REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Case 443 of 2009

MAHAT CARL JOHNSON :::::::::::::::::::::::::::::::::::: **PLAINTIFF/RESPONDENT**

- VERSUS -

MARLBOROUGH PROPERTIES LTD. :::::::::::::: **DEFENDANT/APPLICANT**

R U L I N G

1. Before the court is the **Notice of Motion** dated **13th December 2011** brought under **Order 10 Rules 10** and **11; Order LI Rule 1** of the **Civil Procedure Rules** and **Sections 1A, 1B, 3A** of the **Civil Procedure Act.** The motion seeks as the substantive prayer an order that the interlocutory judgment entered for the Plaintiff on **15th August 2011** be set aside together with all consequential orders arising therefore, and that the Defendant be granted leave to file its defence and counter-claim in terms of the draft defence and counter-claim annexed to the application and that the suit be heard on merit.

2. The application is based on grounds stated in the application the main one being that the Plaintiff and the Defendants were, upon the filing of the suit in court, engaged in negotiations to settle the matter. The Defendant's advocates, being satisfied that the parties would reach a settlement, did not file a defence. Sometime in **November 2011**, the Defendant intimated to his advocates that the negotiations did not succeed hence the need to proceed with the matter. Around that time, on **14th November 2011**, in an effort to file a Defence, the Defendant's advocate established that an interlocutory judgment was entered on **15th August 2011** without their knowledge. The Defendant allege that the failure to file the defence was not deliberate or due to any laxity on the part of the Defendant or his advocates. It is also premised on the ground that the Defendant has a solid and credible defence and that the mistakes of the Defendant's counsel should not be visited upon the Defendant.

3. The application is supported by affidavit of **NICHOLAS STOCK** – the Managing director of the Defendant Company sworn on **13th December 2011** with annextures which include a draft defence and correspondences between the Advocates of the parties.

4. The application is opposed through a replying affidavit sworn by the Plaintiff dated **13th January 2012** with annextures thereto. The affidavit magnifies the grounds upon which the application is premised, with the main submission being that the Applicant was indolent and failed, for a period of over $2^1/_2$ years, to file a defence and that this court should not allow such kind of indolence.

5. The parties filed written submissions to the application. The Defendant/Applicants submissions were filed on **26th January 2012** while the Plaintiff/Respondents submissions were filed on **8th May 2012**.

6. The brief history of the application is that by a suit filed in court on **24th June 2009** the Plaintiff/Respondent sought various prayers against the Defendant/Applicant as follows:-

(a) An order for specific performance of the sale agreement dated 21st October 2005 compelling the Plaintiff to hand over vacant possession of Flat No. B7 on L.R no. 300/375 to the Plaintiff.

(b) A mandatory injunction directing and compelling the Defendant to put the Plaintiff in possession of Flat No. B7 on L.R. No. 300/375.

(c) A permanent injunction restraining the Defendant, its servants, employees, agents and anyone authorized by it from advertising for sale, selling, transferring, dealing with or in any other manner interfering with Flat No. B7 on L.R. No. 330/375.

(d) Mense profits assessed at Kshs.80,000/= per month from 23rd April 2009 or from such other date as the court may direct until vacant possession is handed over to the Plaintiff.

(e) Costs of this suit.

(f) Interest on (d) and (d) above.

Together with the Plaint the Plaintiff filed a Notice of Motion seeking injuctive orders protecting the suit property pending the hearing and determination of the suit. By a Ruling of this court dated **10th February 2010**, the Plaintiff's/Respondent's aforesaid Notice of Motion was allowed and the suit premises conserved pending the hearing of this suit. After this Ruling little development appears to have taken place in the matter, although there is little evidence that the parties were mentioning it between themselves as per the few correspondences annexed in the affidavits. On **15th August 2011**, the Plaintiff obtained Judgment in default of appearance and defence. The Defendant then filed the current application dated **13th December 2011** seeking *inter-a-alia* that the interlocutory judgement of **15th August 2011** be set aside and leave be granted to it to file a defence. The court issued a temporary stay of execution of the interlocutory judgement and scheduled the application for *inter-partes* hearing on **17th January 2012**.

On **17th** the hearing of the application was adjourned to **26th January 2012**, when the same was dismissed for non-attendance by both parties. The application, which is this application, was however subsequently reinstated on **15th March 2012** and this is now the Ruling on the same.

7. I have considered the application, the opposing affidavits and submission of the parties. To dispense with the matter I have raised the following issues for determination:-

(a) The Defendant/Applicants conduct in this matter and whether the failure to file a defence was deliberate or excusable.

(b) Applicable law.

(c) Whether the draft defence raises prima facie issues.

8. To address the first issue it is worth noting that the Plaint was filed in court on **24th June 2009**. It is

over $2^1/_2$ years and the Defendant has not filed its defence. On **25th June 2009**, summons were served upon the Defendant to enter appearance. There is no proper explanation from the Defendant as to why that kind of delay was allowed. There is a feable attempt by the Defendant to suggest that during that time there were negotiations going on between the parties directly. However, there is little evidence of such negotiations. What is clear to me is that a combination of factors caused the situation in which the Defendant is in now, and these factors could include a deliberate intention not to file a defence, an oversight, as has been alleged, on the part of the Defendant and its advocates or plainly indolence on the part of the Defendant or its advocates. Whichever, in single or in combination it was, the issue for this court is to determine is whether the cause is excusable. The Defendant's counsel submitted that filing of the defence did not take center stage as there was the "*indication and goodwill*" that the matter would be resolved out of court and that the Plaintiff and Mr. Stock were meeting on their own. However, there is no evidence on record that there existed any goodwill, that would have led the Defendant's counsel not to enter appearance or file a defence. There is no document on record to show that the parties were actually negotiating anything. Infact this submission by the Defence Counsel that it is this "*good will*" that prevented them from filing a defence totally negates the counsel submissions that the non-filing of the defence was an oversight on their part and that the Defendant should not suffer for the mistakes of counsel. It is clear that the counsel did not file the defence based on the alleged goodwill. If that is so, then the non-filing of the defence was deliberate on the part of the Defendant, and the Defendant's counsel should not blame themselves. If it was not deliberate, then it was an oversight or plainly indolence on the part of the Defendant. This is so because from the records of the suit, the claim is protracted and the Defendant ought to have been vigilant at every stage. Failure to file a defence for a period of over $2^1/_2$ years in a matter which is hotly disputed shows that the Defendant was indolent and utterly lacked interest in defending the suit. This court cannot excuse this kind of plain and clear case of unmitigated indolence.

The Defendant, citing a case of **MAINA – VS – MUIRUKI,** has urged this court not to impute mistake of counsel on the Defendant. However, in my view, there is no case for error of Judgement in this matter. The Defendant was communicating with its counsel and they were aware that a suit had been filed against them. A defence was always due, and in the absence of one the Plaintiff was entitled to seek Judgement in default. In his submissions the counsel for the Defendant Mr. Tongoi submitted that Judgements have been set aside for reasons "*as banal as being stuck in a traffic jam or misreading the cause list*" and that this court should do the same. In my view the comparison is misplaced.

The defence counsel further submitted that the Plaintiff stands to suffer no prejudice or loss which cannot be compensated for by costs, claiming that no action has taken place in the file since the entry of judgment which in any event is a court administrative action which did not involve active participation of the Plaintiff, and that in any event the matter is yet to go for formal proof. I agree with the above sentiments. However, this kind of submission does not take seriously the process of this court, whether it is the kind of submissions which is not convincing to this court, and does not paint the Applicant as being serious.

9. The second issue I raised is on the applicable law. Specifically I refer to Sections 1A, and 1B of the Civil Procedure Act, and Article 159 (1) (b) of the Constitution.

Article 159 (1) (b) of the Constitution of Kenya expressly demands and requires that "**Justice shall not be delayed**". Allowing this application shall, in the circumstances of this matter, amount to a prejudicial and inexcusable condonation of a delay in justice upon the Plaintiff/Respondent.

Section 1A of the **Civil Procedure Act, Cap 21** of the laws of Kenya provides that:-

"1) the overriding objective of this Act and the Rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act;

(2) the court shall, in exercise of its powers under this Act or the interpretation of any provisions seek to give effect to the overriding objective specified in subsection (1);

(3)a party to civil proceedings or an advocate for such a party is under a duty to assist the court to further the overriding objective of the Act and, to that effect, to participate in the process of the court and to comply with the directions and orders of the court."

Section 1B (1) provides that:-

"for the purpose of furthering the overriding objective specified in Section 1A, the court's duty is to handle all matters prescribed before it for the purposes of attaining inter-alia, the just determination of proceedings, the efficient disposal of the business of the court, the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties."

In my view, it would be a travesty of justice, in the light of the above provisions, and of the Civil Procedure Act and the Constitution, to allow this application.

10. On the last issue I sought to establish if the proposed defence raises triable issues. I have looked at the Plaint. I have also considered the proposed defence. I have also considered the aforesaid Ruling of this court by Mr. Justice Muga Apondi, which granted the injuctive orders in this matter. Yes, the proposed defence, in my view, has been drafted to mislead this court that the Defendant has a defence. In my view, the Defendant's proposed defence is a sham and a mere defence which if allowed to be ventilated at a trial will only prejudice the Plaintiff by prolonging this matter much longer. Even if the proposed defence was arguable, it must be appreciated that there is a regular Judgement in place legally bringing to a holt the trial period.

In exercising my discretion in this matter I am aware of the finding in the case of **SHAH – VS MBOGO [1967] E.A. 116** and **PITHON WAWERU MAINA – VS – THUKU MUGIRIA [1982-88], 1 KAR 171**, in which cases it was observed that:-

"in exercising the discretion the court should consider among other things the facts and circumstances both prior and subsequent, and all the respective merits of the parties. The question as to whether the affected party can reasonably be compensated by costs for any delay occasioned by the setting aside of the Judgement should be considered and it should always be remembered that to deny a person a hearing should be the last resort of the court."

I have applied my mind to the above view, and in the exercise of my discretion. I dismiss the Notice of Motion application dated **13th December 2011** with costs to the Plaintiff/Respondent.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 16th DAY OF JULY 2012

E. K. O. OGOLA

JUDGE
PRESENT:
Mbaka for the Plaintiff/*Respondent*

N/A for the Defendant/Applicant

Teresia – Court Clerk