REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 34 OF 2006

GEOFFREY KURIA GITHAMBU.....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY LIMITED.....1ST DEFENDANT

REUBEN WARUI MWANGI AND

MERCY WANIRU WARUI.....…… 2ND DEFENDANT

R U L I N G

1. This suit was filed on 2nd February, 2006 wherein the Plaintiff sought various orders against the first Defendant. The Plaint was later amended and the 2nd and 3rd Defendant were joined as parties. In the Amended Plaint, the Plaintiff made various allegations against all the Defendants and prayed, *inter alia*, that the sale of the property known as Title No. Ndumberi/Ndumberi/1594 (hereinafter *"the suit Property"*) by the 1st Defendant be nullified. Although the file before me is a reconstructed one as the original seems to have gone missing, the record shows that all the parties were properly served with the statement of claim and summons to enter appearance.
2. The firm of Oraro and Company entered appearance and filed a Defence on behalf of the 1st Defendant on 16th February, 2006. Upon the 2nd and 3rd Defendant being joined to these proceedings, the said firm of Oraro and Company once again entered appearance on their behalf on 8th February, 2007 but no Defence was filed on their behalf. As a result, interlocutory judgment was entered against the 2nd and 3rd Defendants on 13th March, 2007. Correspondence on record would show that attempts by the said firm to have the interlocutory judgment set aside by consent were firmly rejected by the Plaintiff. Thereafter, nothing seems to have been done on that judgment. On 8th February, 2011, the firm of Issa and Company came on record for the 2nd and 3rd Defendant but later applied and was allowed to cease from so acting on 12th October, 2012. On 25th April, 2013, the firm of Walker Kontos Advocates came on record for the 2nd and 3rd Defendants and subsequently on 29th July, 2013 filed an application to set aside the aforesaid interlocutory judgment and for leave to be granted to the 2nd and 3rd Defendant ("hereinafter *"the Applicants"*) to file a Defence to the Plaintiff's claim.
3. It is the said application dated 29th July, 2013 that is the subject of this ruling. That application was supported by the Affidavit of Reuben Warui Mwangi sworn on 29th July, 2013. The grounds

for the application as contained both in the body of the motion and Supporting Affidavit are that the firm of Walker Kontos Advocates had only come on record on 25th April, 2013, that the prayers sought in the statement of claim were draconian as they sought to deprive the Applicants of their property without compensation contrary to Article 40 of the Constitution, that the Applicants were bona fide purchasers of the suit property for value and had acquired good title therefor, that the Applicants had purchased the property at an auction on 11th August, 2006 in good faith, that the applicants had since disposed of the suit property in 2010 to a 3rd party one Stephen Mararo whom they would join in the proceedings if the application was allowed. The Applicants also contended that they have a good defence on merit.

4. In his submissions, Mr. Karungo Learned Counsel for the Applicants reiterated what was in the Supporting Affidavit and further submitted that, there was a previous law firm of Issa and Company who were on record for the Defendants but had failed to file a Defence. That the failure to file a Defence was not the fault of the Defendants. Mr. Karungo further submitted that Article 47 of the Constitution requires fair administrative action and that since the suit had not proceeded for trial no prejudice would be suffered if the application was allowed.
5. Mr. Mbaluto, Learned Counsel for the 1st Defendant supported the application and submitted that the orders sought in the Plaint were drastic and not amenable to interlocutory judgment. That whilst in the previous legal dispensation, an Applicant had to show clear grounds for setting aside an interlocutory judgment, currently the overriding objective is to do substantive justice to the parties. Both Mr. Karungo and Mr. Mbaluto urged that the application be allowed.
6. The application was opposed vide a Replying Affidavit sworn by the Plaintiff on 24th September, 2013. He contended that the application was an abuse of the Court process as the Applicants had all along (for 6 years) known of the existence of the said interlocutory judgment and had not applied to have it set aside, that the Applicants had not explained why a defence was never filed, that there was no explanation given why the previous two law firms had not filed the current application, that in any event one of those law firms, Issa and Company had pulled out for lack of instructions. It was further contended that the proposed defence did not raise any triable issues. That the Applicants had disposed off the suit property during the pendency of the suit and such sale was therefore irregular. That if the application is allowed it will delay the conclusion of the suit and that the Applicants having slept on their rights, they cannot wake up at this point in time and seek to enforce them. The Plaintiff prayed for the dismissal of the application. No submissions were filed or received on behalf of the Plaintiff.
7. I have carefully considered the Affidavits on record and the submissions of Counsel. This is an application to set aside an interlocutory judgement. Such an application is in the discretion of the court but as in all other discretions, the same must be exercised judiciously upon known principles and not capriciously.
8. In the case of **Njagi Kanyunguti Alias Karingi Kanyunguti & Others Vs David Njeru Karingi CA No. 1818 of 1994 (UR),** the Court of Appeal held:-

> ***"In an application brought either under OIXA Rule 10 or OXB Rule 8 of the Civil Procedure Rules, the court exercises discretionary jurisdiction. The discretion being judicial is exercised on the basis of evidence and sound legal principles. The court's discretion is wide, provided it is exercised judicially (see Pithon Waweru Maina Vs Thuku Mugiria [C.A No. 27 of 1982], Patel Vs E.A Cargo Handling Services Ltd 1974 EA 75). The court is also enjoined to consider all the circumstances of the case, both before and after the judgment being challenged, before coming to a decision whether or not to vacate the judgment.....***
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> ***However, it is trite law that this or any other Court will only exercise its judicial discretion in favour of setting aside a judgment in order to avoid injustice, or hardship resulting from accident inadvertence or excusable mistake or errors and will not assist a person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice." (Emphasis mine)***

9. From the foregoing, it is clear that in exercising its discretion, the court has to do so in order to

avoid an injustice or hardship arising from an accident, in advertence or excusable mistake or error. The evidence on record upon which the court is called upon to exercise its discretion is simple; that although the Applicants were properly served with court process, they entered appearance within time but failed to file a defence. That the judgment sought to be set aside was a lawful judgment and that the application is being made six (6) years since its entry.

10. From the record, it is clear that no explanation was offered by the Applicants why no defence was filed all this time. The Applicants also chose to be silent on the delay in bringing the present application. Neither in the application nor Affidavit was any explanation, let alone excuse, was proferred as declared in the **Kanyunguti case (supra).** The discretion to set aside a lawful judgment is to be exercised to avoid an injustice or a hardship caused by inadvertence mistake or error. These in my view are lacking in the application under consideration.
11. Mr. Mbaluto urged the court to apply the overriding objective of doing substantive justice to the parties rather than seek for reasons. That may be so. But substantive justice enjoins the court to look at the positions of all the parties before it. In this case, the position of the applicants is that they failed to file a defence, they attempted to dispose off the property the subject of the suit during the pendency of and with full knowledge of this suit and further failed to take any step to impugn the judgment for six (6) years. On the part of the Plaintiff, he came to court making specific allegations against the Defendants and has been trying to have the allegations adjudicated upon. He has a lawful judgment in his favour. The justice of the case demands that before his position of advantage is reversed or affected, there be good and compelling reasons. In this case I see none.
12. One aspect that a court has to consider in such an application is if there is a good defence on merit. This is so when a judgment sought to be set aside such as in this case is a lawful one. I have seen the draft defence annexed to the application. In it, the applicants intend to argue that they purchased the suit property at a public auction on 11th August, 2006, that the suit is overtaken by events as the suit property has already been sold to a 3rd party in 2010 and that the purchase of the suit property in August, 2006 was bona fide.
13. I have considered the proposed defence. In the Replying Affidavit, it has been alleged that at the time the property was sold to the 2nd and 3rd Defendant, who are man and wife, the 2nd Defendant was the legal officer of the 1st Defendant. In effect, the 1st Defendant sold the property to its employee casting doubt on the issue of bonafides. On the alleged sale of the property to a 3rd party in 2010, apart from an inconclusive undated sale agreement was produced that there was no evidence to prove that fact. No search from the lands office was produced to show that the property had passed on to the alleged 3rd party. In any event, the 2nd and 3rd Defendants purported to dispose off the property during the pedency of the suit whose notice and notice of judgment they had. Can the Applicants be allowed to benefit from their own wrong? I do not think so. Six (6) years is a long time to wait to seek justice. It will, in my view, prejudice the Plaintiff.
14. The upshot of the matter is that I find the application dated 29th July, 2013 to be without merit and is hereby dismissed with costs.

DATED and **SIGNED** at **BUNGOMA** this day 21st of February, 2014.

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A. MABEYA

JUDGE

DELIVERED and **SIGNED** at **NAIROBI** this ..5th .....day of...March.....2014

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J.B. HAVELOCK

JUDGE