



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO 19 OF 2003

JACK AND JILL SUPERMARKET LIMITED.....PLAINTIFF

VERSUS

INTRA AFRICA ASSURANCE COMPANY LIMITED.....1ST DEFENDANT

ANIL PATEL T/A ANIL INSURANCE.....2ND DEFENDANT

RULING

INTRODUCTION

1. The 1st Defendant's Notice of Motion dated 17th December 2014 and filed on 19th December 2014 was brought under the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules. It sought the following orders:-

1. THAT the 1st Defendant/Respondent be granted Stay of Execution of the judgment of this Court pending hearing and determination of the intended appeal.

2. THAT the costs of this application be provided for.

THE 1ST DEFENDANT'S CASE

2. The application was supported by the Affidavit of Praful Patel that was sworn on 17th December 2014. The 1st Defendant's Written Submissions were dated 7th March 2015 and filed on 11th March 2015. Its Response to the Plaintiff's Written Submissions was dated and filed on 23rd June 2015.

3. The 1st Defendant pointed out that on 10th October 2014, it filed a Notice of Appeal as it intended to appeal against the judgment that was delivered by this court on 7th October 2014. It stated that it was apprehensive that if it paid the Plaintiff the decretal sum totalling to Kshs 7,188,285/= together with interest from the date of filing suit till payment in full and it succeeded on appeal, it would not be able to recover the said decretal sum as the Plaintiff was facing financial difficulties, caused by amongst others, the latest being demolition of its remaining supermarket on or about May 2013.

4. It stated that it was willing to furnish such security as the court would direct and that it was in the interests of justice that the application be allowed as prayed.

THE PLAINTIFF'S CASE

5. In response to the said application, Schon Noorani, the Plaintiff's Chairman, swore a Replying Affidavit. The same was undated but was filed on 27th February 2015. The Plaintiff's Written Submissions were dated 11th May 2015 and filed on 13th May 2015.

6. The Plaintiff was emphatic that the decretal sum was Kshs 19,373,625/= being the principal and interest exclusive of costs and not as had been contended by the 1st Defendant. It said that the demolition of its supermarket ought not to be used against it to deny it the fruits of its judgment.

7. It was its averment that the 1st Defendant's present application had not met the threshold of the requirements required under Order 42 Rule 6 (1) of the Civil Procedure Rules and that the same had been made in bad faith, it was an abuse of the process of the court and was intended to delay or avoid paying it the decretal sum herein which had been pending since the year 2001. It therefore averred that it was in the interests of justice that the said application be dismissed with costs to it.

LEGAL ANALYSIS

8. The Defendant's application was premised on the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010. The conditions are that a stay of execution order is generally granted if the applicant has successfully demonstrated that he may suffer substantial loss unless the order is made, that the application was made without unreasonable delay and that the applicant has provided sufficient security. Evidently, the three (3) prerequisite conditions set out in Order 42 Rule 6 of the Civil Procedure Rules cannot be severed. The key word is "**and**". It connotes that all three (3) conditions must be met simultaneously.

9. This was in tandem with the case law and the submissions that were made by both the Plaintiff and the 1st Defendant. However, the court deemed it prudent to address the following preliminary issues before it could consider the merits or otherwise of the 1st Defendant's application:-

a. Competence of the Plaintiff's Replying Affidavit; and

b. Representation of both the Plaintiff and the 1st Defendant.

10. An affidavit is required to be dated and to state the place where the same was attested. It was not clear whether or not the copy of the Plaintiff's Replying Affidavit that was served upon the 1st Defendant was dated. Notwithstanding, it is the copy that is placed in the court file that the court will consider as it is the one that forms the court record.

11. Section 5 of the Oaths and Statutory Declarations Act Cap 15 (Laws of Kenya) stipulates as follows:-

"Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."

12. A perusal of the Plaintiff's Replying Affidavit on the court file showed that the same was not dated. In light of the provisions of Section 5 of the Oaths and Statutory Declarations Act that are couched in mandatory terms, the court found and held that the Plaintiff's Replying Affidavit was incompetent and incurably defective. For all purposes and intent, the 1st Defendant's application was therefore unopposed.

13. Having said so, the court noted that the present application was filed by the firm of M/S Inamdar & Inamdar Advocates who had been representing the 1st Defendant herein until the time of delivery of the judgment herein. A.B. Shah Advocate filed his Notice of Change of Advocates on 29th January 2015.

14. It was, however, evident that the said Notice of Change of Advocates was of no legal effect as the same was filed in absence of the leave of the court as is required by Order 9 Rule 9 of the Civil Procedure Rules, 2010, judgment having been entered on 7th October 2014. The said Order provides as follows:-

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court (emphasis court)—

**(a) upon an application with notice to all the parties; or
(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”**

15. Notably, although judgment herein was entered as aforesaid, A.B. Shah Advocate never filed any application to come on record or filed a consent showing that the firm of M/S Inamdar & Inamdar Advocates had consented to him coming on record for the 1st Defendant herein. His Written Submissions could not therefore be deemed to have been properly on record making it difficult for the court to consider the same.

16. As regards the Plaintiff's present advocates namely, M/S Michuki & Michuki Advocates, they filed a Chamber Summons application dated 8th January 2015 in which they sought to be granted leave to come on record in place of the firm of M/S A.F. Gross & Co Advocates in line with the provisions of Order 9 Rule 9 of the Civil Procedure Rules. With the consent of the parties' advocates, the said application was allowed on 16th January 2015.

17. However, the said firm of advocates did not appear to have filed a Notice of Change of Advocates. If it did, then the same was not on the court file. It is evident that a formal notice of change of advocates must be filed in accordance with the provisions of Order 9 Rule 5 of the Civil Procedure Rules. The same provides as follows:-

“A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”(emphasis court)

18. The importance of this notice of change of advocates has further been emphasised in Order 9 Rule 6 of the Civil Procedure Rules that stipulates as follows:-

“The party giving the notice shall serve on every other party (emphasis court) to the cause or matter (not being a party in default as to entry of appearance) and on the former advocate a copy of the notice endorsed with a memorandum stating that the notice has been duly filed in the appropriate court (naming it).(emphasis court)

19. It therefore follows that in the absence of a formal Notice of Change of Advocates, the firm of M/S A.F. Gross & Co Advocates was for all purposes and intent deemed to be proper advocates on record for the Plaintiff herein and consequently, the Written Submissions by the firm of M/S Michuki & Michuki Advocates on behalf of the Plaintiff herein were also not properly on record.

20. Be that as it may, in the event, the said firm of M/S Michuki & Michuki Advocates had filed their Notice of Change of Advocates but the same did not make its way to the court file for one reason or the other, the present application was for all purposes and intent, unopposed as the Replying Affidavit was defective and incompetent.

21. However, the court could not automatically find that in view of the fact that the 1st Defendant's

application was unopposed, the application was successful. The merits or otherwise of the application could not be considered for the reason the court found that A.B. Shah Advocate was also not properly on record for the 1st Defendant.

22. Accordingly, having considered the pleadings, affidavit evidence, written submissions and the case law in support of the respective parties' case, the court came to the conclusion that the 1st Defendant's present application was defective and incompetent.

DISPOSITION

23. In the circumstances foregoing, the upshot of this court's ruling was that the 1st Defendant's Notice of Motion application dated 17th December 2014 and filed on 19th December 2014 was misplaced and the same is hereby dismissed. As both firms representing the Plaintiff and the 1st Defendant did not appear to be properly on record, each party shall bear its own costs of the application.

24. It is so ordered.

DATED and SIGNED at NAIROBI this 18th day of September 2015

J. KAMAU

JUDGE

READ, DELIVERED and SIGNED at NAIROBI this 25th day of September 2015

F. AMIN

JUDGE