



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 326 OF 2010

TOM OGENCHE MOGOI.....PLAINTIFF

VERSUS

BEATRICE BOSIBORI OGOI.....1ST DEFENDANT

CO-OPERATIVE BANK OF KENYA LIMITED.....2ND DEFENDANT

RULING

The 2nd Defendant filed the application dated 3/6/2014 seeking to have the orders made on 22/3/2013 discharged, varied or vacated forthwith. Those orders were made pursuant to the application dated 20/3/2013 made by the Plaintiff in which he sought to have the 2nd Defendant paid the sum outstanding as previously disclosed in the proceedings after which the 2nd Defendant would cease to be a party in the suit. That application was heard *ex-parte* on 22/3/2013 and the court made orders directing the Plaintiff to pay to the 2nd Defendant the amount outstanding as previously disclosed in the proceedings and thereafter the 2nd Defendant would cease to be a party. The court fixed the application for *inter partes* hearing on 12/4/2013.

The 2nd Defendant contends that these orders were final in nature and there was nothing left for *inter partes* hearing. After the Plaintiff obtained those orders, he has failed to prosecute his application and the 2nd Defendant now seeks to have the orders discharged or set aside under order 40 Rule 7 of the Civil Procedure Rules. The 2nd Defendant avers that it has been prejudiced as it cannot proceed with the realization of the property known as Nairobi/Block 82/3646 registered in the name of the 1st Defendant who charged it to the 2nd Defendant to secure loans granted to her. The application is supported by the affidavit of Samuel N. Kibugi in which he confirms the fact that the suit property was charged by the 1st Defendant to the 2nd Defendant.

This suit was initially brought against the 1st Defendant but the Plaintiff later amended the plaint and joined the 2nd Defendant which holds a charge over the suit property as a party. The 2nd Defendant contends that after the *ex-parte* order was made on 22/3/2013, and it filed its Grounds of Opposition together with its Replying Affidavit on 11/4/2013 and on 29/4/2013 respectively, the Plaintiff has not taken steps to prosecute that application since 29/4/2013 when it was adjourned.

The 2nd Defendant contends that those orders ought not to have subsisted for more than 14 days. It contends that it is greatly prejudiced since the loan amount due from the 1st Defendant is not being serviced and that as at 18/10/2013 the sum of Kshs. 1028053.63 was due and owing from the 1st Defendant which amount continues to accrue interest at commercial rates yet the 2nd Defendant cannot

realize the security because of the court order. The 2nd Defendant also contends that the *ex-parte* order is unfair and harsh because it removed the 2nd Defendant from these proceedings without giving it an opportunity to be heard or without being compensated for the costs it had incurred in defending its interest in this suit. A copy of the order issued on 26/3/2013 was exhibited.

The Plaintiff swore the replying affidavit in opposition to this application. He concedes making the application to amend the plaint and being granted leave. The Plaintiff raises the issue of non-service of the statutory notice by 2nd Defendant and alleges that the amount claimed by this Defendant was settled at Kshs. 3521657.75 which he has duly paid. He depones that he made the application dated 20/3/2013 seeking the court's leave to pay the balance claimed by the 2nd Defendant of Kshs. 521,657.75 as previously disclosed to avoid having the suit property auctioned. The Plaintiff contends that once the Bank had received the sum of Kshs. 3,521,657.75, which the bank admits receiving, it ought to have ended the dispute save for the issues of costs and the discharge of the suit property.

The court has looked at the amended plaint filed in court on 12/7/2011 which joined the 2nd Defendant to these proceedings. It is pleaded in the plaint that the Plaintiff and the 1st Defendant were husband and wife until December, 2007 when the 1st Defendant moved out of the matrimonial home. The 1st Defendant was an employee of the 2nd Defendant. The Plaintiff originally owned the suit property but he transferred it to the 1st Defendant in order to facilitate the 1st Defendant obtain banking facilities. He filed the suit when he learnt that the 1st Defendant was trying to sell the suit property which he claims is their matrimonial home. Most of the reliefs sought in the plaint are directed at the 1st Defendant. The first relief is sought against both defendants to restrain them from selling or disposing the suit property or from receiving any monies as consideration for the sale of the suit property.

Although the Plaintiff alleges that the amount due was settled at Kshs. 3,521,657.75 after the proceedings before Lady Justice Nyamweya, he did not produce any evidence of the settlement. Instead he annexed a copy of the redemption notice dated 7/10/2011 issued by Expeditious Merchants showing that the amount owed as at 3/10/2011 was Kshs. 3,521,657.75 together with interest at bank rates as provided in the charge.

The court has considered the application, the replying affidavit and the submissions of counsels and finds that the orders made were final and the 2nd Defendant which holds the title over the suit property as security was not afforded an opportunity to be heard before those orders were made.

The application dated 3/6/2014 is allowed. The orders made on 22/3/2013 are hereby discharged. This being an old suit filed in 2010, the Plaintiff is directed to set it down for hearing without further delay.

Dated and delivered at Nairobi this 9th day of October 2017.

K. BOR

JUDGE

In the presence of: -

Mr. Macharia for the Plaintiff

No appearance for the 1st Defendant

Mr. Kimondo for the 2nd Defendant

Mr. Vincent Owuor- Court Assistant