



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENT AND LAND**  
**E LC SUIT NO. 823 OF 2014**

**ELIZABETH WAMURANGA ICIKA .....PLAINTIFF/APPLICANT**

**=VERSUS=**

**JAMII BORA BANK LIMITED.....DEFENDANT/RESPONDENT**

**RULING:**

The matter coming up for the determination is the Defendants Notice of Motion dated 15<sup>th</sup> July 2014 brought under **Section 3A of the Civil Procedure Act Order 51 Rules 3 and 15 Order 40 Rule 7 of the Civil Procedure Rules** seeking for this Orders;

- i. *That the ex parte proceedings of 3<sup>rd</sup> July 2014 and all the consequential Orders be and are hereby set aside.*
- ii. *That the Plaintiff's application dated 23<sup>rd</sup> June, 2014 be heard afresh inter partes on the merits.*
- iii. *That in the alternative to prayer No.2 and 3 above the order of injunction granted on 3<sup>rd</sup> July 2014, in the Plaintiff's favour be and is hereby discharged and/or set aside.*
- iv. *That cost of this application be provided for.*

The application is grounded on the following;

- a) *That the Plaintiff's application for injunction dated 23<sup>rd</sup> June, 2014 was heard **ex-parte** and allowed on 3<sup>rd</sup> July 2014 on the basis that the same was not opposed by the Defendant.*
- b) *That the Defendant had no Notice that the Plaintiff's application dated 23<sup>rd</sup> June 2014 was scheduled to come up in court on 3<sup>rd</sup> July 2014 and was therefore unrepresented.*
- c) *That the Defendant failure to attend Court on 3<sup>rd</sup> July 2014, when the Plaintiff's application came up was unintentional and unpremeditated.*
- d) *That the Defendant has by virtue of the ex parte orders on 3<sup>rd</sup> July, 2014 been condemned unheard by no fault of its own.*

- e) That the *ex parte* Order of injunction is working extreme hardship on the Defendant whose exercise of its statutory power of sale over the suit property which has properly accrued has been curtailed without the Defendant being heard.
- f) That the Defendant is keen and ready to present its opposition to the Plaintiffs application dated 23<sup>rd</sup> June, 2006, on substantial legal and factual grounds.
- g) Further, that the *ex parte* Order of injunction sought and obtained by the Plaintiff was so granted by the Court on the basis of misrepresentation and material non-disclosure on the part of the Plaintiff and therefore ought to be set aside in any event .
- h) That the interest of justice would be best served if the orders sought herein were granted.

The application is further supported by the affidavit of **Fred Chumo**, the Head of Legal Services with **Jamii Bora Bank Ltd**.

The application is contested. **Elizabeth Wamuranga Icika**, the Plaintiff herein averred that the application was duly served and a return of service filed in Court. Further that when the application was served, it indicated that inter partes hearing would be on 3<sup>rd</sup> July 2014. She further averred that the applicant's application is frivolous, vexatious and intended to annoy. Therefore it was her contention that the proceedings of 3<sup>rd</sup> July 2014 are for all intents and purposes regular. Further, that the Order of injunction issued on 3<sup>rd</sup> July 2014 was properly issued and that the Defendant /applicant simply refused to appear for reasons best known to them and should not therefore blame themselves for being docile.

The Deponent further denied that the proceedings of 3<sup>rd</sup> July, 2014, were irregular and the application should not be allowed. It was also her contention that the failure of representation should not be visited upon the Plaintiff /Respondent as the Defendant/applicant was properly served with both the said application and Orders indicating the date of the next hearing and the applicant's allegations are misleading.

The application was canvassed by way of written submissions which I have carefully considered. I have also considered the provisions of Section 3A of the Civil Procedure Act which donates to Court the inherent power to issue any Orders that would ensure end of justice or prevent abuse of the Court process. Further Order 40 Rule 7 grants the Court discretion to set aside injunction Order as and when applied by a dissatisfied party but who must convince the court as to why such orders may be set aside.

Having considered the instant application the pleadings and the written submissions, the court finds that there are some undisputed facts .

There is no doubt that the Plaintiff /Respondent herein took a loan facility from the Defendant/applicant in the year 2012 and charged her property **LR No.Nairobi /Block 118/1981** as security for the loan facility.

There is also no doubt that the Plaintiff/Respondent defaulted in the loans repayments and the Bank attempted to exercise its **Statutory Power of Sale**, by advertising the Sale of the property through Public Auction by **Garam Investments auctioneers**, as evidenced by ENI 2.

There is also no doubt that the Plaintiff/Respondent moved to court on 24<sup>th</sup> June 2014, through a certificate of urgency application dated 23<sup>rd</sup> June 2014. The Plaintiff/Respondent obtained temporary Order of injunction restraining the Defendant/Applicant from selling the suit property; the temporary injunction was to last for the period ending on 3<sup>rd</sup> July 2014.

There is also no doubt that the said Order given on 24<sup>th</sup> June 2014 and issued on 25<sup>th</sup> June, 2014 was served on the Defendant/Applicant on 27<sup>th</sup> June, 2014. The Defendant /Applicant alleged that indeed

the said Order and Notice of Motion was served to them but the Notice of Motion had no hearing date. Indeed, the Notice of Motion attached to the applicant's Notice of Motion has no hearing date. There is also no doubt that the attached Order indicated that the temporary injunction was issued for a period ending 3<sup>rd</sup> July 2014. Though Order 3 states that the application was to be served for interpartes hearing before any Judge in the ELC Division, it was not very clear when the interpartes hearing was to take place.

Applicant alleged that though they received the Notice of Motion and the accompanying Order, they expected to receive a **Hearing Notice** inviting them for interpartes hearing. There is no doubt that the matter came for interpartes hearing on 3<sup>rd</sup> July, 2014 but the Defendant was absent.

The Court relied on the Affidavit of service filed by the process server on 2<sup>nd</sup> July, 2014 indicating that the Defendant was served. Indeed, on the attached copy of the certificate of urgency, there is a stamp dated 27<sup>th</sup> June 2014 indicating that the same was received by the Defendant Bank. On 3<sup>rd</sup> July, 2014 when the matter came for hearing, the Court indicated as follows:-

***“I have seen the Affidavit of service. There is a stamp of the Defendant bank dated 27<sup>th</sup> June 2014” The application is served and the Respondent not in Court. The Notice of Motion dated 23<sup>rd</sup> June 2014 is not opposed and I allow it in terms of prayer No 3 and costs in the cause”.***

Therefore the temporary Orders were confirmed until the final determination of this suit. Those are the Orders that the Defendant/Applicant herein are contesting.

Having now considered the application herein in totality and the written submissions, the Court finds that the principles upon which Court consider in such applications are well settled. Whether or not to set aside an ex parte Order is a matter of Court's discretion. However such discretion must be exercised judiciously. The applicant relied on various authorities to support its arguments in favor of setting aside the Orders early issued.

Though it is evident that the Defendant/Applicant herein was served with the Notice of Motion dated 23<sup>rd</sup> June 2014, it is indeed clear that its Notice of Motion did not have a hearing date. The Orders also served on them showed the Orders were to last up to 3<sup>rd</sup> July 2014. The Court also relied on the Return of Service, which had an attached copy of the certificate of urgency bearing a received stamp from the Defendant /Bank. However, the Notice of Motion attached had a hearing date of 3<sup>rd</sup> July, 2014 whereas the applicant's copy bore no date. That was therefore misleading and the court relied on the said **Return of Service** to allow the Plaintiff's Notice of Motion dated 23<sup>rd</sup> June, 2014.

I will rely on the authorities quoted by the Defendant /Applicant herein; **Mwalia Vs Kenya Bureau of standards ( 2001) EA 148**; where it was held that:-

***“ The discretion of the Court to set aside Judgment in default of appearance or defence was unfettered , except that exercised it had to be exercised in a rational manner on well settled principles and or terms that were just.....”***

Further, in the case of **James Juma Muchemi & Partners Ltd Vs Barclays Bank of Kenya Ltd & another ( 2012) eKLR**, the Court held that:-

***“.....there exists jurisdiction under Order 40 Rule 7 for the Court in appropriate cases to interfere with an order of injunction made under Order 40.....that jurisdiction is discretionary and like all other discretion , the same must be exercised judiciously”.***

The applicant averred that if the Notice of Motion served on them had a clear date for the hearing, they would indeed have attended and opposed the said Notice of Motion. There is no doubt that the copy of Notice of Motion served on them had no hearing date and the Court would therefore not doubt the

applicant's submissions. I will refer to the case quoted by the Defendant/Applicant herein, **Reef Building Systems Lts Vs Nairobi City Council** (Unreported) where the court held that :-

***“ ...as the Order of injunction is an equitable relief issued to prevent the ends of justice from being defeated , it may be discharged or varied or set aside if it is shown it is contrary to the ends of justice to retain it in force”.***

In the instant matter, the Defendant were misled since the copy of Notice of Motion served on them did not have clear hearing date. The Notice of Motion dated 23<sup>rd</sup> June 2014 was allowed entirely on the basis that the same was not opposed. Of the Defendant/Applicant had appeared and opposed. May be the outcome would have been different. The Defendant /applicant deserve an opportunity to present its side of the case.

Having now analyzed the facts herein and the relevant provisions of law, such as ***Order 51 Rules 3 & 5 of the Civil Procedure Rules***, it is clear that the Defendant was entitled to Notice of hearing date of the Notice of Motion which was not the case herein. The upshot of the foregoing is that the Court finds the Defendant's Notice of Motion dated **15<sup>th</sup> July 2014** merited. The Court allows the said Notice of Motion in terms of payer No.2 and 3 with costs to the applicant.

Further, the applicant is granted leave of 14 days from the date of this Ruling to file and serve their Replying Affidavit to the Notice of Motion dated **23<sup>rd</sup> June 2014** and Plaintiff/Applicant granted correspondence leave of 7 days after service to file Supplementary Affidavit if need be. Matter to be mentioned on **17<sup>th</sup> December, 2014** for further orders.

It so so ordered.

Dated, Signed and delivered this 27th day of **November, 2014**.

**L . GACHERU**

**JUDGE**

In the presence of :-

Mrs Rose Olouch holding brief for Mrs Kahindi for the Plaintiff/Respondent

None attendance for the Defendant/Applicant though notified.

Court Clerk: Kamau

**L . GACHERU**

**JUDGE**

**Court:**

Further mention on 17<sup>th</sup> December, 2014 for further Orders.

**L . GACHERU**

**JUDGE**