REPUBLICOF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 331 OF 2005

COOPERATIVE BANK OF KENYA .....PLAINTIFF

-VERSUS-

PETER KIMANI.....DEFENDANT

RULING

[1] The Notice of Motion dated **3 June 2016** was filed herein on **6 June 2016** by the Defendant under **Sections 1A, 1B and 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya** and **Order 12 Rule 7 of the Civil Procedure Rules** seeking for the following orders:

[a] spent

[b] spent

[c] That the judgment entered in this case on **19 December 2014** and all orders consequential to the said judgment be set aside;

[d] That this case be remitted for fresh hearing *inter partes;*

[e] That the costs of the application be provided for.

[2] The grounds relied upon by the Defendant are that the hearing and the consequent judgment were made without his knowledge, as he was then indisposed and that his erstwhile Advocates never informed him of the hearing date. It was his case that he stands to suffer irreparably unless the orders sought are granted since the loan that is the subject of case had been recovered from the sale of the charged property; and that the circumstances leading to his failure to attend court were beyond his control. In his supporting affidavit sworn on **3 June 2016**, he averred that he was unaware, until the **10 May 2016**, when a Secretary from the firm of **Nyachoti & Co. Advocates** called him and advised him that there was a judgment against him in this case and that execution was imminent. He added that when he confronted his advocates then on record, **Mr. Nyachoti**, the latter expressed his intention to withdraw from the conduct of the case and told him an application to that end had already been filed.

[3] It was further the contention of the Defendant that during the time that the matter was heard and determined *ex parte*, he was suffering from a serious medical condition that caused him the loss of his sight, which fact was known to his erstwhile advocates; and that it was surprising that the Court was not

informed of his predicament. He exhibited his Medical Report as **Annexure PK-1** to augment his averments. He contends that he has a valid defence to raise, namely that the loan had been fully repaid and that this could be proved.

[4] In the Replying Affidavit sworn on **14 July 2016** by **Mr. Onsando Osiemo,** Counsel for the Plaintiff, the Plaintiff took the stance that the Defendant did not pay the debt owed to it and that was why this suit was filed in the first place. It was deponed that the Defendant had acknowledged its indebtedness and made several proposals to settle the same in the years **2003, 2011** and **2012**. Letters to that effect were exhibited as annexures to the Replying Affidavit. The Plaintiff also made reference to the findings of the Court in its previous decisions herein. For instance, the Plaintiff urged the Court to uphold the finding that the Court made in respect of the Defendant's application dated **24 September 2010**, namely that it was common ground that the Applicant admitted liability by his letter dated **22 August 2003**. The Court also found as a fact that the Defendant never disclosed to the Court or the Plaintiff his alleged sickness at any time or at all during the course of time; instead there was an eagerness on the part of the Defendant to prosecute this suit and to even have it struck out for having been filed outside the limitation period.

[5] I have considered the application, the Replying Affidavit as well as the written submissions filed herein by the parties. The record confirms that the default judgment that was recorded herein on **3 March 2014** was regularly entered, in that hearing proceeded after the Court was satisfied that hearing notice had been served. Nevertheless, **Order 12 Rule 7 of the Civil Procedure Rules** under which the application has been brought provides that:

> **"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."**

[6] The Defendant has herein proffered two reasons for the setting aside of the judgment and the orders flowing therefrom. The first reason was that he was unwell and therefore was unable to attend Court for the hearing of his case. He further blamed his erstwhile advocates, **Nyachoti & Company Advocates**, for not bringing this fact to the attention of the Court, yet Counsel was fully aware of the situation. The second reason was that he has a good defence, being that the security was realized thereby extinguishing his equity of redemption, and thereby his liability to the Plaintiff; and that this occurred before the institution of this suit on **22 June 2004**.

[7] The approach to adopt in such matters was well-stated in the case of **Patel vs. East Africa Cargo Services Ltd (1974) EA 75** that:

> "**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... where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits."**

And, as pointed out in the case of **Mbogo Vs. Shah [1968] EA 93** the discretion is intended to be exercised **"...to avoid injustice or hardship resulting from 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.

[8] Thus, a careful perusal of the record does confirm the averments made by learned Counsel for the Plaintiff, that the Court has had occasion to consider and make a determination on these twin issues. For instance, in its Ruling dated **24 September 2010**, the Court held thus:

> **"It is common ground that the Applicant admitted liability by a letter dated 22nd August 2003. In that letter, he also made proposals of settlement."**

[9] And at paragraph 14 of the Judgment dated **19 September 2014**, the Court came to the following conclusion:

> **"...the court found and held that the Defendant had been advanced a sum of Kshs 800,000/- as had been averred by the Plaintiff as the ruling of the aforesaid learned judge had indicated that the Defendant had admitted the debt, which finding had never been set aside, varied and/or appealed against. Indeed perusal of the aforementioned documents and the evidence by George Ratemo Macheo who was the Plaintiff's Credit Recovery Officer, it was manifestly evident that the Defendant indeed had borrowed Kshs 800,000/- from the Plaintiff and the same was secured by a charge over the subject property. In fact in her ruling of 24th September 2004, the aforesaid judge observed that the Defendant had acknowledged the debt..."**

[10] What the Defendant has in his Defence are averments to the Plaintiff through its agents, **Nguru Auctioneers**, realized the security for the loan by way of sale sometime in **2001** and therefore that he would require the Plaintiff to produce accounts. Accordingly, in the light of the previous findings by the Court herein, it can hardly be said that the Plaintiff has any triable issue. The pronouncement in the case of **Philip Keipto Chemwolo & Mumias Sugar Co. Ltd vs. Augustine Kubende (1982-1988) 1 KAR 1036**, by the Court of Appeal is pertinent, namely:

> **"The discretion is in terms unconditional. The courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a prima facie defence...The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."** (Emphasis added)

[11] It is not lost on the Court that the Defendant pitched the argument that the mistake of the Advocate should not be visited on the Client. In support of this proposition, the Defence Counsel cited the persuasive cases of **John Joseph Mukoma vs Michael Karanja& Another [2008] eKLR; Lucy Bosire vs Kehancha Divisional Land Disputes Tribunal & 2 Others [2013] and Paul Asin T/A Asin Supermarket vs Peter Mukembi [2013] eKLR**, but the reason appears to have been raised more as an afterthought. The judgment in issue was passed in **2014.** The application by the Defendant's erstwhile advocates for leave to cease acting was itself filed on **9 December 2013**, and the Medical Report that the Defendant relied on expressly stated that his eyesight has been good since **2013** when he underwent a second surgery. There is, therefore, no satisfactory reason why he did not pursue the matter with his lawyers earlier.

[12] In the premises, I would share the views expressed by **Kimaru, J** in the case of **Savings and Loans Limited vs Susan WanjiruMurituHCCC No.397 of 2002** that:

> **"Whereas it would constitute a valid excuse for the Defendant to claim that she has been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of her case. The Court cannot set aside a dismissal of a suit on the sole ground of mistake by Counsel of the litigant on account of such Advocate's failure to attend Court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the Defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. She had been indolent and ... it would be a travesty of justice for the Court to exercise its discretion in favour of such a litigant."**

[13] For the foregoing reasons, I find the application dated **3 June 2016** to be devoid of any merit. The same is hereby dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF MARCH, 2017

OLGA SEWE

JUDGE