REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO 658 OF 2007

USAFI SERVICES LIMITED.....PLAINTIFF

V E R S U S

1. **GELU UNICFRAFTS LIMITED**
2. **ALEX SANAIKA OLE MAGELLO**
3. **LUCY MUTHONI KAHIA MAGELLO .....DEFENDANTS**

R U L I N G

1. The Plaintiff's suit against the Defendants, jointly and severally, was for refund of KShs 3,615,540/00 (with interest) paid towards purchase price in a land sale transaction between the Plaintiff and the 1st Defendant which failed, as pleaded, for want of consideration. The 2nd and 3rd Defendants (husband and wife) were directors of the 1st Defendant and its guarantors in the transaction.

2. Though the Defendants duly entered appearance, they did not file defence and **interlocutory judgment** was entered against them on 15th April 2008. **Final judgment** was entered on 18th May 2012 after the case was heard on 29th February 2012. The Plaintiff proceeded *ex parte* as there was no appearance for the Defendants at the hearing.

3. The Defendants subsequently applied by **notice of motion dated 3rd October 2012** for the main orders that both interlocutory and final judgments be set aside and they be granted unconditional leave to defend. That application is the subject of this ruling.

4. The application is brought under **Order 10, rule 11** of the **Civil Procedure Rules (**the **Rules)** upon grounds, *inter alia* –

(i) That the Defendants learnt of the final judgment on 25th October 2012 upon being served with notice for ruling on taxation of the Plaintiff's costs of the suit.

(ii) That the Defendants verily believed all along that their previous advocates had taken all necessary steps to secure their interests in the suit, including filing defence.

(iii) That the mistakes and inaction of their counsels should not be visited upon them.

(iv) That there was no proper service or at all of notice for the hearing of 29th February 2012, and the Defendants were thus condemned unheard.

(v) That the Defendants have a good defence to the claim, including –

a. That there was conflict of interest in one Mr Kirundi, an advocate of this court, who was a director of the Plaintiff and who had acted for the Defendants in "previous matters", but failed to advise the Defendants to get independent legal advice, in that he, Mr Kirundi, "procured" the sale agreement the basis of the action.

b. That Mr Kirundi did not at any time advise the Defendants of his apparent conflict of interest.

(c) That prior to the sale agreement the Defendants had confided in Mr Kirundi of their economic distress at the time and had sought financial assistance from him.

(d) That Mr Kirundi had exploited the advocate/client relationship between him and the Defendants in that he procured a sale agreement that had "unbelievable, blatant, unconscionable terms heavily tilted in favour of a company in which he was a shareholder and director".

(e) That the Plaintiff's claim is barred by statute.

(f) That the plaint as drawn did not disclose a reasonable cause of action against any of the Defendants.

(g) That the sale agreement failed because of the defaults of the Plaintiff, not the 1st Defendant.

(h) That it is fair and just that the application be allowed.

5. There is a supporting affidavit sworn by the 3rd Defendant that sets out the factual basis for the application. A draft statement of defence and other documents are annexed to the affidavit.

6. The Plaintiff has opposed the application by **replying affidavit filed on 30th November 2012** sworn by Mr Kirundi. Grounds of opposition emerging therefrom include –

(i) That the passage of five years before final judgment was entered shows that the Defendants were not diligent in following the progress of the suit.

(ii) That the Defendants truly owe the Plaintiff KShs 3,615,540/00 for failure of consideration as it turned out that they did not own the property they were purporting to sell to the Plaintiff. The Defendants therefore have no good defence to the claim.

(iii) That the application has no merit and is only meant to delay justice.

(iv) That notwithstanding the above grounds of opposition the Plaintiff is willing to complete the sale/purchase transaction in exchange for valid title documents of the property which ought to be produced before the court.

(v) That in the event that the application is allowed it ought to be upon the condition that the Defendants deposit the decretal sum in court within a specified period pending hearing and determination of the suit *inter partes*.

7. In response to the replying affidavit the Defendants filed a supplementary affidavit, also sworn by the 3rd Defendant. It essentially raises no new issues and is argumentative.

8. I have considered the submissions of the learned counsels appearing, including the authorities

cited.

9. The court's power under **Order X, rule 11** of the Rules is quite wide and unfettered, subject only to dictates of justice. But like all judicial discretions, it will not be exercised whimsically but upon settled principles. The principles here include that the power will be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. The power will not be exercised to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice (**Shah -v- Mbogo [1969] EA 116**). The court will also consider the nature of the action; the defence, if one has been brought to the notice of the court, however irregularly; whether the plaintiff can reasonably be compensated by costs for any delay occasioned; and all this, bearing in mind that to deny anyone a hearing should be the last resort of the court (**Jamnadas Sodha –v- Gordandas Hemraj (1952) ULR 7**).

10. I have considered the above principles in relation to the facts of this case. No good explanation has been offered why defence was not filed. The Defendants blame their advocates for the failure to file defence; but they have not demonstrated what they themselves did to follow up the matter. It will be recalled that interlocutory judgment was entered on 15th April 2008. It was not until 18th May 2012 that final judgment was entered; and then not until 25th October 2012 were the Defendants woken from their slumber by the notice of ruling on taxation! That was a 4-year slumber!

11. In this day and age the mere plea that "it was my advocate's fault" will not be the magic bullet. "Then sue your advocate!" may be a proper retort.

12. I am more worried about the issue of service of hearing notice for the hearing of 29th February 2012. The Defendants had counsels on record who should have been served. The Process Servers' plea that he was not able to trace their offices for service of the hearing notice rings convenient rather than true. Why was an inquiry with the Law Society of Kenya not made as to the location of the advocate's offices? There is also evidence that the Process Server had served the advocates previously at Westlands, Nairobi and not at the places he went to serve them the hearing notice.

13. Service of hearing notice for 29th February 2012 was tenuous at best. The Defendants having lost their opportunity to file defence, it was incumbent upon the Plaintiff to ensure that their counsels were duly served for the "formal proof" hearing so as not to also lose their entitlement to participate in the hearing. I find there was not due service of the hearing notice.

14. I would have no hesitation to set aside the final judgment. The question is whether I should also set aside the interlocutory judgment.

15. I have already expressed my view in respect to the failure to file defence. I also bear in mind that the Defendants have not denied receiving KShs 3,615,540/00 from the Plaintiff towards the purchase price of KShs 4 million. I have not found in the Defendants' papers any positive averment that the 1st Defendant had title to the land it purported to sell, or that it was in a position to transfer the same to the Plaintiff. The Plaintiff's case is that it turned out that the 1st Defendant had no title to the land sold that it could pass to the Plaintiff, and that therefore there was total failure of consideration.

16. The sale agreement was entered on 30th December 1998. The Defendants received almost the entire purchase price upon that agreement, in their own words over several years. It is now rather late in the day, fifteen (15) years down the line, to claim that the sale agreement was procured by "undue influence, material misrepresentation, unfair advantage and excessive benefit". I am not satisfied that the Defendants have an arguable defence to the claim for refund of the purchase price paid and interest as provided for in the sale agreement, or in limitation. The sale agreement appears to have been drawn by the parties themselves, and that is permitted by the law.

17. Having considered the matters placed before the court, I am satisfied that it is in the interest of justice that the final judgment be set aside to enable the Defendants to participate in the hearing. Such

hearing will be before another judge. I find that it will not be in the interests of justice to set aside the interlocutory judgment, which was lawfully and properly entered, or grant the Defendants leave to file defence. I decline to do so.

18. As the Defendants have partially succeeded, costs of the application (which ordinarily would have gone to the Plaintiff) shall be in the cause. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 12th DAY OF FEBRUARY 2014

H.P.G. WAWERU

JUDGE

DELIVERED THIS 14TH DAY OF FEBRUARY 2014