously and upon reason.

22. M. Achola further urges the court to read and aply the letter and spirit of Article 159 (2) (d) of the Constitution and administer justice without undue regard to procedual technicalities. He submits that the non attendance of the applicant's Counsel was not occasioned by the applicant's own doing and therefore, bearing in mind the powers under section 3A of the Civil Procedure Act, it is only fair that the applicant's application be heard and determined on merit, and that applicants ought to be heard on merit irrespective of the errors made by their advocates. He urges the court to allow the application with costs to the respondents.

Submissions by the respondent

23. In submissions dated 8th December 2017, the respondent argues that the application dated 29th May 2017 had been filed under certificate of urgency and there were orders in the nature of injunctions in place. The idea behind filing an application under certificate of urgency is to get the court's attention and not to get orders and sleep on them. It was incumbent on the applicant to act equitably and exhibit good will and not the converse. The applicant was under a duty to expedite his application and ensure that it was heard and determined as a matter of urgency.

24. The respondent argues that the applicant had failed to explain the non attendance of his Counsel by attaching proof that the Counsel was before another court. No cause list was attached to prove the existence of a matter to which learned Counsel, Mr. Kiprono, was attending. The applicant had a duty to prove that the non-attendance by Counsel was a mistake and not deliberate.

25. It was the respondent's submission that the non-attendance by his Counsel was part of a grand scheme by the applicant and his advocate to frustrate the hearing and determination of the application dated 29th May 2017. The respondent relied on **Savings and Loans Limited vs Susan Wanjiru Muritu Nairobi (Milimani) HCCS No. 397 of 2002** in suppiort of his assertion that it is not every case where the mistake was made by the advocate that would be a ground for setting aside orders. The applicant had not himself demonstrated any personal initiative

in the absence of professional concern and due diligence on the part of Counsel.

26. It was also submitted on behalf of the respondent that the minute an advocate holds brief in a matter, he takes the position of Counsel on record. It was therefore expected that Mr. Kiprono, in default of Mr. Achola's appearance, would proceed with the hearing of the application. Reliance was placed on the decision in **Kenya Toner and Suppliers Limited vs Director of Weights and Measures Minister of Trade & Industry & Attorney General [2012] eKLR** in which the court stated that an advocate holding brief had full authority in the eyes of the court to prosecute the matter.

27. It was the respondent's submission that the applicant's intention was to frustrate and delay access to justice by the respondent which amounted to fraudulent litigation with the sole aim of misleading the court to satisfy his expectations. Reliance was placed on the case of **Philip Keipto Chemwolo (supra)** in support of this assertion. It was the respondent's contention that it continued to be frustrated by the applicant who has refused to honour his contractual obligations in the guise of existence of court orders and urged the court to dismiss the application with costs.

Analysis and Determination

28. I believe the sole issue before me is whether the court should set aside its orders of 16th October 2017 and reinstate the application dated 29th May 2017. I have already set out above the averments and submissions of the parties in this matter with respect to the events of 16th October 2017. The applicant has relied on Order 12 Rule 7 of the Civil Procedure Code which provides as follows:

> ***7. Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.***

29. Further, section 3A of the Civil Procedure Act provides for the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process. It provides as follows:

> ***Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.'***

30. The court has discretion to set aside a judgment or order. The exercise of this discretion is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. In **Shah vs Mbogo & Another (1967) EA 116**, it was held that:

> ***"The discretion to set aside an exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice".***

31. In his decision in **Haji Ahmed Sheikh t/a Hasa Hauliers vs. Highway Carriers Ltd (1982 – 88) 1 KAR 1184**, Gachuhi JA stated as follows:

> ***"The powers of the court in dealing with application under order IX rule 10 is to do justice to the parties. In Pithon Waweru Maina vs Thuku Mugiria, Civil Appeal No. 27 of 1982 (unreported) (ibid) (Porter, Kneller, JJ.A. and Chesoni, Ag. J.A.) Potter, J.A. in quoting Duffus, P., in Patel vs E.A. Cargo Handling Services Ltd., (1974) E.A. 75 stated at page 1 of his judgment this:***
>
> > ***'There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just' …. The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules'.***

32. In the present case, the applicant seeks an order setting aside the orders made in this court on 16th October 2017 dismissing his application dated 29th May 2017. As observed earlier, the application in question had been brought under certificate of urgency, and an ex parte order against the defendant/respondent granted. The application was thereafter fixed for hearing on 18th July 2017.

33. Though the applicant was served with a defence and a reply to his application, he was not ready to proceed as his Counsel had not filed a reply to the response by the respondent. The applicant was given more time to file his reply, and the application fixed for hearing on 16th October 2017, three months after the application had been scheduled for hearing, and five months after the application was filed and interim orders granted.

34. On the day scheduled for hearing of the application, Mr. Kiprono who was holding brief for Mr. Achola for the applicant requested for an adjournment on the ground that Mr. Achola's home had been attacked the week before and he felt unsafe. Mr. Onsare opposed the application and informed the court that six days before the hearing date, on 10th October 2017, Mr. Achola had indicated his intention to seek an adjournment, on the basis that his house had been attacked and he was not safe. Mr. Onsare therefore opposed the application for an adjournment. When the matter, which had been scheduled for hearing at 12.00 p.m was called out at 12.20 p.m and neither Mr. Achola nor Mr. Kiprono was present, Mr. Onsare moved the court to dismiss the application.

35. Given the above set of facts, the question is whether the reasons advanced by the applicant amount to 'sufficient reason' to justify the exercise of the court's discretion in favour of the applicant.

36. It is notable that the excuse or reasons advanced on oath by the applicant is that Mr. Kiprono was engaged in a matter before the Environment and Land Court. That he was still engaged in that matter when the matter came up for hearing at 12.20 p.m. It is noted that no cause list for the Environment and Land Court was attached to the applicant's affidavit. No mention was made of the matter that Mr. Kiprono was involved in, or the parties thereto. More importantly, this is contrary to what Mr. Kiprono had personally told the court when the matter was first called out. The view that this court takes is that the applicant is not being honest, and has deposed to matters that are not true.

37. In the case of **Philip Chemwolo & Anor. vs Augustine Kubende (supra)** Apaloo J stated that:

> ***"I think a distinguished equity Judge has said:***
>
> ***'Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on the merits'.***

38. However, in this case, I am not satisfied that the applicant merits the exercise of discretion in his favour. The delay in prosecuting his application, which had been brought under certificate of urgency and ex parte orders issued is, in my view, not excusable. That the applicant then swears an affidavit that suggests untruths on his part, and his advocate gives excuses for not prosecuting his matter that are really not tenable, suggests an intention to delay the prosecution of the application. Yet he had in force ex parte orders in his favour. While it is true that the objective of the court is to do justice, such justice must cut both ways.

39. It has been submitted that the error of the advocate should not be visited on the applicant. This, indeed, has been held by our courts to be the case. However, an advocate is the agent of the litigant, and where the advocate is guilty of inaction, as the agent of the litigant, the litigant will bear the consequences of his advocates inaction. In its decision in **The Council, Jomo Kenyatta University of Agriculture and Technology vs Joseph Mutuura Mbeera & 3 Others [2015] eKLR**, the Court of Appeal (Waki JA) stated:

> ***"In this case, however, the applicant's advocates simply plead ignorance and consequential inaction which cannot avail them. This Court said so in Rajesh Rughani – Vs- Fifty Investment Ltd. & Another (2005) eKLR:-***
>
> > ***"If the Advocate was simply guilty of inaction that is not excusable mistake which the Court may consider with some sympathy".***
> >
> > ***In the case of Bains Construction Co. Ltd. -Vs- John Mzare Ogowe 2011 eKLR this Court also observed:-***
> >
> > > ***"It is to some extent true to say mistakes of Counsel as is the present case should not be visited upon a party but it is equally true when Counsel as agent is vested with authority to perform some duties as principal and does not perform it, surely such principal should bear the consequences".*** (Emphasis added)

40. In conclusion, I find that the application before me is not merited. It is hereby dismissed with costs to the respondent. The applicant may proceed with his substantive claim against the defendant as set out in his plaint dated 29th May 2017.

Dated Delivered and Signed at Kericho this 3rd day of October 2018

MUMBI NGUGI

JUDGE