



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI COMMERCIAL COURTS

HCCC NO. 513 OF 2006

ORIENTAL COMMERCIAL BANK.....PLAINTIFF

VERSUS

SHABBIR'S MOTOR SPARES LIMITED.....1ST DEFENDANT

MOHAMMEDALI KHATAU THAVER.....2ND DEFENDANT

SHABBIR MOHAMEDALI KHATAU.....3RD DEFENDANT

MOHAMMEDTAKI MOHAMED KHATAU.....4TH DEFENDANT

RULING

1. At the end of it all, the circumstances surrounding the Application before Court reveals how advocates, sometimes with the best of intentions, may conduct cases to the detriment of their clients.

2. Mohammedtaki Khatau (Mohammed) is the 4th Defendant herein and has through a Notice of Motion dated 12th August 2019 sought the following prayers:-

a) That the 4th Defendant be granted leave to file and serve a defence, his witness statements and bundle of documents.

b) That the Court do order that the firm of Okoth & Kiplagat Advocates do provide to the Applicant's Advocates a copy of the affidavit of service of the process server who allegedly served summons upon the 4th Defendant or in the alternative to reveal the name and address of and the said process server be summoned for cross-examination by the 4th Defendant's advocates.

c) That the Court be pleased to order that the Plaintiff do produce the originals of the following documents;

i. The charge dated 19/9/1997

ii. The guarantee by Mohamedtaki Mohamedali Khatau dated 26/2/1997.

iii. The Application for Banking facility dated 21/6/1999 and

iv. Any other document allegedly bearing the signature of the 4th Defendant in this matter.

d) That the Court be pleased to make an order that the original documents produced in paragraph (c) above be tendered to the DCI (Director of Criminal Investigations) Nairobi for examination of the signatures allegedly belonging to the 4th Defendant and the same be subjected to examination by a document examiner at the DCI Nairobi to compare the 4th Defendants' signature and a report be submitted to this Court.

e) That the Court orders that the case herewith starts *de novo* and the 4th Defendant be granted an opportunity to testify and cross-examine the Plaintiff's witness.

f) That this suit be marked as abated as against the 2nd Defendant herein.

g) That the costs of this Application be provided for.

3. Emerging from the affidavit of Mohamed sworn on 12th August 2019 and another of 22nd October 2019 is the sorry state of affairs that bedevils this old matter.

4. The Court record shows that through a memorandum of 25th October 2006, all Defendants entered appearance in this matter through the firm of M/s Achola Jaoko & Company Advocates. The same firm filed a joint Statement of Defence for the four Defendants on 15th November 2006. Through a Notice of Change of Advocate filed on 19th March 2008, the firm of Macharia Kenneth & Associates came on record for the Defendants.

5. The conduct of the Defence was to be taken over by the firm of Lumumba Mumma & Kaluma Advocates and on closure of the business of the firm, the firm of K'Bahati & Co. Advocates came on record in its place. To be noted is that all firms came on record as acting for the all Defendants, including Mohamed.

6. Mohamed depones that it was not until 2nd August 2019, about 13 years after the presentation of the proceedings that he came to learn of the existence of these proceedings. Hence this application. He denied ever giving instructions to any of the Advocates said to have acted for him. He further denies having ever been served with summons to enter appearance.

7. Concerned that the Application before Court was a suggestion that the firm of Achola Jaoko & Co. Advocates and Macharia Kenneth Associates had acted without instructions, on 25th October 2019 I directed that the Application, all responses and affidavits related to Mohamed's application be served on the firms. This was to afford them an opportunity to respond to Mohamed's allegations. As for the firms of Lumumba Mumma & Kaluma Advocates and K'Bahati & Co. Advocates, Mr. Thomas K'Bahati had sworn an affidavit filed on 24th October 2019 explaining the circumstances of the two firms.

8. An affidavit of service by Nicholas Kimwele Omwenga sworn on 18th November 2019 and filed on 29th November 2019 shows that the firm of Achola, Jaoko & Co. Advocates and Macharia Kenneth & Associates were both served on 30th October 2019. By the time of the hearing of the current application on 29th November 2019 neither of the two firms had filed any response. In addition, they did not participate in its hearing.

9. On his part, counsel K'Bahati stated that he became seized of the matter in November 2010 when the 3rd Defendant instructed him while he was a partner in the firm of Lumumba Mumma & Kaluma Advocates. He states that the 3rd Defendant expressly instructed him to act for all Defendants. Similar instructions were given to the firm of K'Bahati & Co. Advocates when the firm of Lumumba Mumma & Kaluma Advocates closed. It is his testimony that the 3rd Defendant instructed him to continue representing the Defendants.

10. Counsel states that on seeking instructions from the 3rd Defendant in respect to the matter before Court, the 3rd Defendant who is bedridden sent him the following text message:-

“Please do the reply that all the time he was under your command and now he is not, so be it...”

11. Counsel states that this matter has dragged on for too long and that hearing commenced on 4th June 2012 (seven years ago) and has been heard by more than three Judges. He further depones;

“[11] It is not convincing for the Applicant to allege that he was not served with summons or was not aware of the suit since its institution in 2006, more so when he is a brother to the 3rd Defendant, he does not disclose why his family could only tell him about the case thirteen year later”.

12. As for the Plaintiff, it points out, through an affidavit of Wilfred Machini, that Mohamed is a brother to the 3rd Defendant and that the two are Directors of the 1st Defendant. He depones that by information of their counsel, Mohamed alongside the 3rd Defendant were all served on 9th October 2006 in their offices where they operated the business in the name of the 1st Defendant.

13. The Plaintiff Bank then makes the following point:-

“[14] That for the very first time on 12th August 2019 when the matter is almost over, the 4th Defendant breaks away and appoints the firm of Musesya & Company Advocates to take over the conduct of the matter from the firm of K'Bahati & Company Advocates and what should not miss the attention of the Court is that the instructions the 4th Defendant gives to the new firm is to take over the conduct of the matter not to file a Notice of Appointment (*Annexed herein and marked “WM 6” is a copy of the Notice of Change of Advocates*)”.

14. This Court has heard counsel on the application and takes the following view.

15. No doubt, this suit is very old. About 14 years now. In addition, the hearing has dragged on since 2012 in the hands of no less than three Judges. Lastly the matter was at the tail end when one last witness was just about to testify. These factors, taken together, militate against returning this matter back to *de novo* hearing unless they are good and compelling factors.

16. Mohamed has repeatedly stated that he has not been aware of these proceedings and has not instructed any of the 4 law firms said to be on record on his behalf at different times. None of the firms have disapproved what Mohamed says. Two have been silent in the face of damning accusation that they acted without instructions. The other two have explained that the instructions to act came from the 3rd Defendant and not Mohamed. Indeed, Mr. K'Bahati who has been in conduct of this matter on behalf of the last two law firms does not say that he has ever met Mohamed. So confident was Mohamed that he offered himself for cross-examination on what he had deposed. Neither Mr. K'Bahati nor counsel for the Plaintiff took up the challenge. Given these circumstances, the Court has no reason to disbelieve Mohamed (the 4th Defendant) when he says that he did not instruct the four firms.

17. Because of reasons stated earlier, the Court would be unwilling to accommodate Mohamed notwithstanding the issue of representation if it was demonstrated that he was aware of the proceedings. The question would then be what would be the good reason to accommodate him if he was all along aware of the existence of the proceedings and had done nothing about!

18. On this Mohamed asserts that he only got to know of the proceedings on or about 2nd August 2019 from the son of the 3rd Defendant. He contends that he was never served with summons to enter appearance in the matter. Any evidence to the contrary?

19. If the Plaintiff had served summons upon the 4th Defendant, then it would be expected that the affidavit of the process server would be shown to Court as cogent proof of service. Instead, Mr Machini, a credit manager to the Plaintiff, simply states;

‘That I have been advised by the Plaintiff’s counsel on record which information I verily believe to be true that the 4th Defendant alongside the 3rd Defendant were all served on 9th October 2006 at their offices where they operates their business in the names of the 1st Defendant”.

20. Now this hearsay account is also weak for other reasons. The information lacks specifics such as the time of service and address of service. Further, there is no information on whether the Defendants acknowledged receipt of service, and if so, the manner of acknowledgement.

21. For the reasons stated this Court accepts the contention by the 4th Defendant that he was neither served with summons herein or was in any other way made aware of the proceedings. Obviously, it would be most unjust to condemn him unheard. He faces a claim as guarantor to a facility allegedly advanced to the 1st Defendant. If found to be liable, then he would be personally liable for the money decree that would follow. It would be unfair to require Mohamed to meet such a decree when he has not been afforded an opportunity to confront the evidence in circumstances which are not of his making.

22. In reaching this outcome, I do not ignore the argument made by the respondents that Mohamed’s advocate came on record by filing a Notice of Change of Advocates and not a Notice of Appointment. The Court was asked to find that a Notice of Change of Advocate presupposes that the Advocate previously on record was indeed properly appointed. That would make the current application a nonstarter.

23. On his part Mohamed explained that the filing of a Notice of Change instead of a Notice of Appointment was a technical error which did not mean that he was confirming that he had duly instructed K'Bahati & Co. Advocates to act of him.

24. I accept the explanation given by Mohamed because the Notice of Change is dated the same date as the application and filed simultaneously. In the affidavit in support of the application he deposes that he did not instruct firm of K'Bahati & Co. Advocates or the other firms that came on record before the said firm. There is an unequivocal assertion challenging instructions and the filing of a Notice of Change that may have conveyed a message to the contrary would have been filed in error.

25. What are the appropriate orders to make? Prayer (e) has been overtaken by events. Prayer (f) and (g) can be sought only by way of interrogatories, discovery and formal application once the 4th Defendant has filed defence. In prayer (c), the 4th Defendant seeks that the suit as against the 2nd Defendant be marked as abated. I am not certain in what capacity he calls this out and it will not be granted.

26. In respect to the opportunity to file Defence and to reopen the matter, the Court must remain sensitive to the age of the matter. The prayer of the 4th Defendant is to simply to cross-examine the Plaintiff’s witness and not those presented by his co-defendants. I see that the only witness who testified for the Plaintiff is Wilfred Machini who swore the affidavit herein on 3rd September 2019. Hopeful, he shall be available for cross-examination by the 4th Defendant. The other Defendants will be at liberty to conduct further cross-examination on issues that may arise during the cross-examination by the 4th Defendant and of course, the Plaintiffs right to re-examination remains. The 4th Defendant will then be allowed to testify.

27. Something else, the 4th Defendant did not display a copy of the Defence he intends to file but revealed its nature in his affidavit of 12th August 2019. In fairness to the Plaintiff it should not be confronted by more than has been stated to be the defence to be put forward. For that reason, the statement of Defence to be filed shall conform to the line of defence set out in his affidavit.

28. These are the orders of Court. The Application dated 12th August 2019 and filed on 12th August 2019 is allowed in terms of:-

28.1 Prayer (d). The Defence to be filed and served within 14 days should pay heed to the observations of Court made in the preceding paragraph.

28.2 Prayer (h) is allowed only to the extent that PW1 shall be recalled for cross-examination by the 4th Defendant and, if necessary, thereafter by the 1st, 2nd and 3rd Defendants and re-examination by the Plaintiff.

28.3 Costs of the application shall be to the 4th Defendant.

28.4 The firm of K'Bahati & Co. Advocates shall be given an opportunity to show cause why costs of the application should not be borne by it personally.

28.5 The Court shall proceed to give directions towards expedited conclusion of the hearing.

Dated, Signed and Delivered in Court at Nairobi this 28th Day of February 2020

F. TUIYOTT

JUDGE

PRESENT:

K'Bahati for 1st and 3rd Defendants

K'Bahati for Ogembo for Plaintiff

Musesya for 4th Defendant

Court Assistant: Nixon