



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 2410 OF 1999

NYAMOGO AND NYAMOGO ADVOCATES.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA.....DEFENDANT

RULING

1. Barclays Bank of Kenya, the Defendant herein, took out the amended notice of motion dated 28th August 2015 in which it sought for the following orders:
 1. *A conservatory order be issued staying the execution of the warrants of attachment dated 29th July 2015 and issued on the same date in this matter pending hearing and determination of this application inter partes;*
 2. *An order setting aside the warrants of attachment dated 29th July 2015 and issued on the same date in this matter pending hearing and determination of this application inter partes;*
 3. *The respondent do forthwith refund to the applicant herein the sum of kshs.1,053,358.00*
 4. *Costs of this application be provided for:*
2. The Defendant/applicant did not file any affidavit in support of the amended motion. I presume the Defendant intended to rely on the affidavit of Guto Mogere which was filed in support of the original motion dated 4th August 2015. When served with the motion, Nyamogo & Nyamogo Advocates filed the replying affidavit of Nyamodi Ochieng Nyamogo to oppose the motion.
3. I have considered the grounds stated on the face of the amended motion and the facts deponed in the affidavit filed in support and against the motion. It is the submission of the Defendant/Applicant that the Plaintiff/Respondent irregularly took out warrants of attachment to satisfy a decree purportedly issued by this court on 8th May 2015 to recover ksh.1,053,358/=. The Defendant further argues that the matter was not before the court of Appeal and in its judgement delivered on 8.5.2015, the court of Appeal enhanced the award on damages from ksh.10,000/= to kshs.500,000/= which amount was duly paid and acknowledged by the Plaintiff/Applicant with no objection. The Defendant further complained that though the court of Appeal did not award interest in its judgement, the warrants of attachment incorporated interest of ksh.560,908 calculated from 04.02.2000 upto 25.07.2015. Mr. Mogere, learned advocate for the Defendant/Applicant complained that the terms of the decision of the Court of Appeal have not been settled hence the execution process was premature. The learned advocate further argued that unless the order is given the Defendant/Applicant would suffer substantial loss in that it stands to lose ksh.1,053,358/=.
4. Mr. Nyamogo learned advocate who appeared for the Plaintiff/Respondent strenuously opposed

the motion by relying on his replying affidavit. The learned advocate also made oral submissions to resist the motion. It is Mr. Nyamogo's submission that this court has no jurisdiction to entertain the Defendant's application.

5. It is pointed out that the Defendant is claiming that warrants of attachment which were issued included interest yet the Court of Appeal did not award interest in its judgement. Mr. Nyamogo also urged this court to find that it has no jurisdiction to hear and determine the issue. The learned advocate was of the view that the issue can only be determined either by way of review or appeal or in the alternative the same should be placed before the Court of Appeal. Mr. Mogere did not address this court over this submission but instead he merely stated that since the warrant was irregularly issued this court has the right to intervene.
6. The history of this dispute is short and straightforward. On 8th June 1998, the Plaintiff/Respondent drew a cheque in favour of one Arthur William Ogwayo for kssh.4,376,402/35 to settle a business debt. On or about 3rd June 1998, Barclays Bank of Kenya. Ogwayo's banker failed to effect special clearance of the cheque out of which to the knowledge of the Defendant/ Applicant funds were to be made available to Ogwayo who was leaving on a business trip to South Africa and consequently he had to leave without money. By reason of that, the Plaintiff suffered loss of a customer, loss of credit and reputation and loss of business. The Plaintiff filed this suit against the Defendant claiming for general damages for breach of contract, injurious falsehood, for libel, for negligence, costs and interest. Liability was settled by consent recorded on 15.05.200 where the Defendant admitted wrongly dishonouring the Plaintiff's cheque. Justice PJ Ransley, heard the case on quantum and in the end he awarded the Plaintiff ksh.1 million to represent damages for injurious falsehood. The Plaintiff was also awarded ksh.10,000/= being damages for breach of contract plus costs and interest. The Plaintiff was unhappy on the award ksh. 10,000 for nominal damages hence he preferred an appeal before the Court of Appeal. In its judgement delivered on 8th may 2015, the Court of Appeal adjusted the figure from kshs.10,000/= to ksh.500,000/=.
7. The Court of Appeal did not express itself as to whether or not the award on appeal would attract interest.
8. There is no dispute that the warrants of attachment issued by the Deputy Registrar of this court incorporated interest of ksh.560,908/=. This court has now been asked to intervene to correct the error. There is no doubt that the Deputy Registrar of this court did what is now complained of in exercising of her/his powers set out under Order 49 of the Civil Procedure Rules. The question is whether or not this court has jurisdiction to entertain the dispute? The matter before me is a motion seeking to impugn what the Deputy Registrar has done under Order 49 of the Civil Procedure Rules. Where a party is dissatisfied with the decision of the Deputy Registrar of this court, he or she is required to file an appeal pursuant to the provisions of Order 49 Rule 7(2) of the Civil Procedure Rules or in the alternative file a reference under paragraph 11 of the Advocates (Remuneration) Order. Where it is appropriate, a party may approach the court by an application for review. The matter before me is not an appeal, an application for review nor a reference. With respect, I am convinced by the arguments put forward by Mr. Nyamogo that the motion is improperly before this court. In other words this court has not been properly approached in or to assume jurisdiction to entertain the dispute. The end result is that the motion has to be struck out.
9. Mr. Nyamogo has pointed out that the amended motion does not comply with the provisions of Order 8 rule 7 of the Civil procedure Rules. It is argued that the amended motion does not have the words which were deleted or underlined as mandatorily required by the rules. Mr. Mogere did not deem it fit to respond to Mr. Nyamogo's challenge. A cursory look at the amended motion will reveal that the same does not fully comply with the provisions of Order 8 rule 7 of the Civil Procedure Rules. It does not show what was crossed out with a line nor what was added by underlining. In my view though the Rules are couched in mandatory terms on what should be done, the Rules also gave the court the discretion to entertain such pleadings by looking at the substance and ignore defects of form. But it must be made clear that the amendments of pleadings is a very important step in bringing clarity in pleadings so that it cannot by any stretch of

imagination be regarded as defects of form. Amendments may breath life to an otherwise hopeless action hence the rules must be seriously observed. For this special reason, I am obliged to accept the invitation by Mr. Nyamogo and find the amendment to be incurably defective.

10.In the final analysis, I have come to the conclusion that this court has not been properly approached and that the amended motion is incompetent and improperly before this court. The same is ordered struck out with costs to the Plaintiff/ Respondent.

Dated and delivered in open court this 23rd day of October, 2015.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

.....for the Defendant