



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO.148 OF 2016

DAVID SILA ONYANGO.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA1ST DEFENDANT

PURPLE ROYAL AUCTIONEERS2ND DEFNDANT

RULING

1. National Bank of Kenya Limited and Purple Royal Auctioneers, the defendants, filed the notice of motion dated 27th September 2016 against **David Sila Onyango**, the Plaintiff, seeking for the five prayers as summarized below;

- i) (spent)
- ii) To vary, discharge and or set aside the orders issued on 22nd September 2016.
- iii) The Defendants be granted leave to file a replying affidavit to the Plaintiff's application dated 14th June 2016.
- iv) An order for the Plaintiff to deposit the outstanding loan amount into the court or a joint account in the joint names of the advocates.
- v) Costs.

The application is based on the seven grounds marked (a) to (g) on the notice of motion and is supported by the affidavit of Christine Nyabiage Ogaro sworn on the 23rd September 2016.

2. The notice of motion is opposed by the Plaintiff through his replying affidavit sworn on the 10th October 2016.

3. The counsel for the parties agreed to file written submissions on the application. The counsel for the Defendants filed their written submissions dated 2nd November 2016 on the 7th November 2016 while counsel for the Plaintiff filed theirs dated 21st November 2016 on the 23rd November 2016.

4. The issues for determination by the court are as follows;

- a) Whether the Defendants have established sufficient and justifiable reasons for the orders issued

earlier to be varied, set aside or discharged.

b) What orders to issue

c) Who pays costs.

5. The court has carefully considered the grounds on the notice of motion, affidavit evidence by both sides, the written submissions by both counsel and come to the following determinations;

a) That indeed the reliefs or orders sought by the Plaintiff in their notice of motion dated 14th June 2016 which were granted *ex parte* on 22nd September 2016 are in the nature of equitable remedies. That the Plaintiff was therefore obligated to not only come to court in clean hands, but make full disclosure on all the material aspects.

b) That the court has discretion to set aside and vary its orders in accordance with **Order 40 Rule 7** of the Civil Procedure Rules. That there are several superior court's decision on that issue including **Harrish Chandra Bhovanbhai Jobanputra & another –V- Paramount Universal Bank Ltd & 3 Others** [2014] eKLR .

c) That when the plaintiff appeared *ex parte* before court on the 20th June 2016, prayer 2 of the notice of motion dated 14th June 2016 was granted on condition he pays the 1st Defendant Ksh.2 million “**on or before the close of business on Monday 27th June 2016**” and in default the order “**shall lapse automatically without any further reference to the court.**”

d) That when counsel for both parties appeared in court on the 30th June 2016, they entered into three consent orders on the Defendants filing their replying papers in 14 days, extending the conditional interim orders of 20th June 2016 for 14 days to enable the Plaintiff pay the balance of Ksh.950,000/= and setting the notice of motion dated 14th June 2016 for hearing on the 22nd September 2016.

e) That on the 22nd September 2016 the counsel for the parties attended court. The learned counsel for the Plaintiff disclosed that the Plaintiff had only paid Ksh.800,000/= out of the Kshs.950,000/= and therefore the conditional interim order had lapsed. The learned counsel pointed out that the Defendants had not filed any replying papers to the notice of motion dated 14th June 2016 and that it was therefore unopposed and should be allowed in terms of prayer 3. The learned counsel for the Defendants submitted that the failure by the Plaintiff to pay ksh.950,000/= in 14 days from 30th June 2016 meant that the notice of motion dated 14th June 2016 had been overtaken by events. The learned counsel conceded that the Defendants had not filed any replying papers to the notice of motion dated 14th June 2016. That after considering counsels submissions, the court granted the notice of motion dated 14th June 2016 in terms of prayer 3 with costs in the cause.

f) That a party who wishes to oppose an application is required under **Order 51 Rule 4** of the Civil Procedure Rules to file grounds of opposition, replying affidavit or notice of preliminary objection. The Defendants had not filed any reply by the 22nd September 2016 when the application came up for hearing. The learned counsel for the Defendant has explained in their submissions that the failure to do so was a mistake by counsel which she submitted should not be visited on the party. The learned counsel referred the court to the case of **Paul Asin t/a Asin Supermarket –V- Peter Ukembi** [2013] eKLR in which reference was made to the case of **Shah –V- Mbogo & Another** 1967 E.A 116 on the principles of setting aside an order due to excusable mistake. The learned counsel for the Plaintiff submitted that the counsel for the Defendants knew the consequences of failure to file their replying papers and that such a failure by counsel was not an excusable mistake but an act of negligence and the party has recourse against the advocate. The learned counsel referred to the case of **Charles Omwata Omwoyo –V- African Highlands & Produce Co. Ltd** (2002) eKLR where the court cited **Ketteman –V- Hausel Properties Ltd** (1988) 1 All ER 38

and held that ***“it was time for legal practitioners to shoulder the consequences of their negligent acts or omissions like other professionals do in their field of endeavor.”*** The counsel also referred to the court of appeal decision in the case of **Tana & Athi River Development Authority -V- Jeremiah Kimigho Mwakia & 3 Others**. That having considered the submissions by counsel on this issue, the court find and hold that the failure by counsel to file and serve their replying papers to the notice of motion dated 14th June 2016, contrary to the consent of 30th June 2016, was not an excusable mistake in view of the submissions by counsel holding brief for the counsel for the Defendants on 22nd September 2016. The learned counsel had told the court the following while replying to the Plaintiff’s counsel submissions;

“.....I do not know why the Defendants/respondents have not filed replying papers to the application dated 14th June 2016. They may be granted more time.”

g) The parties and counsel in a suit have a duty under **Section 1A (3)** of the Civil Procedure Act Chapter 21 of Laws of Kenya **“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.”** That the overriding objective is set out in **Section 1A (1)** of the said Act as **“to facilitate the just expeditious, proportionate and affordable resolution of the civil disputes governed by the Act”**. The failure by the Defendants to file and serve their replying papers as directed goes contrary to the above provision and to seek to file the replying papers at this stage would lead to more delay and expenses.

h) That in view of the foregoing and especially the finding in (f) above the court finds and holds that the Defendants have not made a justifiable case for leave to be granted to file a replying affidavit to the Plaintiff’s application dated 14th June 2016 as to-do so would lead to delaying this matter longer.

i) That the learned counsel for the Defendants has not made a case for varying the order of 22nd September 2016 as the facts pleaded and deponed to by the Plaintiff has not been controverted or rebutted by the Defendants through filing of the requisite pleadings. That prayer 2 of the notice of motion dated 27th September 2016 is therefore declined. That prayer 4 was meant to be in the interim and has therefore since lapsed.

j) That as the costs in respect of the Plaintiff’s notice of motion dated 14th June 2016 was ordered to be in the cause, so are the costs in the current application.

6. That flowing from the foregoing the notice of motion dated 27th September 2016 is without merit and is dismissed with costs in the cause.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 10TH DAY OF MAY 2017

In presence of;

Plaintiff Absent

Defendants Absent

Counsel Mr Theuri for the Plaintiff

M/S Achiro for the 1st Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

10/5/2017

10/5/2017

S.M. Kibunja Judge

Oyugi court assistant

Parties absent

Mr. Theuri for the Plaintiff/Respondent

M/S Achiro for the 1st Defendant/applicant

Order; Ruling dated and delivered in open court in presence of Mr. Theuri and M/S Achiro for the Plaintiff and 1st Defendant respectively.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

10/5/2017