



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO.E406 OF 2019

BENEL DEVELOPMENT LIMITED.....PLAINTIFF/APPLICANT

VERSUS

FIRST COMMUNITY BANK LIMITED.....DEFENDANT/RESPONDENT

RULING

(1) Before this Court is the Notice of Motion dated **30th January 2020** by which **FIRST COMMUNITY BANK LIMITED**, the Defendant / Applicant seeks the following orders:-

“1. SPENT

2. SPENT

3. That this Honourable Court be pleased to review and set aside its Orders issued on the 14th of November, 2019 and extended on the 21st of November, 2019.

4. That the Plaintiff’s Notice of Motion filed under Certificate of Urgency on the 13th of November, 2019 be and is hereby dismissed.

5. That the Plaintiff’s suit filed on the 13th of November, 2019 be and is hereby struck out for being fatally defective.

6. That the costs of the Application and the suit to be in the cause.”

(2) The Application which was premised upon **Sections 3A, 80** of the **Civil Procedure Act** , **Order 45, O51** of the **Civil Procedure Rules 2010** was supported by the Affidavit of even date sworn by **MS CLARIS OGOMBO**, a Legal Officer employed by the Defendant Bank.

(3) The Plaintiff / Respondent **BENL DEVELOPMENT LIMITED** opposed the Application and relied upon their Replying Affidavit dated **29th September 2020** sworn by **MOHAMED YASSIN ISMAIL** a Director of the Plaintiff Company. The Application was canvassed by way of written submissions. The Defendant/Applicant filed its written submissions on **22nd June 2020** whilst the Plaintiff / Respondent filed its submissions dated **7th October 2020**.

BACKGROUND

(4) The Plaintiff herein instituted this suit against the Defendant by way of a Plaint dated **13th November 2019**. Contemporaneously with the said Plaint the Plaintiff filed the Notice of Motion dated **13th November 2019** seeking injunctive orders against the Defendant Bank. On **14th November 2019** the Court allowed prayer (2) of the Notice of Motion dated **13th November** and made the following orders ex-parte:-

“(a) A temporary injunction be and is hereby issued restraining the Defendant/Respondent by itself, its servants, agents Joseph Kariuki T/A Josrick Merchants Auctioneers and/or employees or whomsoever else is acting on its behalf from proceeding with the planned public auction of 14th November 2019 or trespassing onto selling, transferring or disposing of Land L.R. No. 7149/23 (Original No. 7149/8/5) belonging to the Plaintiff/Applicant pending the hearing of this application

inter partes.

(b) The Applicant clear the Auctioneer's costs and fees within seven (7) days of today's date.

(c) Mention on 21st November 2019 for further directions."

The above interim orders were extended by the Court on **21st November 2019**.

(5) The Defendant / Applicant filed a Replying Affidavit dated **3rd February 2020** in opposition to the Plaintiffs application dated **13th November 2019**. Subsequently the Defendant / Applicant filed the current Notice of Motion dated **30th January 2020** seeking that the interim orders granted by the Court on **14th November 2019** be reviewed and set aside.

(6) The Plaintiff / Respondent did not file any Reply to the instant application until **30th November 2020** a full **ten (10) months** after the application had been filed and way after the Applicant had filed and served their written submissions. Thus the Respondent clearly filed its Reply out of time in which Reply they urged the Court to dismiss the application dated **30th January 2020** with costs.

ANALYSIS AND DETERMINATION

(7) I have carefully considered all the material placed before this Court as well as the written submissions filed by the two parties. The Applicant urges the Court to allow this application on the basis that the Motion of **30th January 2020** was uncontested. The Applicants further submit that the Plaint as filed is fatally defective as the accompanying Verifying Affidavit is not commissioned as required by the Civil Procedure Rules. That since the suit is not properly filed on account of the fatally defective Verifying Affidavit then it follows that the Notice of Motion dated **13th November 2019** which is grounded on the suit is equally defective and cannot stand as Civil Proceedings cannot be instituted by way of a Notice of Motion. That in light of the defective nature of both the suit and application dated **13th November 2019**, the Court ought not to have granted the injunctive reliefs sought by the Plaintiff / Respondent.

(8) The Defendant / Applicant also took issue with the Respondent's failure to serve them with proper Summons to enter appearance. That the Summons served upon the Defendant on **13th November 2019** did not meet the requirement of the **Civil Procedure Rules** in that the said Summons are undated, unsigned and sealed. That due to this breach of the **Civil Procedure Rules** the suit has abated.

(9) On its part the Respondent whilst conceding that the Verifying Affidavit which accompanied the Plaint was **not** commissioned as required by **Order 4 Rule 1(2)** and **(6)**, submits that this was due to an inadvertent failure by the Respondents former Advocate to commission said Verifying Affidavit. That this amounted to a procedural lapse which would not be fatal and does not render the Plaint dated **13th November 2019** void, but only renders the same voidable.

(10) The Respondent contends that the provisions of **Order 4 Rule 1(2)** exist merely to make litigant assume ownership of their suit by verifying the correctness of the averments in the Plaint. That the aim is to avoid the making of claims on behalf of a Plaintiff without the express instructions of the said Plaintiff. The Plaintiff therefore seeks the leave of the Court to regularize the proceedings.

(11) On the issue of the defective nature of the Summons to Enter Appearance as claimed by the Applicant the Respondents submit that their Advocate duly prepared the Summons and filed the same in Court together with the pleadings. That the failure to serve proper Summons cannot be blamed on the Defendant / Respondent as this was a problem of the Judiciary and its internal processes. The Respondent submits that the question of Summons is in actuality a non-issue as the Defendant did enter appearance and are actively participating in the suit. Finally the Respondent urges the Court to ensure that substantive justice prevails as per the Oxygen principles and as enshrined by **Article 159(2)** of the **Constitution of Kenya, 2010**.

(12) From the above the following are the issues which arise for determination.

(i) Should the Notice of Motion dated 30th January 2020 be allowed as unopposed?

(ii) Should the suit filed on 13th November 2019 be struck out for being defective.

(iii) Are the Defects curable.

(i) Is the Application unopposed

(13) The Defendant / Applicant submitted that the instant Motion was effectively uncontested as the Respondents did not adhere to the directions given by the Court on **5th February 2020** that the Replying Affidavit be filed and served within seven (7) days of that date. In this regard the Applicants cited and relied on the Ruling of **Hon. Justice Wendoh** in **ISEME KAMAU MAEMA & CO. ADVOCATES –VS- CONCORD INSURANCE CO. LTD [2020]eKLR** where it was held:-

"The application was served on the Respondent on 3rd March 2012 as evidenced by the Affidavit of Service sworn by Vihaki Armstone on 7th May 2012. The Respondent acknowledged service by stamping on the Notice of Motion. The Respondent did not file any reply to the Motion nor was there appearance at the hearing of the application. The Notice of Motion is not contested and I therefore enter Judgment in favour of the Applicant as prayed, against the Respondent in terms of prayers 1 and 2 of the Notice of Motion."

(14) It is not contested that the Replying Affidavit to the Notice of Motion dated **30th January 2020** was filed out of time. The said Replying Affidavit was filed on **30th September 2020** in non-compliance with the directions of the Court. Indeed the said Reply was filed three (3) months **after** the Defendant / Applicant had filed its written submissions. Should the fact that the Replying Affidavit was filed out of time be taken to mean that the application is unopposed? I think not. Courts have an obligation to grant a hearing to each party to a suit. In order to determine the application fairly and on merit the Court must consider the Replying Affidavit despite the same having been filed out of time.

(15) In the case of **CENTRAL BANK OF KENYA –VS- UHURU HIGHWAY DEVELOPMENT LTD & OTHERS [1998]eKLR Hon. Justice Bosire (Retired)** observed as follows:-

“I am therefore, unable to subscribe to the view expressed by Mr. Rebello that documents filed out of time in response to an application are necessarily invalid and should not be looked at. To my mind a Court is obliged to consider them unless for a reason other than mere lateness, it considers it undesirable to do so. Besides, the learned Judge in the Court below fell into error when he said that a failure to file grounds of opposition automatically entitles the Applicant to orders ex-parte.” [own emphasis]

(16) I find that the Replying Affidavit dated **29th September 2020** though filed late is now on record and the Court is obliged to give due consideration to the same. As such I am not persuaded by the argument that the present application is unopposed.

(ii) **Is the Suit filed on 13th November 2019 fatally defective?**

(17) The Defendant / Applicant position is that the failure to have the Verifying Affidavit accompanying the suit filed on **13th November 2019** commissioned, renders the entire suit as well as the Notice of Motion dated **13th November 2013** fatally defective and as such the same ought to be struck out.

(18) **Order 4 Rules 1(2) and (6) of the Civil Procedure Rules 2010** provides as follows:-

“4.(2) The Plaintiff shall be accompanied by an affidavit sworn by the Plaintiff verifying the correctness of the averments contained in Rule 1(1)(f) above.

(3) ...

(4) ...

(5) ...

(6) The court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with sub-rule (2) (3), (4) and (5) of this rule.” [own emphasis]

(19) In **KENYA AGRICULTURAL RESEARCH INSTITUTE (KARI) –VS- FATAH ALI, CHAIRMAN ISAHAKIA SELF HELP GROUP & ANOTHER [2011]eKLR** the Court held as follows:-

“In my view, the plaintiff has to demonstrate that this suit is properly filed and not just brought by a busy body or an officer who has no authority. Such authority should be exhibited. None was exhibited. But as to whether this suit should be struck out just because the authority is not exhibited, I find that to be a drastic measure to be taken at such an early stage. This matter has just been filed by a party who believes they are aggrieved. It is a dispute over land. This court has a duty to do substantive justice to the parties by taking into account the overriding objectives of the Civil Procedure Act as provided under Section 1A & 1B of the Civil Procedure Act. ...” [own emphasis]

(20) Likewise in the case of **TRUST BANK LTD –VS- AMALO CO. LTD (2002) KLR 63** where the Applicant’s documents were expunged from the record by the Court and the Appellant was denied the right to be heard in the application because of lack of diligence in the matter, the Court of Appeal while allowing the appeal held:-

“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigant from the pursuits of his right.” [own emphasis]

(21) **The spirit of the law is that as far as possible in the exercise of judicial discretion the court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for it not to do so. In the instant case, this Court would be reluctant to strike out a suit just because authority under seal has not been filed. This is because the Plaintiff can be allowed time within which the authority can be filed failing which the Court can then take that drastic action of striking out the pleadings.**

(22) Whilst conceding that the Verifying Affidavit accompanying the Plaintiff had not been commissioned, the Respondent pleads that this was due to an inadvertent error on the part of their Advocate then on record. That this amounts to an irregularity as to form and not substance and this is a curable defect.

(23) In my view the failure to commission the Verifying Affidavit though indeed rendering the Plaintiff defective does not render it fatally so. **Order 4 Rule 2(6)** uses the word “may” giving the Court the discretion on whether or not to strike out a Plaintiff which is non-compliant. In deciding upon a similar issue in **AGRICULTURAL FINANCE CORPORATION & ANOTHER –VS- DRIVE-IN ESTATE DEVELOPMENT LTD [2006]eKLR Hon. Justice Azangalala** (as he then was) held as follows:-

“So the only issue for determination is whether or not failure to file the compliant verifying affidavit within the period allowed by the Court is fatal and should result in the striking out of the Plaintiff. The requirement for a Verifying Affidavit is contained in Order VII rule 1(2) of the Civil procedure Rules. Sub-rule (3) of the same rule reads:-

“The Court may of its own motion or on the application of the Defendant order to be struck out any Plaintiff which does not comply with subrule (2) of this rule.”

In my view the use of the word “may” shows that the Court has a discretion as to whether or not to strike out a Plaintiff which is not accompanied by an affidavit verifying the correctness of the averments contained in the Plaintiff.” [Emphasis added]

(24) In the same case the Hon. Judge went on to expound upon the exercise of discretion by a Court in deciding upon an application brought under **Order 4 Rule 1(6)** of the **Civil Procedure Rules** as follows:-

“As it has been said by several eminent judges before me, in exercising the discretion give in sub-rule (3) of rule 1 of Order VII of the Civil Procedure Rules the court should be alive to the principle of justice that procedural lapses, omissions and irregularities unless they go to the jurisdiction of the court or prejudice the adversary in a fundamental respect which cannot be atoned for by an award of costs are not to be taken as nullifying the proceedings affected.” [emphasis added]

(25) Thus although the Court does have discretion to strike out defective pleadings, such defective affidavits are not necessarily fatal and the Court is at liberty to grant a party the opportunity to file a compliant Affidavit within a specified time.

(26) In **MICROSOFT CORPORATION –VS- MITSUMI COMPUTER GARAGE LTD & ANOTHER [2001]eKLR Hon. Justice Aaron Ringera** (as he then was) held as follows:-

“In my opinion, where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaintiff but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form and procedure which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected. In those instances the Court should rise to its higher calling to do justice by saving the proceedings in issue. In the matter at hand I am of the view that the error manifest in the verifying affidavit neither goes to the jurisdiction of the Court nor prejudices the defendants in any fundamental respect. Indeed no prejudice has been alleged.

Being of that persuasion, I think the ends of justice would best be served by sustaining the proceedings by declining to strike out the suit while at the same time putting right the lapses in the offending affidavit. I am fortified in this view of the matter by two considerations. First, sub rule (3) of rule (1) of order VII itself seems by the usage of the word “may” to leave the striking out of a plaintiff which is not accompanied by a verifying affidavit within the realm of discretion. If a discretion can be exercised in the case of an omission of the verifying affidavit, *a fortiori* it is also exercisable in the event of such an affidavit being incompetent. Secondly, and to me this is equally important, an appreciation of the mischief which the rule was meant to cure inclines me to the same conclusion. ... The broad purpose of the verifying affidavit is thus to verify the contents of the plaintiff. That purpose may be attained by rejecting a defective affidavit and ordering that a fresh and complying one be made and filed on record”

(27) It is trite law that striking out a suit is a draconian measure – one that ought to be exercised with great caution (see **DT DOBIE & COMPANY (KENYA) LIMITED –VS- JOSEPH MBARIA MUCHINA & ANOTHER [1980]KLR**) Courts ought to aim at retaining rather than dismissing suits.

(28) I find that the defective nature of the Verifying Affidavit to this suit is not fatal to the entire suit. I am fortified in this finding by the provisions of **Article 159(2) Constitution of Kenya** which exhorts Courts to administer substantive justice without undue regard to technicalities.

(29) In the premises I strike out the Verifying Affidavit dated **13th November 2019** and direct the Plaintiff / Respondent to file and serve a fresh compliant Verifying Affidavit within **fifteen (15) days** of the date of this Ruling.

Summons to Enter Appearance

(30) The Applicant claimed that the failure to serve them with the requisite Summons to enter appearance means that the suit has abated. It is alleged that the Summons have never been signed and sealed in the proper manner. I note that the Applicant did not submit on this issue but for completeness the Court will consider the same.

(31) On their part the Respondent pleads that the omission to issue the signed and sealed Summons for service cannot be blamed on them and contends that the fault lies with the Judiciary and its internal procedures. **Order 5 Rule 1(6)** of the **Civil Procedure Rules 2010** provides:-

“(6) Every Summons except where the Court is to effect service, shall be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate.”

(32) It is common ground that Summonses are prepared, signed and sealed by the Court and not by the litigant. The essence of service of Summons upon a party is to give notice to that party of the existence of the suit and to invite him to enter appearance. In **MISNAK INTERNATIONAL (K) LIMITED –VS- 4mb MINING LIMITED C/o MINISTRY OF MINING, JUBA REPUBLIC OF SOUTH SUDAN & 3 OTHERS CIVIL APPEAL No. 118 of 2018** the Court of Appeal held thus:-

“It is trite that one of the tenets of the Rules of natural justice is that a party should not be condemned unheard. In other words, no proceedings should be conducted to the detriment of any person in his absence. It is in line with actualization of this right that the provisions for Summons to enter appearance and service thereof come into play. The essence of such Summons is to give notice to the party sued of the existence of the suit and invite him / her to enter appearance and defend the suit if she / he so wishes. This requirement has been reinforced in a number of decisions of this Court namely, **GIRO COMMERCIAL BANK LTD VS ALI SWALEH MWANGULA [2016]EKLR & BABS SECURITY SERVICES LTD VS MWARUA YAWA NZAO & 19 OTHERS [2019]eKLR.” [own emphasis]**

(33) Although the Plaintiff failed to serve the Summons to enter appearance as required, it is manifest that the Defendants have notice of the suit. They engaged Counsel, entered appearance and filed Defence and have vigorously defended the suit at each stage of the proceedings. Thus the failure to serve Summons has not unduly prejudiced the Defendant. In the case of **TROPICAL FOODS INTERNATIONAL & ANOTHER –VS- EASTERN AND SOUTHERN AFRICAN TRADE & DEVELOPMENT BANK & ANOTHER [2017]eKLR** Hon. Justice Tuiyott held as follows:-

“The purpose of the issue of Summons is for the Defendant to appear within the time specified therein. It also serves to give Notice of the existence of a suit against a Defendant. If, therefore, the Defendant gets notice of the suit by other means other than the Summons and participates in subsequent proceedings then the Defendant should not complain of the non-service of Summons unless it can be demonstrated that the non-service has caused some prejudice on the Defendant.” [own emphasis]

(34) Finally I find no merit in the present application. The same is dismissed in its entirety. Though ordinarily costs follow the cause since this application has been necessitated by the Respondent’s omissions and lapses. I direct that the Plaintiff / Respondent shall meet the costs of this Application.

Dated in **Nairobi** this 26TH day of **FEBRUARY, 2021.**

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MAUREEN A. ODERO

JUDGE