REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 727 OF 2012

EDNEY ADAKA ISMAIL.....PLAINTIFF

VERSUS

EQUITY BANK LIMITED.....DEFENDANT

RULING

1. By a Notice of Motion dated 6th May, 2013, the Plaintiff seeks the following orders:

a) that the order made by this Honourable Court on the 30th day of April, 2013 dismissing the application dated 19th November, 2012 together with the consequential orders be set aside,

b) that the application dated 19th day of November, 2012 together with the consequential orders issued on the 21st day of November, 2012 be reinstated,

c) that costs be provided for.

The said application was supported by the Affidavits sworn by the Plaintiff and the Plaintiff's Advocate, Mr. Charles M. Ongoto, on 6th May, 2013, respectively. The grounds for the application are enumerated on the face of the application as well as in those Affidavits.

2. According to the Plaintiff, when the matter came up for hearing on 15th April, 2013, he was informed by his advocate on record that the same was adjourned but that the Court had ordered that a date for his application dated 19/11/12 be taken at the registry within 30 days by the parties. That subsequently, he learnt that a date had been taken and the hearing of his said application was scheduled for 30th April, 2013. That, on 30th April, 2013, when the matter came up for hearing, the Plaintiff was not within Nairobi but was nevertheless confident that his Advocate on record would attend Court for the hearing and brief him on the outcome.

3. That on 2nd April, 2013 or thereabouts, it came to his attention that the orders granted on 21st November, 2012 had been vacated and that upon inquiring from his Advocate, he was informed that the same was not the case. The Plaintiff averred that thereafter, he was served with a Proclamation Notice by the the Defendant's auctioneers which he presented to his Advocates on 3rd May, 2013. It was

contended that after inquiries made by his Advocate, there was the realisation that the date for the hearing of the application had been diarized wrongly. That all along, the Advocate's diary had reflected that the hearing of the application was on 30th May, 2013 instead of 30th April, 2013 which was the date agreed by the representatives of the parties Advocates at the Court registry. According to the Plaintiff, the mix up as to the date of the hearing was a mistake which should not be visited upon him, as he had never missed Court since instituting the instant case. Further, it was averred that it would only be just and fair if the Orders sought were allowed as it was trite law that an Advocate's mistake should not be visited upon the client.

4. The Defendant opposed the Plaintiff's application, through the Replying and Further Affidavit of Purity Kinyanjui sworn on 15th May, 2013 and 2nd September, 2013 respectively. It was contended that the application was misconceived and without merit as the Plaintiff had demonstrated lack of candour in the matter. According to the Defendant, the Plaintiff was still indebted to it in the sum of Kshs.8,843,654/= as at 28th March, 2013, a fact that had not been denied. That the Plaintiff's default was a breach of contract of the offer letter dated 2nd November, 2011 for the loan facility of Kshs.18,364,500/= which contained terms and conditions of the loan granted including the right of the Defendant to reposses the motor vehicles which had been used as collateral for the loan facility. The Defendant further contended that the explanation on the Plaintiff's Advocate purported mistake had no merit, as the Plaintiff had failed to demonstrate that he had kept his obligation in repaying the loan advanced to him by the Defendant. That the Plaintiff after had gone to a slumber and failed to prosecute his matter after obtaining the interim orders. It was the Defendant's contention that the Plaintiff's Advocate without due care and out of negligence did not follow up on the matter even after 30th April, 2013, to find out whether or not the orders issued on 21st November, 2013 had been vacated. It was therefore contended that the Plaintiff's application lacked merit and ought to be dismissed.

5. When the matter came up for hearing on both 21st June, 2013 and 31st July, 2013, the Court ordered parties to file and exchange written submissions. As at 15th November, 2013, the Plaintiff was yet to do so. The Court ruled that the ruling will be made on the basis of the documents on record.

6. Through its written submissions, the Defendant contended that the orders sought by the Plaintiff cannot be granted as the Plaintiff's suit contravened mandatory provisions of the law which require that summons be extracted and filed within one month of filing the suit, failure to which the suit abates. Further that the Plaintiff failed to observe Order 5 Rule 6 which provides that every summon shall be collected for service within thirty days of issue or notification, failure to which the suit shall terminate. It was also contended for the Defendant that the Court does not have jurisdiction over the suit. That as such, the Court should not rely on the overriding objective of the Civil Procedure Act to aid a party that had contravened provisions of the Law.

7. Relying on the case of **Mirandula Suresh Kantaria -v- Suresh NanillalKaptaria Civil Appeal No.277 of 2005** and **Kamani -vs- Kenya anti-Corruption Commission [2010] eKLR,** the Defendant submitted that the Court should not reinstate the orders that it had previously dismissed, as to do so would go against fairness and equity. Further, the Defendant submitted that it had played its part and had taken dates at the registry on 16th April, 2013 together with the Plaintiff's representative. That as such, it should not suffer for the mistakes of the Plaintiff's Advocate. In its submissions, the Defendant stated that parties should have equal footing and no party should have undue advantage over the other. That by the Court allowing the orders sought, the same would amount to shifting the footing of the parties to the advantage of the Plaintiff.

8. I have considered the application and the Affidavits on record. I have also considered the submissions and the authorities cited by the Defendant. The decision whether or not to restore the Application dated 19th November, 2012 is in the discretion of the Court and like any other judicial discretion, it must be exercised upon reason and not capriciously of spitefully. In **CMC Holdings Limited -vs- Nzioki [2004] 1 KLR 173** it was held that:

> ***"That discretion must be exercised upon reasons and must be exercised judiciously..... In law, the discretion that a Court of law has, in deciding whether***

or not to set aside ex-parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle..... The answer to that weight, matter was not to advise the Appellant of the recourse open to it as the learned Magistrate did here. In doing so, she drove the Appellant out of the seat of justice empty handed when it had what if might have well amounted to an excusable mistake visited upon the Appellant by its Advocate."

9. Further, under the overriding objective in Sections 1A and 1B of the Civil Procedure Act, this Court is enjoined to ensure that there is just determination of the proceedings, in a timely and efficient manner at a cost affordable to the respective parties. Under the said objective, it has been held that the challenge to the Courts is to use the new *"broom"* of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible. See **Stephen Boro Gitiha -vs- Family Finance Building Society & 3 Others Civil Application No. Nai 263 of 2009** and **Lucy Bosire -vs- Kehancha Div. Land Dispute Tribunal & 2 Others [2013] eKLR.**

10. In this Case, it is clear that the parties herein are in a bank-customer relationship whereby the Defendant advanced a loan facility to the Plaintiff of Kshs.18,364,500/=. The same was secured by a chattels mortgage over motor vehicle registration numbers KBQ 699C, KBR 105B, KBR 103B and KBP 944Q. The Plaintiff defaulted in repayment of the loan prompting the Defendant to instruct a firm of auctioneers to realized the security held by the Defendant Bank. The Plaintiff thereafter instituted this suit and obtained interim injunctive orders against the Defendant pending the hearing and determination of his Notice of Motion dated 19th November, 2012. That application was slated for hearing on 30th April, 2013 when it was dismissed for the non-attendance by the Plaintiff and/or his Advocate. The Advocate for the Plaintiff claimed that the non-attendance occurred when, by inadvertence, the hearing date for the application was noted in his diary as 30th May, 2013 instead of the agreed date of 30th April, 2013. As such the blame has been placed at the door steps of the Plaintiff's Advocate which he has candidly admitted.

11. The question then, that arises is whether the Plaintiff has offered sufficient reason to persuade this Court to exercise its discretion in his favour and reinstate the application. It is true that where the justice of the Case mandates, mistakes of Advocates even if they are blunders, should not be visited on the clients when the situation can be remedied by costs. In the Case of **Lucy Bosire -vs- Kehancha Div. Land dispute Tribunal & 2 Others (supra) Odunga J held as follows:-**

"It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits. See Philip Keipto Chemwolo & Another -vs- Augustine Kubende [1986] KLR 492; [1982-88] 1 KAR 1036 at 1042; [1986-1989] EA 74."

However, it is not in every Case that a mistake committed by an Advocate would be a ground for setting aside orders of the Court. In **Savings and Loans Limited -vs- Susan Wanjiru Muritu Nairobi (Milimani) HCCS No.397 of 2002 Kimaru, J** expressed himself as follows:-

"Whereas it would constitute a valid excuse for the Defendant to claim that she had 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 his or her Case. The Court cannot set aside dismissal of a suit on the sole ground of a 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. For the Defendant to be prompted to action by the Plaintiff's determination to execute the decree issued in its favour, is an indictment of the Defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the Court, it would be a travesty of justice for the Court to exercise its discretion in favbour of such a litigant. (emphasis added)

12. I fully agree with the above holding. It is not enough for a party to simply blame the Advocate but must show tangible steps taken by him in following up his matter. From the Plaintiff's Supporting Affidavit of 6th May, 2013, it is clear that the Plaintiff was keen on his case as he followed up on the dates of the hearing of the application, a fact that has not been disputed by the Defendant. Though, he knew that the application was coming up for hearing on 30th April, 2013, he did not attend Court as he was out of town. In his words, he was confident that his Advocate would attend Court and inform him of the outcome as was the usual customary practice. Further, the Plaintiff deponed that at some point he received information that the interim orders had been vacated prompting him to call his Advocate, who then re- assured him that the same was not the case. He deponed that this was his very first non-attendance on his part. To my mind, this is not the conduct of a negligent and indolent Plaintiff as the Defendant alleges. As noted earlier, errors and blunders can happen on the part of a party's Advocate and it would not be in the interest of justice for a litigant to suffer because of such an error.

13. Further, there is no allegation presented that the Defendant stands to suffer any prejudice that cannot be compensated by way of costs if the application is allowed. All that has been alleged is that the Plaintiff had defaulted on its obligation to repay the loan facility and should therefore not be entitled to the orders he seeks. In my view, the Court has to take cognizance of the effect of allowing the Plaintiff's application. If the Plaintiff's dismissed application is reinstated for hearing and thereafter the same is found to be unmerited, there would be no prejudice caused on the part of the Defendant. This must however be weighed against the consequences of shutting out the Plaintiff from the hearing of his application and hence losing his vehicles held as collateral for the loan facility by the Bank. The Court must take into account the principle of proportionality and see where the scales of justice lie. The law is now clear that the business of the Court, so far as possible, is to do justice between the parties and not to render nugatory that ultimate end of justice. The Court, in exercising its discretion, should always opt for the lower rather than the higher risk of injustice. See **Suleiman -vs- Ambose resort Limited [2004] 2 KLR 589.** From the record, notwithstanding the bitter dispute between the parties, the Plaintiff has continued to service the loan notwithstanding the orders that are force.

14. I have also considered the Defendant's submission that the Plaintiff had failed to follow mandatory provisions of the law with regard to extraction and service of the summons in this suit. That this court does not have the jurisdiction to hear and determine this Case. It was the Defendant's submission that flowing from these reasons, the Plaintiff should not be granted the orders sought. Without necessarily delving into the merits of these arguments, I must state that the issue raised by the Defendant is crucial as to the suitability or continued presence of these proceedings. I have on my part, perused the record. I note that whilst the suit was filed on 21st November, 2012, the summons were only issued on 29th May, 2013, six (6) months later. They were collected on 31st May, 2013. There is no evidence whether they have been served or not. Of course this Court cannot rule on this issue without Affidavit evidence. The matter was raised in the submissions and not in the Replying Affidavit. To my mind it would have been prudent if the issue was raised separately through a formal application and not through the submissions as the Defendant has done. If however, it had been raised in the Replying Affidavit therefore giving the Plaintiff an opportunity to respond, this Court would have perfectly been able to rule on it. Now that it was not, I cannot rule on it when considering the application before me.

15. In the result, having considered the foregoing and the reasons advanced for non-attendance on behalf of the Plaintiff, I find merit in the application dated 6th May, 2013, which I hereby allow and set aside the order of dismissal of the Notice of Motion dated 19th November, 2012 together with consequential

orders. The orders issued on 21st November, 2012 are hereby reinstated. However, those orders are only extended for forty five (45) days only within which time the Plaintiff should list his application dated 21st November, 2012 for hearing.

Dated and Signed at Bungoma this 14th day of February, 2014.

A. MABEYA

JUDGE

Dated and Delivered at Nairobi this …4th .... day of …...March..... 2014.

J. B. HAVELOCK

JUDGE