Osnett Investments Limited v Kenya Commercial Bank Limited & another (Commercial Case E007 of 2024) [2025] KEHC 16794 (KLR) (14 November 2025) (Ruling)

Neutral citation: [2025] KEHC 16794 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

COMMERCIAL CASE E007 OF 2024

EN MAINA, J

NOVEMBER 14, 2025

BETWEEN

OSNETT INVESTMENTS LIMITED ..... PLAINTIFF

AND

KENYA COMMERCIAL BANK LIMITED ..... 1ST DEFENDANT

NORERN AUCTIONEERS ..... 2ND DEFENDANT

RULING

1. The Applicant filed Notice of Motion Application dated 03/03/2025 seeking the following orders, that;

    a. Spent

    b. The honourable court be pleased to set aside the ruling entered against the plaintiff/applicant on 25th September 2024.

    c. This case be reinstated and continue from where it had reached before Justice Honourable Muigai.

    d. The Plaintiff will suffer irreparable harm if the orders sought are not granted.

    e. Costs of this application be provided for.

2. The Application is supported by the Affidavit of Esther Mutindi Mwau Sigilai, a director of the Applicant company who contended that she instituted this case on the 4/04/2024 seeking judgement against the Defendants for initiating recovery proceedings leading to loss of the subject motor vehicle, loss of business, loss of profits, loss of interests, damages for mental and psychological torture and costs of the suit; at the time ,there was Milimani Commercial Case No. 4813 of 2018 between the same parties which had not been heard or determined and which had been set down for Pre-trial directions

before Hon. C.K Cheptoo on 8th August 2023. The Defendants in an application dated 6/05/2024 sought to striking out the Plaintiffs application for reason of being sub-judice and after hearing and determination, the same was struck of.

3. The Applicant contended that it noticed apparent error and decided to withdraw Milimani Commercial Case No. 4813 of 2018 due to the court lacking the pecuniary jurisdiction to hear and determine this matter, through a notice of withdrawal duly filed on 13/11/2024. It was indicated that as at 8/08/2023 the case had not been heard. The Applicant deposed that the dual filing was not in any way meant as an abuse of the court process and urged the court to grant the orders sought as he will be unfairly condemned to continue paying interest on the subject motor vehicle loan facility which has already been re-possessed by the Defendants.

4. In opposition of the 1st Defendant/Respondent filed a Replying Affidavit deposed by Kenneth Likara, head Counsel- Litigation on 23/04/2025 wherein It was deposed that the Lower court has pecuniary jurisdiction over this dispute whose subject matter was valued at Kshs 9,000,000 and he was aware that the Applicant had abandoned and/or unprosecuted the application dated 25/04/2024. The 1st Respondent stated that on 13/05/2024 this Court struck off this suit for being subjudice to Chief Magistrates Court Civil Suit No. 4813 of 2018: Osnett Investments Limited versus Shadow Soft Limited, Dennis Wendoh & KCB and marked this file as closed. It was contended that the application was mischievous and manifest of concealment of facts for reasons that; there was no evidence of the alleged repossession, the security, motor vehicle registration number KCD 161Z, was jointly registered in the names of the Applicant and the 1st Respondent, the Applicant sold the subject Motor vehicle to third parties without informing them as can be seen from the lower court proceedings and the third parties took possession of the motor vehicle.

5. That the Applicant thereafter fell into arrears in servicing its loan with the 1st Respondent bank which loan currently stands at Kshs. 3,950,700.48/= and continues to accrue interests at contractual rates. He confirmed that the said loan was written off as of 19/09/ 2022 when it was no longer profitable for the bank to pursue recovery efforts. It was deposed that that the 1st Respondent will be heavily prejudiced should the Court be inclined to grant audience to the Plaintiff/Applicant who is clearly attempting to sanitize its unlawful dealings uncovered by the Lower Court which Court has jurisdiction to entertain this dispute. The court was urged to dismiss the application.

6. The Application was canvassed by way of written submissions. As at the time of writing this ruling, only the Respondent had filed submissions on 26/05/2025.

7. The Respondent raised three issues. First, it was submitted that the Application is manifest of gross distortion and concealment of material facts. He reiterated the contents of its replying affidavit and placed reliance on the case of Absa Bank Kenya PLC v Atieno (Civil Appeal E073 of 2022) [2023] KEHC 26633 (KLR).

8. Secondly, the Applicant submitted that this court is not the proper forum for this suit and thus ought to grant the orders sought by the Plaintiff/Applicant.It was submitted that the current application seeking to reinstate this suit in the High Court is an after-thought and clearly mischievous and hence ought to be disallowed. That the Plaintiff has not sufficiently demonstrated the inadvertence error excusable mistake/error. It is clear beyond peradventure that this suit is deliberately filed in order to frustrate the bank from recovery justice. Further, that the orders sought by the Plaintiff/Applicant are irregular since the ruling averred to in the Application is non-existent and therefore incapable of enforcement. In support of the issue of discretion of the court to grant such orders, reliance was placed on the case of Bilha Ngonyo Isaac vs. Kembu Farm Ltd & another & another [2018] eKLR.

9. Lastly, the 1st Respondent prayed that he be awarded the costs of the application.

Determination

10. This court has considered the Application before it, the affidavits for and against it as well as the submissions of the parties and find that the issues for determination is Whether the the ruling entered against the plaintiff/applicant on 25th September 2025 should be set aside.

11. The Court of Appeal in the case of Pithon Waweru Maina V Thuka Mugiria [1983] KECA 117 (KLR) rendered itself on the factors to be considered when setting aside and stated as follows;

> " This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice: Shah v Mbogo [1969] EA 116,123 BC Harris J.
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> The matter which should be considered, when an application is made, were set out by Harris J in Jesse Kimani v McConnel [1966] EA 547, 555 F which included, among other matters, the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any material factor which appears to have entered into the passing of the judgment, which would not or might not have been present had the judgment not been ex parte and whether or not it would be just and reasonable to set aside or vary the judgment, upon terms to be imposed. This was approved by the former Court of Appeal for East Africa in Mbogo v Shah [1968] EA 93, 95 F. There is also a decision of the late Sheridan J in the High Court of Uganda in Sebei District Administration v Gasyali [1968] EA 300,301,302 in which he adopted some wise words of Ainley J, as he then was, in the same court, in Jamnadas v Sodha v Gordandas Hemraj (1952) 7 ULR 7 namely: "The nature of the action should be considered, the defence if one has been brought to the notice of the court, however, irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of a court." And, because it is a discretionary power it should be exercised judicially, or in the Scots phrase, used by Lord Ainslie in Smith v Middleton [1972] SC 30: "... in a selective and discriminatory manner, not arbitrarily or idiosyncratically," for otherwise, as Lord Diplock said in his speech in Cookson v Knowles [1979] AC 556: "... the parties would become dependent on judicial whim ..."

12. In addition, in the case of Hajar Services Limited v Peter Nyangi Mwita [2020] eKLR, the Court reiterated that the discretion of the court must be exercised judicially, not whimsically. The court stated;

> " This being an exercise of judicial discretion, like any other judicial discretion must on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. One of those judicial principles expressly provided for in the above provision is that the applicant must satisfy the Court that he has a good cause for doing so, since as was held in Feroz Begum Qureshi and Another vs. Maganbhai Patel and Others [1964] EA 633, there is no difference between the words "sufficient cause" and "good cause".

> It was therefore held in Daphne Parry vs. Murray Alexander Carson [1963] EA 546 that though the provision for extension of time requiring "sufficient reason" should receive a liberal construction, so as to advance substantial justice, when no negligence, nor inaction, nor want of bona fides, is imputed to the appellant, its interpretation must be in accordance with judicial principles."

13. From the record before this court, the matter was dismissed and the court directed that the court file be closed. From the annexures attached to the 1st Respondent's affidavit, there is indeed a similar suit before the Milimani Commercial courts, something which the Applicant has not denied. There is no evidence that the notice of withdrawal was filed. There are no sufficient grounds before this court to warrant this court to set aside its order. This application and the suit are clearly an abuse of the court process and I am inclined to agree with the 1st Respondent. Consequently, the Application is found to be without merit and the same is dismissed. The costs are awarded to the 1st Respondent.

    Orders accordingly.

RULING SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 14TH DAY OF NOVEMBER 2025.

E. N. MAINA

JUDGE

In Presence of:

Ms Kimomna for the Respondent

Ms Waweru for Ngwili for the Applicant

C/A: Geoffrey