

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 3933 of 1989

MILLICENT PERPETUA ATIENO WANDIGA AND ANOTHERPLAINTIFF

Versus

JOHN CHEGE DEFENDANT

RULING

By this application filed on 13th May, 1996, the defendant, hereafter called "the applicant", seeks orders as follows -

"1. That this Honorable Court be pleased to review and/or vary the orders made on 22nd made on 22nd September, 1992. 2. That the applicant be granted leave to defend the suit herein." The application is grounded on an affidavit in which it is deponed that the orders had been entered against him in his absence and that he had a good defence to the suit.

The defendants however oppose the application on the grounds inter alia that the judgment had been properly entered and that the applicant had not made full disclosure to the court. In a detailed replying affidavit the respondents counsel deponed that the applicant had since been adjudged bankrupt and had no right to bring the current application. He also stated that the defence had been properly entered as the applicant had failed to provide requested particulars. He did not however disclose that the bankruptcy order had since been stayed pending an application to set it aside as it was also obtained ex parte.

By way of background information, it appears that the defendant used to own same premises known as L.E. No.209/8292/37 Nairobi. By an agreement for sale made on unspecified date (agreement not dated) but said to have been signed on 2nd or 3rd November, 1988, the applicant agreed to sell the said premises to the defendants for Shs. 740,000/= . The date of completion was stated to be 15th December, 1988 in the agreement which agreement was made under the Law Society conditions of sale. A sum of Shs, 100,000/= was paid to the advocates acting for both parties, Messrs. Hayanga and Co. Advocates, which sum was to be paid to the chargees of the premises, Messrs. H.F.C.K Ltd. but the said advocates appear to have paid some to the applicant on 21st November, 1988.

After the above, Messrs. Hayanga and Co. Advocates paid a sum of Shs. 23,086.20 to discharge the property from the H.F.C.K. Ltd. loan from a sum deposited for that purpose by the respondents herein. Victoria Finance Co. Ltd. also agreed to pay a sum of Shs. 450,000/= on behalf of the respondents on 28th November, 1988 but the applicant apparently changed his mind and took the titles from the H.F.C.K. Ltd. and refused to release to the parties mutual advocate as the respondents had not deposited the balance of the purchase price by 15th December, 1988. After some futile correspondence to the H.F.C.K. Ltd. and the applicant, the respondents realised that the applicant did not intend to sell the premises to them and instructed Messrs. Ongeche and Co. Advocates, to act for them.

Messrs. Ongeche and Co. Advocates on 11th August, 1989 lodged a caveat against the title. On 26/1/90 however the Registrar of Titles informed the respondents that he intended to remove the caveat if no court order is obtained within 45 days. Meanwhile the respondents had filed the current suit on 14th day of September, 1989 for specific performance or refund of deposit, made to the applicant of Shs. 123,000/= plus interest. On 18th September, 1990 the plaint was amended to exclude a claim for Shs. 123,000/= but in its place put a claim for Shs. 100,000/= plus a further sum of Shs. 120,000/= paid to Messrs. Hayanga

and Co. Advocates as the applicants advocate of which sum Shs. 23,000/= was used to discharge the charge and the balance apparently retained by the advocate and claimed loss of use of the moneys, as well as general damages. On 14th October, 1990, the applicant filed a defence and counterclaim to the respondents claim. Further on 11th October, 1990, long after the period of 45 days had expired and Registrar entitled to remove the caveat the respondents obtained an order extending the caveat.

While the suit was pending, the respondent obtained an order for particulars, an application for which had been served by registered post to a box number said to belong to the applicant's advocate who filed the defence, although an order to that effect had not been obtained as the defence showed a physical address. When the application for particulars came up for hearing on 23/10/91 the applicant's advocate apparently entered a consent order to the effect that the particulars would be supplied within 21 days from that date and that in default, the defence would be struck out. The particulars were not supplied within the agreed time and the plaintiff set down the suit for formal proof without applying to have the defence formally struck out. On the date of the formal proof, of which the applicants counsel was notified through registered post, without an order to that effect the applicants counsel withdrew from the suit and the formal proof proceeded without the presence of the said counsel on the 22nd September, 1992, and the respondents were awarded damages of Shs. 797,766/=. The decree does not show if any evidence was heard nor can this fact be verified as the original file cannot be found to date and it was not until 21st October, 1994 that the file was reconstructed and the respondents proceeded to tax costs on 22/11/95 and matter brought to the attention of the applicant leading to the filing of this application on 13th May, 1996 by the current advocates of the applicant who filed their notice of appointment on 19th March, 1996.

The determination of this matter has been seriously hampered by the non-availability of the original file or proceedings. I will nevertheless endeavour to do as much justice as possible based on the imperfect material now available to me. Before I look at the merits of the matter I wish to recall that in dealing with such issues, the main consideration is whether the judgment was rightly entered. If not then the applicant would be entitled *ex debito* justified to have the judgment set aside. On the other hand, if the judgment was properly entered, then before the matter is reviewed or set aside, it must be shown that the setting aside would serve a purpose and whether or not the defendants failure to ensure that *ex parte* orders are not entered was deliberate or with a view to defeating the course of justice. In the respondents ground of opposition it was also contended that the applicant had no *locus standi* as a receiving order had been made against him. In support of this contention Mr. Fraser for the respondents relied on the case of *Heath vs. Tang and Another* (1993) 1 WLR 1421 in which it was held by the Court of Appeal in England on the strength that a bankrupt's estate vests in a receiver. Although on principle this may be so I find that in the present case as the receiving order has since been stayed, on 29th December, 1996 the applicant still has *locus standing*.

Was the judgment herein entered regularly? As already stated, there was a valid defence, on record in this suit. It was never formally struck out before the alleged formal proof was held by the court. The only order the applicant had was that the applicant had to provide particulars within 21 days on the threat of having his defence struck out if the particulars are not so provided. It also appears that no evidence was taken of the loss suffered by the respondents. If that were so, such a colossal figure of Shs. 797,000/= could not have easily been justified. In my ruling therefore the respondents could not proceed with formal proof; they should have first had a formal order striking out the defence before proceeding with the formal proof. I therefore find that the judgment herein was irregularly entered as there was still a valid defence on record. The order clearly shows an error apparent on record which brings the matter within the purview of O. 44 Rule 1 of the Civil Procedure Rules.

In case, I am wrong in my above conclusion, I now examine the merits of the matter if the formal proof were set aside. In this regard it is observed that the agreement between the parties was to be completed by 15th December, 1988. By that date the respondents were not in a position to pay nor had they paid the balance of the purchase price. Consequently it could be argued that the respondents had not honored the agreement as it was not in the contemplation of the parties that the balance would be by a loan. The defence also raises a counterclaim. If the matter were therefore to proceed to hearing the court would be able to determine who of the warring parties is entitled to judgment instead of shutting out the parties from the seat of justice.

As regards the manner in which the applicant came to have himself shut out from the seat of justice, the larger blame appears to lie on the applicant's lawyers in failing to honor the consent order they had entered into. He is also to blame in not advising the client that the fact that the suit premises had been sold to a third party did not absolve him from liability. I therefore find that as there is no indication that the applicant participated in this delay, I would be loathe to visit the sins of the counsel on an innocent client.

There is of course the issue of sale of the suit premises despite extension of the caveat by the court. It is however observed that the notice for removal of caveat was given way back on 26/6/1990 and the application for extension was made on 21/8/90, after the 45 days had expired allowing for normal time allowed for service of registered matters in Nairobi, and an order for extension was not made until 29th August, 1990, by which time the Registrar of Titles could have rightly removed the caveat as the 45 days had elapsed. It is therefore not clear if the applicant in any way influenced the removal of the caveat regularly or irregularly.

The blame on the delay in bringing the current application after getting to know of the matter "herein would also appear to lie largely on the choice of the legal advisors. Although the current advocate was instructed way back in March 1996 action was not taken until May, 1996 when this application was filed. As it is not usual for the courts to visit the sins of counsel on the client, I cannot say that this was done with a view to delaying the cause of justice on the part of the applicant. In the result and for the reasons canvassed hereinabove it is my ruling that the judgment herein through a default clause and/or formal proof was irregularly obtained and/or that the setting aside would enable the court to determine some arguable points raised by the defence. I hereby therefore set aside the court's orders entered into on 22nd September, 1992. As the confusion herein was caused by the laxity of the applicant's original counsel in not complying with a consent order, I make no order as to costs. I direct that the matter do now proceed to determination of the issue relating to whether the default to supply particulars should render the defence struck out on an application to be presented by the respondents in court. Orders accordingly.

Dated at Nairobi this 28th day of February, 1997.

G. P. MBITO

JUDGE