



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT NYAHURURU**

**ELC CASE NO 287 OF 2017**

**EAST AFRICA VENTOR CO. LTD.....PLAINTIFF/APPLICANT**

**VERSUS**

**AGRICULTURAL FINANCE CO-OP LTD.....1<sup>st</sup> DEFENDANT/RESPONDENT**

**LEGACY AUCTIONEERS SERVICE.....2<sup>nd</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The matter before me for determination was filed on the 1<sup>st</sup> November 2016 at the Nairobi High Court vide a Plaint dated the 30<sup>th</sup> October 2016. Alongside the Plaint was an application of the same date seeking for interim orders.

2. The same was placed before the Hon Judge on the 1<sup>st</sup> November 2016 wherein the court issued orders to the effect that a sum of Ksh. 200,000/ be deposited before the close of the business or by 9:30 am the next morning in default to which the 1<sup>st</sup> Defendant was at liberty to proceed with the sale.

3. The matter was set for inter parties hearing for the 15<sup>th</sup> November 2016 on which day the court was not sitting. Subsequently it was slated for mention for the 6<sup>th</sup> March 2017. However, with the establishment of the Nyahururu High Court, the matter was transferred therein wherein the Application dated the 30<sup>th</sup> October 2016 was heard inter parties and a ruling delivered on the 2<sup>nd</sup> November 2017 which injunctioned both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from selling the suit property for as long as proper notices had not been issued as directed. There were further orders that the Defendants also to carry out a forced sale valuation as required by the provisions of Section 97 of the Land Act.

4. Pursuant to the delivery of the said ruling, counsel for the Respondents fixed the matter for mention at the registry wherein on the 27<sup>th</sup> June 2018 the matter was placed before the court which directed parties to comply with the provisions of Order 11 of the Civil Procedure Rules within 21 days so that the main suit could be heard and determined.

5. On the 25<sup>th</sup> October 2018, when the matter came up for mention to confirm compliance, there was no appearance by the Plaintiff/Applicant. The Defendant/Respondents thus sought for a hearing date wherein the court obliged them and scheduled the matter for hearing for the 5<sup>th</sup> February 2019.

6. On the said date, there was neither appearance by the Plaintiff nor their Counsel. The matter was thus dismissed for want of attendance, pursuant to the provisions of Order 12 Rule 3 of the Civil Procedure Rules.

7. It was pursuant to the dismissal of the case that the Applicant herein filed an application vide Notice of Motion dated 13<sup>th</sup> February 2019 brought under Article 159 of the Constitution, Section 80 of the Civil Procedure Act, Order 22 Rules 25 and 52, Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules where they sought for the following orders:

a. Spent.....

b. Spent

c. That the honorable court be pleased to reinstate the Plaintiff's suit herein for hearing on merit.

d. That pending the hearing and determination of this application, the Defendants be reinstated by a way of a temporary injunction either by his agents, servants, employees, workers, from selling, alienating, transferring, disposing, advertising or in any manner dealing with the Plaintiff's suit property.

e. That pending the hearing and determination of this case; the Defendants be restrained by way of injunction either by his agents, servants, employees, workers, from selling, alienating, transferring, disposing, advertising or in any manner dealing with The Plaintiff's suit property.

f. That costs of the application be provided for.

8. It was after the Plaintiff/Applicant had filed and served the said application that the Defendant/Respondent, filed their replying affidavit and an application for Preliminary Objection, dated the 20<sup>th</sup> February 2019, on the 22<sup>nd</sup> February 2019.

9. Both these Applications were argued on the 28<sup>th</sup> February 2019.

#### **The Plaintiff/Applicant's Arguments.**

10. While relying on the supporting affidavit filed by the Plaintiff, one Geoffrey Wahome, counsel for the Plaintiff submitted that on the 25<sup>th</sup> October 2018 when the matter came up for mention, counsel for the Defendant had fixed the matter for hearing ex parte, for the 5<sup>th</sup> February 2019 but had not effected service of the hearing notice upon them. That in the absence of service the matter had thus been dismissed by mistake.

11. Counsel further argued that pursuant to the provisions of Section 1A and 1B of the Civil Procedure Act, the court had wide discretion to make orders geared towards a just determination of a matter which powers needed to be exercised on behalf of the Plaintiff herein who had become aware of the adverse orders against him after he was served with a letter by the Defendants of their intention to auction the suit property.

12. That further, in contravention of the court's ruling dated the 2<sup>nd</sup> November 2017, the Defendant's had not served them with the Statutory Notices as directed by the court. That there were good reasons why the Plaintiff did not appear in court on the date scheduled for the hearing of the matter. The Plaintiff had relied on the following decided cases, amongst others to buttress their submissions.

a. **Trust Bank Limited vs Amalo Company Limited [2002]eKLR**

b. **Pithon Waweru Maina vs Thuu Mugira [1083] eKLR**

c. **Wanguhu vs Kania [1985] eKLR**

13. The Plaintiff thus prayed for the suit to be re-instated so that it could proceed for hearing and determination on merit.

#### **The Defendant/Respondent's Response.**

14. The Defendant's Counsel did not seem to oppose the Plaintiff's application herein. His submission was to the effect that the decision of the court was not based on the nature of the Statutory Notice, but rather on whether the Plaintiff had annexed their documents to the pleadings. He sought to rely on their replying affidavit sworn by one Rose Ochanda and filed on the 20<sup>th</sup> February 2019.

15. Counsel further submitted that all along, the Plaintiff had never been ready to prosecute the matter and that it had always been the Defendant who has moved the court to have the same prosecuted. That the Plaintiff could not now come to court to state that they wanted to have the matter prosecuted. That be as it may they were ready to have the same proceed to hearing and determination.

#### **Determination.**

16. I have considered the proceedings on the court's record as well as the submission by both counsel and the fact that that application to reinstate the suit for hearing and determination was not opposed by the Defendants herein.

17. I note that on the 27<sup>th</sup> June 2018 the Plaintiff had been represented when orders were issued for parties to comply with the provisions of Order 11 of the Civil Procedure Rules so as to set the matter down for hearing. A date for the 25<sup>th</sup> October 2018 was subsequently fixed for the mention to confirm compliance on which date only the Defendants' counsel was present wherein he sought for a hearing date and undertook to effect service upon the Plaintiff. A hearing date was issued but on that date the neither the Plaintiff nor his counsel was Present, leading to the dismissal of the matter for want of attendance.

18. From the court record, it is clear that despite the clear undertaking by the defence counsel, to effect service of the hearing date, there was no proof of such service. This may be attributed to the lack of diligence by the defence Counsel, but it is nevertheless a mistake for which the Applicant should not be blamed. In this regard I would restate the words of Apaloo, JA in the case of **Philip Chemowolo & Another v Augustine Kubende, [1982-88] 1 KAR 103** that:

*“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit ... the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”*

19. The foregoing being my view of the matter, I will allow the application dated 13<sup>th</sup> February 2019 and set aside the dismissal order of 5<sup>th</sup> February 2019 with costs to the Plaintiff.

20. Further orders are that the suit be reinstated for hearing and determination on the merits.

21. Owing to the fact that the same emanates from a contractual loan agreement between the Plaintiff and the 1<sup>st</sup> Defendant in the sum of Kenya Shillings 10,000,000/= the matter is herein transferred to the Chief Magistrate's court for further directions.

22. On the second issue where the Plaintiff/Applicant seeks for temporary injunctive orders, I wish to point out that this issue was dealt with vide the ruling delivered on the 2<sup>nd</sup> November 2017 and the matter rests at that.

**Dated and delivered at Nyahururu this 7<sup>th</sup> day of May 2019**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**