



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI LAW COURTS
CIVIL CASE NO 499 OF 2004

THE CO-OPERATIVE BANK OF KENYA LIMITED.....PLAINTIFF

VERSUS

PIUS KIMAIYO LANGAT.....DEFENDANT

RULING

INTRODUCTION

1. The Defendant's Notice of Motion application dated 7th June 2013 and filed on the same date was brought under the provisions of Section 3A of the Civil Procedure Act, Order 10 Rule 11 of the Civil Procedure Rules Chapter 21 of the Laws of Kenya and all enabling provisions of the law. It sought the following orders:-
 - a. **THAT pending the hearing and determination of this application *inter partes*, this Honourable Court be pleased to order that the interim orders of stay of execution pending in favour of the Defendant be restored and maintained.**
 - b. **THAT this Honourable Court be pleased to set aside the orders issued on 5th November 2013 dismissing the Defendant's application dated 13th November 2012 for non-attendance by the Defendant's advocates.**
 - c. **THAT subsequent to prayer to prayer (3) above, the Defendant's application dated 13th November 2012 be reinstated and the same be listed for hearing in the normal manner on such date as may be ordered by the court.**
 - d. **THAT the costs of the Application be in the cause.**

2. The grounds on which the Defendant relied on in support of its application were generally as follows:-
 - a. **THAT the dismissal was prejudicial to the him as the temporary orders of stay of execution in his favour lapsed and that in the absence thereof, there was real likelihood of the Plaintiff proceeding with execution proceedings against him.**
 - b. **THAT the failure by his counsel to appear in court at 9.10 am was inadvertent and excusable and that he only arrived at about 9.15 am and found that the application had been dismissed.**
 - c. **THAT the application herein was presented in good faith and without any delay immediately his counsel became aware of the said orders for dismissal.**
 - d. **THAT he was ready to expeditiously prosecute the application herein and that it would be just and fair in the circumstances of the case that the orders sought herein be granted.**

AFFIDAVIT EVIDENCE

3. The Defendant's application was supported by the Affidavit of Charles Kanjama which was also sworn on 7th June 2013. He reiterated the facts had had been set out in the grounds on the face of the Plaintiff's application. He added that when the court issued its directions in respect of the filing and service of a Further Affidavit and written submissions on 25th April 2013, he gave the file to one of his staff members to draft the said documentation and to ensure that the client came from Naivasha to swear the said affidavit.

4. He stated that the said member of staff went on leave to study for exams and failed to bring the said file to his attention. He said that he was only called by his clerk on 5th June 2013 informing him that the Notice of Motion application dated 13th November 2012 was scheduled for hearing that morning. He stated that unfortunately, he arrived at the court but was informed that the said application had been dismissed.

5. In response thereto, Flavia Kalande swore an affidavit on behalf of the Plaintiff on 20th June 2013. The same was filed on 24th June 2014. It was her contention that the application herein was misconceived and an abuse of the court process and that the Defendant had not adduced any good or sufficient cause why the orders that he had sought should be granted. She averred that the matter was called out twice, during the call over of the cause list and after the said call over leading the court to dismiss the Plaintiff's application for want of prosecution.

6. She added that the Defendant had not filed a Supplementary Affidavit in support of the Notice of Motion application dated 13th November 2012 despite having been given leave to file the same and as a result, he was guilty of laches as he had not prosecuted the said application since it was filed. It was her contention that the Plaintiff was a renowned financial institution which was capable of compensating the Defendant if he were to succeed in his appeal.

7. The Plaintiff also filed Grounds of Opposition dated and filed on 13th June 2013. The grounds were generally as follows:-

- a. **The Application was misconceived and an abuse of the Honourable Court.**
- b. **The Application was brought in bad faith.**
- c. **The Defendant was guilty of laches as the Application had not been prosecuted since 13th November 2012.**
- d. **The Defendant never complied with the court orders issued on 25th April 2013.**
- e. **There was no good reason that had been adduced for failure by the Defendant to comply with the court's directions.**
- f. **That no good reason had been adduced for failure by the Defendant's advocates to attend court.**

LEGAL SUBMISSIONS BY THE DEFENDANT

8. In his written submissions dated 8th July 2013 and filed on 9th June 2013, the Defendant's counsel submitted that Article 50 of the Constitution of Kenya, 2010 gives each person a right to a fair and public hearing and that Article 159 (2) of the Constitution provided that courts shall dispense justice to all irrespective of status, they shall not delay justice and that that justice shall be dispensed without undue regard to procedural technicalities. He argued that to deny a party a right to be heard because of a technical ground of failure to prosecute would be a grave injustice.

9. It was averred that the Defendant's advocates had complied with all the directives of the court save for those that had been issued on 25th April 2013. The said advocates contended that it was only fair that the Defendant be given his day in court as he had much to lose in terms of the securities that had been held by the Plaintiff against the sums that were advanced to him.

10. It was the Defendant's advocates' further argument that the reasons for the failure by its counsel to attend court on 5th June 2013 had been given. It was stated that the said failure was due to an inadvertent error on the part of the Defendant's advocates which was regretted as it painted a bad handling of the matter. It was the Defendant's advocates' further contention that dismissing an application touching on the Defendant's very likelihood would be catastrophic.

11. The Defendants' advocates relied on the case of **Shah vs Mbogo [1967] EA 116** in which the court held as follows:-

“Discretion is judicially exercised when it is based on concrete facts not whims. The court is vested with the discretion so that in the exercise of it injustice or hardship resulting from accident, inadvertence or excusable mistake or error may be avoided.”

12. The court was also referred to the case of **Charagu vs Kaguru [1986] KLR** where the court also exercised its discretion and allowed a party to file a Notice of Appeal out of time and the case of **CMC Holdings Limited vs Nzioki [2004] 1KLR** where the Court of Appeal also exercised its discretion where the litigant had demonstrated such an excusable mistake, inadvertence, accident or error.

13. It was the Defendant's advocates' submission that the failure to attend court on 5th June 2013 was an honest mistake by counsel and that it would be a great miscarriage of justice if the orders of 5th June 2013 were not set aside and his application dated 13th November 2012 reinstated particularly in view that the present application was filed without any delay.

LEGAL SUBMISSIONS BY THE PLAINTIFF

14. The Plaintiff's written submissions were dated 6th June 2013 and filed on 7th August 2013. It submitted that although the court had discretion to set aside the orders it issued on 5th June 2013, the same could only be exercised judiciously and not whimsically. It argued that the court had to look at the reasons advanced by the Defendant's advocates to justify his failure to attend court. In addition, it stated that the court had to consider the injustice, hardship and/or prejudice which the parties were likely to suffer if the application was granted or refused and whether the Plaintiff could be adequately compensated by an award of damages as had been observed in the case of **Shah vs Mbogo** (Supra).

15. It referred the court to the decision of **David Livingstone Oyieko vs Simon Kiprono Siele [2005] eKLR** in which Musinga J (as he then was) considered an application to set aside an *ex parte* order. While referring to the holding in the case of **Shamsudin Jivan Mitha vs Abdulazziz Ali Ladak [1960] E.A. 1054** where the court therein stated that where a party who is called out and does not appear when the suit was called out must show sufficient cause exactly what happened to him as he was coming to court as to cause his delay in coming to court, the said learned judge allowed to application to set aside the *ex parte* order but awarded the Plaintiff thrown away costs in the sum of Kshs 15,000/=.

16. It contended that the Defendant was guilty of laches and that if the Defendant was desirous of prosecuting its application dated 13th November 2012, it ought to have filed a Supplementary Affidavit and written submissions as had been directed by the court. It was its argument that the present application was merely meant to obstruct justice and/or delay it. The Plaintiff, however, added that if the court was inclined to allow the Defendant's application, then it ought to be awarded thrown away costs in the sum of Kshs 15,000/= as had been awarded by Musinga J (as he then was) in the case of **David Livingstone Oyieko vs Simon Kiprono Siele** (Supra).

LEGAL ANALYSIS

17. The court has considered the parties' oral and written submissions and notes that the real issue for determination was whether the Defendant's Notice of Motion application dated 13th November 2013 should be reinstated as had been sought by its counsel.

18. The test for allowing the Defendant's application is whether or not the delay in bringing this application falls squarely within the parameters of the court's discretion to allow the same. The court must be satisfied that a plausible explanation has been given to explain the inadvertence of doing a particular act to establish whether or not the same would be excusable. This does not, however, excuse a party who has been ignorant of a particular fact for the reason that ignorance is not an excuse. The court should consider the hardship that would be caused to the party applying if the said application was not granted and determine whether an award of costs would be adequate compensation to the party who has been set back by the setting aside of *ex parte* orders.

19. It is trite law that a party must be given a fair and reasonable opportunity to present its case and should not be penalised for the omissions or commissions of its legal representative. In allowing a party to ventilate its case which has been negatively compromised due to its legal representative's omissions or commission, a court must consider what prejudice the other party would suffer if it exercised its discretion in favour of an applying party.

20. The court's discretion is not an absolute one. It must be exercised judiciously on the basis of facts and legal principles. In determining whether the Defendant would suffer prejudice if the court did not allow its application, the court has found it useful to consider the events that led to the court dismissing the Defendant's Notice of Motion application dated 13th November 2013.

21. Judgment in this matter was entered in favour of the Plaintiff and against the Defendant for a sum of Kshs 4,706,570.05 together with interest thereon at the rate of 21% per annum from 25th March 2004 until payment in full on 4th October 2012. A stay of execution was granted for on the same date for a period of twenty one (21) days to enable the Defendant file a formal application for the grant of the said orders pending appeal. He filed his Notice of Appeal on 11th October 2012 and filed the formal application seeking a stay of execution pending appeal on 14th November 2012. The Defendant's advocates filed the present application on 10th June 2013 after the court dismissed the application dated 13th November 2012 on 5th June 2012.

22. It does appear that the Defendant has always proceeded within the time lines that had been given by the court. While there are repercussions for not complying with the court orders, the court must not operate in a vacuum. The court appreciates that to err is to human. Provided that the reversal of an error does not cause harm or damage to any party to a suit, the court should ordinarily exercise its discretion judiciously if the facts of the error can be explained satisfactorily.

23. It is not out of the ordinary for parties not to comply with its directions for one thing or another. The court is expected to ensure that it takes such remedial action in the interests of justice. Indeed, a party to a suit ought not to be made to suffer as a result of its advocates omissions or commissions. The court is alive to the fact that refusal by a court to allow a party to ventilate its case especially where its legal representative has done and/or omitted to do something to its detriment is a very drastic action and must only be done as a last resort. The court must therefore be very cautious not to deny such a party an opportunity to have its day in court.

24. On the other hand, the uncertainty of seeing an end to a matter and being kept away from its fruits of judgment is apparent prejudice against the Plaintiff herein bearing in mind that judgment herein was entered on 4th October 2012. There is every need to have the matter herein determined expeditiously as has been spelt out in Section 1A(1) of the Civil Procedure Act Cap 21 (laws of Kenya) which provides that:

“The overriding objective of this Act and rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes...”

25. The present application was brought expeditiously and the mistake was excusable. It is the conclusion of the court that against the backdrop of the guiding principles of setting aside an *ex parte* order, this is a case which merits the exercise of this court's discretion in favour of the Defendant herein

and concurs with its advocates' submissions in this regard.

26. In arriving at the said conclusion the court has had due regard to the holding in the case of **Shah vs Mbogo** (Supra) which stipulated as follows:-

“ Applying the principles with that the court’s discretion to set aside an *ex parte* judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake but not to assisting a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice.”

27. The court also had due regard to the case of **Kitts Mbatu Mukonyole vs Levi Ndombi Mukonyole [2013] eKLR** where the Court of Appeal reinstated an appeal which had been dismissed for non-attendance by the parties when the same was called out for hearing by the said court.

28. As has been seen hereinabove, while it is clear from the facts that have been adduced herein that counsel for the Defendant sufficiently explained why he had not complied with the court directions, it is the finding of this court that the Plaintiff has suffered prejudice and will suffer prejudice if the court sets aside and/or vacates its orders of 5th June 2013. However, the court finds that it is not a prejudice or hardship that cannot be compensated by an award of damages. As the sword of justice must cut both ways, the Plaintiff ought to be compensated by an award of damages which this court will proceed to do.

DISPOSITION

29. Accordingly, the upshot of this court’s ruling is that the Defendant’s Notice of Motion application dated and filed 7th June 2013 is hereby allowed in terms of Prayer Nos (2) and (3) therein. The Defendant shall pay the Plaintiff’s thrown away costs in the sum of Kshs 15,000/= payable within the next fourteen (14) days from the date of this ruling.

30. In view of the fact that the stay of execution orders have now been reinstated, this court directs that the matter be mentioned on 18th July 2014 when the court will issue its further orders and/or directions in respect of the Defendant’s Notice of Motion application dated 13th November 2012.

It is so ordered.

DATED and DELIVERED at NAIROBI this 10th day of July 2014

J. KAMAU

JUDGE