REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL CASE NO. 27 OF 2015

NATIONAL BANK OF KENYA LTD …… PLAINTIFF

VERSUS

TOM MUTEI T/A TOM MUTEI ADVOCATES …… DEFENDANT

RULING

1. The plaintiff instituted suit against the defendant on 22nd October, 2015 and simultaneously filed a chamber summons application dated 19th October, 2015 seeking inter alia, that all taxation proceedings for Advocate/client bill of costs between the plaintiff and the defendant in various miscellaneous applications filed in different courts in the country be stayed pending the hearing and determination of the suit.
2. The suit was instituted by way of a plaint dated 19th October, 2015 in which the plaintiff sought the following orders;-

i. ***An order that the defendant to render/furnish accounts of all the monies collected and/or received on behalf of the plaintiff in various matters listed in paragraph 10 above.***
ii. ***An order that the defendant to furnish accounts of all the legal fees paid to him in respect of the instructions in all suits filed in favour or against it listed in paragraph 10 above.***
iii. ***An order that the defendant furnish accounts on all the party and party costs he has recovered and/or received in respect of the matters listed in paragraph 10 above.***
iv. ***Refund and/or remittance of all the monies received from the borrowers and guarantors of loans in various suits filed against or in favour of it.***
v. ***Costs to the suit.***
vi. ***Interest at court rates.***\

3. It is noteworthy that paragraph 10 of the plaint only seeks stay of taxation in the various matters pending taxation in several courts but does not specifically list the suits in question as inferred by the plaintiff in its prayers. The said suits are listed in paragraph 11 of the plaint.
4. On 4th November, 2015 when the application dated 19th October 2015 was scheduled for hearing interparties, parties agreed that a preliminary objection raised by the defendant on the validity of the suit be heard first since it was challenging the jurisdiction of the court to entertain the entire suit. A notice of preliminary objection to that effect had been filed on 30th October, 2015 together with the defendant's statement of defence.
5. The points of law raised in the preliminary objection were that;

(i) The suit is incompetent and bad in law for want of due institution.

(ii) The court lacks jurisdiction to entertain the plaintiff's suit as instituted.

6. In support of the objection, learned counsel for the defendant *Mr. Omondi* submitted that the suit as instituted was not properly before the court and that it ought to be struck out. He submitted that as the plaintiff and the defendant enjoyed an Advocate/client relationship and the principle prayers by the plaintiff sought to have the defendant ordered to render an account of monies allegedly collected or received by the defendant for the benefit of the plaintiff, the suit ought to have been commenced by way of an originating summons as stipulated under ***Order 52 Rule 4(2)*** of the ***Civil Procedure Rules*** (the Rules) and not by way of plaint. Counsel further argued that since the plaintiff filed the suit by way of a plaint instead of the procedure prescribed by the Rules, this court lacked jurisdiction to determine the suit as filed.
7. *Mr. Omwenga*, learned counsel for the plaintiff contested the objection. Counsel asserted that the court had jurisdiction to determine the suit as filed since it had jurisdiction to grant the prayers sought in the plaint. He maintained that the institution of the suit by way of a plaint as opposed to an originating summons was proper since ***Order 20*** of the ***Civil Procedure Rules*** permits the institution of suits seeking furnishing of accounts by way of plaint. *Mr. Omwenga* further submitted that the instant objection amounted to a technical objection to a suit on matters of form which was prohibited by ***Order 2 Rule 14*** of the Rules. He urged the court to find that the defendant would not suffer any prejudice if the suit proceeded in its current form and dismiss the objection with costs.
8. I have considered the objection and the rival submissions made by the advocates on record. I find that the objection challenges the competence of the suit merely because of the procedure used in its institution having regard to the Advocate/Client relationship existing between the parties and the prayers sought in the suit.
9. I have read the provisions of ***Order 52*** of the ***Civil Procedure Rules***. It sets out the procedure to be followed by parties seeking to implement certain provisions of the Advocates Act relating to legal practice and the discipline of Advocates. I agree with *Mr. Omondi* that ***Order 52 Rule 4 (2)*** provides *inter alia* that actions seeking delivery of a cash account by an advocate should be commenced by way of an originating summons which should be served on the advocate. The question that arises in this matter is whether failure of a party to follow the prescribed procedure in the Rules regarding the institution of a suit against an advocate is fatal to such a suit. Put another way, does failure of a party to comply with the prescribed procedure for institution of suit render a suit incompetent? This is the question that this court must resolve in determining the defendant's objection.
10. In the case of ***Anna Marie Cassiede & Another V Peter Kimani Kairu P/A Kimani, Kairu & Co. Advocates HCC (NRB) No. 39 of 2007*** Kimaru J dealt with an almost similar objection where the plaintiffs had instituted a suit against their advocates by way of a plaint seeking a refund of monies allegedly received by their advocate pending further instructions. The Hon. Judge held as follows;

> "***I accept the defendant's argument that one of the procedures that the plaintiffs can approach the court is by filing an originating summons as provided under Order LII Rule 4(2) of the Civil Procedure Rules. I am however not persuaded by the defendant's submission that that is the only procedure which the plaintiffs are allowed by the law to approach the court. The plaintiffs had the option of filing a suit by way of plaint or by filing an originating motion. The fact that the plaintiff's chose to file suit by way of plaint is not fatal or prejudicial to their case nor does it raise an issue regarding the jurisdiction of this court".***

11. In ***Cecilia Njoki Njenga & 3 others V James Mburu Ndua & Another HCC NO. 335 of 2009 (Nakuru) (2010) eKLR***, Hon. Ouko J (as he then was) when deciding on a similar preliminary point regarding competence of a suit involving a trust commenced by way of plaint instead of an originating summons as provided for under ***Order 36 rule I*** of the ***Civil Procedure***

Rules expressed himself as follows:-

> ***"The trend of looking at the substance and considering if there would be prejudice to any party has culminated in the enactment of Sections 1A and 1B of the Civil Procedure Act introducing the concept of overriding objective of the Civil Procedure Act. The***

courts, by those provisions are conferred with considerable latitude in the interpretation of the law and giving effect to the rules at the same time. In concluding this point, the argument raised on the procedure adopted in this matter is not fatal as it has not been shown to be prejudicial to the 1st respondent …"

12. I am persuaded by the holdings in the above authorities because in my view, the critical consideration for the court in an objection such as the one before me should be whether failure to comply with the prescribed procedure for the commencement of a suit has occasioned prejudice to the defendant such that if the suit was to proceed to hearing in the manner in which it was filed, there would be a failure or a miscarriage of justice.
13. In the present case, though the suit was instituted by way of a plaint instead of an originating summons as prescribed by the rules, the pleadings and the prayers sought are clear. They fully disclose the claims being made against the defendant and the prayers sought. The defendant is thus aware of the case made against him by the plaintiff. He has indeed responded to the plaintiff's claim by filing a statement of defence. I do not therefore see what prejudice failure to comply with the procedure prescribed by the rules has or may occasion to the defendant if the suit is maintained in the form in which it was instituted. With much respect to *Mr. omondi*, I do not also see how failure to comply with procedural rules by itself would oust the jurisdiction of this court as alleged.
14. The situation would have been different and different considerations would have applied if the defendant's complaint was that the suit had been filed in the wrong court or that the claim against the defendant or the prayers sought were not within the court's jurisdiction. This is however not the case here.

    As correctly admitted by *Mr. Omondi*, the objection only challenges the procedure used in instituting the suit. It does not go to the substance of the suit.

15. Given the nature of the objection and the admission by the defendant's learned counsel, it logically follows that what the defendant is asking the court to do is to strike out a suit on the basis of a procedural technicality. The Constitution of Kenya 2010 which is the Supreme law of the land frowns upon such objections. It enjoins the courts to administer substantive justice to parties before it and to disregard procedural technicalities. This is the import of ***Article 159 (2)*** of the Constitution which provides that in exercising judicial authority, the courts should be guided by certain principles which include the following;

    (i) That justice shall not be delayed

    (ii) That justice shall be administered without undue regard to procedural technicalities

    (iii) That the purpose and principles of the Constitution shall be protected and promoted.

16. One of the basic objectives of the Constitution is to promote substantive justice, fairness and expeditious disposal of disputes. The perfect way of ensuring that the dictates of ***Article 159 (2) (d)*** and ***Article 159 (2) (e)*** of the Constitution are not defeated is to avoid the possibility of sacrificing substantive justice at the altar of procedural technicalities. The need to administer substantive justice is also emphasized by the overriding objective set out under ***Section 1A*** and ***Section 1B*** of the ***Civil Procedure Act.***
17. Having found that the defendant is not likely to suffer any prejudice as the claim against him has been fully disclosed and applying the spirit of ***Article 159 (2)*** of the Constitution and the overriding objective of the ***Civil procedure Act*** and the ***Civil procedure Rules,*** I am persuaded to hold that the error of the plaintiff in instituting the suit against the defendant by way of a plaint instead of an originating summons is not fatal to the suit. It is an irregularity which does not affect the competence of the suit as filed.

18. In view of the foregoing, I am satisfied that the preliminary objection dated 29th October, 2015 is not merited and it is hereby dismissed with no orders as to costs.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at **ELDORET this 29th Day of February 2016**

In the presence of:

Mr. Oribo holding brief for Mr. Omwenga for the plaintiff

Mr. Kapere holding brief for Mr. Omondi for the defendant

Naomi Chonde – Court Assistant