



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL CASE NO. 1 OF 2015

DAHIR SADIK AUSAAD..... PLAINTIFF

V E R S U S

1. MODOGASHE CONSTRUCTION LTD..... 1ST DEFENDANT

2. JELLE MAALIM ABDI..... 2ND DEFENDANT

3.ABDI BASHIR ABDI 3RD DEFENDANT

4. FIRST COMMUNITY BANK4TH DEFENDANT

RULING

On the 30th of September 2015, following the inter parties hearing of an application filed on 10th April 2015 filed by the plaintiff under certificate of urgency, this court granted prayer 5 and 6 of that application. The said orders granted were in the following terms:-

“ 1. That there be detention, preservation and/or freezing and subsequent disclosure of the statement of account number 29772189, held by the 1st defendant with the 4th defendant pending the hearing and determination of the suit.

2.That there be no transfer/or disposal of motor vehicles registration numbers KHMA 664E (CRAWLER TRACTOR) and KHMA 697E (ROLLER/GRADER/CRANE), held by the 1st defendant pending hearing and determination of this suit.

As can be clearly seen from the contents of the above orders, they were granted by the court in the interim pending the hearing and determination of the main suit. The main suit has not yet been heard.

On 23rd March 2016, counsel for the defendants filed an application by way of Notice of Motion under Section 3, 3A, 1A, and 1B of the Civil Procedure Act (cap.21) as well as Order 45 and 51 of the Civil Procedure Rules. The application was filed under certificate of urgency and seeks the following orders:-

1. “That the application be certified as urgent and hearing hereof be dispensed with in the first instance.

2. That the honourable court be pleased to order for stay of the orders given on 30th September 2015 and issued on 14th December 2015 by the honourable Justice G. Dulu pending the hearing and determination of this application.

3. That the honourable court be pleased to review the orders given on 30th September 2015 and issued on 14th December 2015 by the honourable Justice G. Dulu”.

Thereafter, the plaintiff filed a replying affidavit to this application sworn on 6th April 2016.

Before the above application was heard however, the plaintiff through counsel also filed an application by way of Notice of Motion under Order 50 Rule 6 and 7 of the Civil Procedure Rules 2010, and Section 22 (a) (b) and 23 of the Civil Procedure (Acts Cap 21), and Section 36 (1)(b) and (3) of the High Court Organization and Administration Acts No. 27 of 2015, as well as section 1A, 1B, and 3A of the Civil Procedure Act, and Order 51 of the Civil Procedure Rules. The prayers in this application are as follows:-

1. The time limited for complying with the Provisions of Order 11 of the Civil Procedure Rules (retrial directions) as ordered by the court be and hereby be enlarged.

2. That there are some factual errors on the plaintiff's statement that need rectification.

3. That the plaintiff be allowed to rectify some factual errors on his statement by filing a fresh statement.

4. That the court be pleased to issue summons against-

a) The Registrar of Companies to attend court and produce the file and give evidence in regard to affairs of the 1st defendant.

b) The DCIO Garissa to attend court and produce the investigation file complete with statements and exhibits, and his recommendations in regard to a complaint by the plaintiff vide OB No. 33/21/05/2015.

c) The Garissa prosecutor Mr. Wanyonyi to attend court and give evidence based on contents of his statement/letter filed before this court on the 16th of March 2016, by counsel for the defendant, though not served on the plaintiff's previous counsels.

d) The Manager Equity Bank to attend and produce documents or statements in regard to account No.(not indicated) - belonging to the 1st defendant.

5. That that the 2,3, and 4 defendants be cited for contempt of court by committal to civil jail by blatantly disobeying the orders of 30th September 2015 for failing to disclose the statements of account No. 29772189 held at the 4th defendant's bank as ordered by the court.

6. The costs of the application be in the cause.

To this application, the defendants filed a replying affidavit sworn by 2nd defendant Jelle Maalim Abdi on 21st April 2016.

Counsel for the parties Mr. Mutembei and Mr. Irungu agreed that the two applications be argued together and a determination be made by the court in the applications simultaneously.

At the hearing of the applications Mr. Mutembei for the defendants stated that he would start with the application dated 23rd March 2016. According to him on that 23rd of March 2016 the plaintiff's new advocate came to court and asked for an adjournment as they had just come on record, and same was granted. The court also allowed the defendant's counsel (Mr. Mutembei) to file an application for review of order of the court made on 30/9/2015 Counsel submitted that the said application dated same day had now been filed and that they were now seeking review of the orders freezing the bank accounts pending hearing of the case.

Counsel stated that the said restraining orders adversely affected the operations of the 1st defendant, resulting in failure in paying salaries, debts and statutory amounts. The freezing order was also an impediment to implementation of ongoing projects.

According to counsel, it was difficult to know when the suit of the plaintiff would be heard and determined as the same plaintiff had now (after the defendant filed the application for review) filed an application dated 5th April 2016 seeking to take the matter back to pretrial stage. Counsel submitted that the granting of orders in the application dated 23rd March 2016, would not prejudice the plaintiff.

Counsel argued that the orders granted by the court on 30/9/2015 also had no backing from the prayers in the plaint, as there was no prayer in the plaint of freezing the bank account.

In response to the submissions of Mr. Mutembei, Mr. Irungu, submitted that with regard to the application of 23rd March 2016, they relied on their affidavit dated 6th April 2016.

Counsel submitted that the defendant's counsel was present in court when the said restraining orders were issued by the court, yet they had not so far made the disclosures on the bank account as directed by the court. Counsel submitted that the predicament of the defendants was thus of their own making.

Counsel submitted further that the attempt through this application to vary the court orders without compliance with the said orders by the defendants, greatly affected the plaintiff. Counsel refuted the allegations that the prayers in the plaint did not cover the restraining orders granted by the court. Counsel urged the court to disallow the application dated 23rd March 2016.

In response, Mr. Mutembei submitted that counsel had not indicated any prejudice that his client would suffer, if the orders sought in the application were granted. Counsel stated that the plaint did not contain allegations of fraud, and therefore such allegations of fraud should not have been brought in the response to this application.

Counsel for the parties then went on to argue the application dated 5th April, 2016 filed by the plaintiff.

Mr. Irungu made submissions in respect of the 2nd application dated 5th April 2016. Counsel submitted that they wanted factual errors in the witness statements to be rectified. They also had highlighted in the application a list of about 4 persons for whom they wanted witness summons issued. Further, they were seeking for orders of committal of the defendants to civil jail for disobeying the court's orders on disclosure of the accounts.

Counsel emphasized that the plaintiff had previously made a report to the police on fraud through OB NO. 33/21/05/2015 and no action had been taken, and maintained that this application was meant to make the defendants comply with the court orders dated 30th September 2015 and disclose the statement of accounts in the bank (4th defendant).

Mr. Mutembei in response, relied on their replying affidavit. Counsel submitted that the plaintiff had not made a basis for the grant of the prayers listed in his application. Counsel emphasized that the alleged errors and extent of those errors and their nature, were not known as they had not been disclosed by the plaintiff in the application. In addition, the purported report to the police had not been annexed to the affidavit. Counsel added that prayer 2 and 3 of the application were vague.

On prayer 4 concerning witnesses, counsel argued that witnesses were ordinarily summoned by parties to give evidence and produce documents, and added that a mere allegation that a witness was coming to court to produce a file was like fishing in the dark. According to counsel the manager of the bank was not said to be summoned in respect of any identified bank account.

Counsel submitted further that on 8th February 2016, this court issued an order that the suit was ready for

hearing, and fixed hearing date of 23rd March 2016, on which the court could not enlarge time without vacating the orders certifying the suit ready for hearing.

Counsel submitted also, that though plaintiff was lamenting on how his complaint was handled by the police, it was not clear how the orders sought in the application were going to assist the court in dispensing justice. Counsel submitted that there was no evidence of fraud or forgery, and that the plaintiff was merely complaining about the conduct of officers of the state who were entitled to defend themselves.

With regard to committal for contempt of court, counsel submitted that the prayer was misplaced and fatally defective. The said prayer was not brought pursuant to leave granted though a Chamber Summons, as was required by the law. Secondly, the plaintiff did not attach the specific order which the defendants did not comply with to support the prayer. Counsel submitted that the non compliance with these mandatory requirements, meant that the prayer for contempt cannot be sustained.

Mr. Irungu in response, submitted that the application was for leave to amend. Prayer 2 acknowledged, that the plaintiff's statement had errors and was thus seeking an order allowing him to file fresh statements.

With regard to witness summons, counsel submitted that their request was specific on what they wanted the witnesses to come and say in court and what was to be produced especially the police file.

Counsel submitted further that the subject matter of the suit was a bank account in the control of the 4th defendant. According to counsel their application was intended to enable the court get a full impression of the matter and as such within the orders issued by the court on 30th September 2015. He asked this court to allow their application.

I have considered the two applications which were argued together. I will give one ruling for both applications. For convenience, I will start with the application dated 5th April 2016. I will observe that none of the parties relied on any authorities in arguing the two applications.

This application was filed by counsel for the plaintiff. It has 6 prayers, as well as sub prayers.

The first prayer is that the time limited for complying with the provisions of Order 11 of the Civil Procedure Rules as ordered by the court be enlarged. This court indeed gave directions in the pretrial directions proceedings. The court directed that the case was ready for trial.

Those are administrative directions in the management of the trial and, depending on the circumstances of any particular case, enlargement of time can be granted -see section 95 of the Civil Procedure Act (cap.21).

Are there good reasons for enlarging the time herein? One of the prayers in this application appear to be the actual grounds for the request for enlargement of time. Prayer 2 states that there are factual errors from the plaintiff's statements that need to be rectified. This prayer in my view is a reason for asking for enlargement of time, and not a substantive prayer.

The problem with the request for enlargement of time is that the alleged factual errors in the plaintiffs witness statements that require to be corrected have not been disclosed to this court. This court therefore does not know whether the plaintiff wishes to file fresh witness statements or what type of corrections he needs to make. In my view, if this application was made in good faith for prayers No. 1, and 3, then I would expect that a copy of the proposed corrected statements would be annexed or at least a disclosure their contents would be given. That has not been done by the plaintiff. The plaintiff is seeking the exercise of discretionary powers by this court without disclosing the nature, extent, and effect of that exercise of discretionally powers. Court's have consistently asked for and required detailed disclosure before exercising discretionary power. The court has to bear in mind that any orders made do affect all the

litigants. In my view, the exercise of discretionary powers has to be done with a lot of caution and a sense of justice to all parties, and cannot be done in an open ended and haphazard manner.

Since I do not know what errors or what changes are envisaged in the corrected witness statements, I find that the plaintiff has not established a case for this court to exercise its discretion in their favour. I will not grant prayers 1, and 3 of the application.

Prayer 4 is for issuance of witness summons against named Officers of Government and the Manager of Equity Bank. In my view those persons, if they are required to be witnesses by the plaintiff, it is for him to approach them and ask the court to issue summons for them to attend during trial.

This court has powers to issue summons to witnesses to attend a trial. That is done on the application of any party. It is also done after the case has been certified as ready for hearing. The plaintiff wants this court to enlarge the time for complying with Order 11 of the Civil Procedure Rules, which means he wants to re-open the matter and file witness statements which means the defendants will also have a right to file their own witness statements.

At this point in time therefore, there is no justification for the court issuing summons for the attendance of the named Officers of Government and Equity Bank, to attend court as witnesses. Besides, they have not yet been identified as witnesses, as I have not been told that they have recorded and filed witness statements. I will thus decline to grant this prayer.

With regard to the prayer for contempt of court which is prayer No. 5, I agree with counsel for the defendants that the law requires that an application for leave to institute such proceedings be filed and leave granted, before such contempt proceedings can be commenced.

Section 5 of the Judicature Act (cap 8) provides that the High court and Court of Appeal has powers to punish for contempt of court as possessed by the High Court of Justice in England. The English Courts have required that leave be granted by the court to weed out flimsy applications. That requirement therefore applies in Kenya. As no leave was sought or granted by the court to bring an application for contempt, the prayer for contempt is for dismissal.

In conclusion the application of the plaintiff dated 5th April 2016 will not succeed.

I now turn to the application dated 23rd March 2016. The prayer that is for decision before me now is prayer No. 3, as prayer No. 1 and prayer No. 2 have already been spent.

Prayer No. 3 seeks a review of the orders of this court made on 30th September 2015 and issued on 4th December 2015. I have already highlighted those orders earlier in this ruling, and I will not repeat them here.

The defendants have now come to this court stating that they want a review of those orders. Their grounds mainly refer to the orders on the bank account, not the restraining orders on the two motor vehicles. They say that the plaintiff has failed to put the case for hearing and was likely to delay in disposing the suit to the detriment and prejudice of the 1st and 4th defendants. They thus seek a review of the interlocutory orders given by this court.

The powers of review of orders or decrees by the High Court are grounded under Section 80 of the Civil Procedure Act (cap.21) and order 45 of the Civil Procedure Rules.

Order 45 rule 1(1) provides as follows:-

“1(1) Any person considering himself aggrieved –

a.By a decree or order from which an appeal is allowed, but from which no appeal has been

preferred, or

b. By a decree or order from which no appeal is hereby allowed and whom from the discovery on new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of the judgment to the court which passed the decree or made the order without unreasonable delay.”

The allegations of detriment to the 1st and 4th defendants alleged in the application are not supported by any facts. The account was frozen by an order of this court and what was required was subsequent disclosure of the statements for the accounts. What it means in freezing that account, in my view, is that monies cannot be paid into that account and monies cannot be processed out of that account.

The defendant have not stated how much money they have in that account nor what obligations require to be met through the money in that account. The defendants have not given the nature and the extent of the review orders that they expect from the court.

Again, review orders are an exercise of powers in the discretion of the court. A litigant thus coming to court for review orders has to be candid and specific on what the problem is and what specific orders they want from the court. This is what is called full disclosure of material facts. The court cannot just make a blind review orders. This application in my view will also fail.

For the above reasons, I find that both applications are not merited. I have to dismiss both of them. The impression I get is that none of the two sides wishes to proceed and conclude this matter, which this court will not condone. For the avoidance of doubt proper fresh applications grounded on the law and Rules can be filed by the parties.

Consequently, I dismiss both applications, and costs will be in the cause.

Dated and delivered at Garissa this 28th day of July 2016.

GEORGE DULU

JUDGE