



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 1336 OF 2001

ROSALINE MARY KAHUMBU.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD.....DEFENDANT

R U L I N G

1. The issue for determination by the court is the interpretation of the ruling made by Mugo, J on 11th November, 2011. The divergent positions taken by counsel on the issue is whether this suit is to proceed by formal proof or a full hearing. The Plaintiff's contention is that the Defence had been struck out vide the court's Ruling of Mbaluto, J on 19th July, 2002 and further that the orders were reaffirmed by the Ruling of Njagi, J on 19th September, 2003.

2. When delivering her Ruling on the application for dismissal of suit for want of prosecution, Mugo, J stated that;

“However, in the interest of justice, I direct that the matter be fixed for full hearing within 30 days. The Plaintiff's application, which seeks for judgment, albeit on admission will not serve a better purpose than if evidence was taken for the court to decide the matter with finality. In exercise of my inherent power and jurisdiction, I order that the Plaintiff's application dated 8th March, 2008, be marked as withdrawn to give room to the full hearing on merits.”

3. The Defendant, in its submissions made on its behalf by Mr. Muiruri and in relying on the Court's directions issued on 27th July, 2012, submitted that the ruling of Mugo, J in allowing for the matter to proceed to full hearing on merits meant that the Defence that had previously been struck out, had been reinstated and that the Plaintiff had to make a formal application for Review of the Orders of the court.

4. In return and in reply to these submissions, Mr. Oluoch-Oluga in making submissions on behalf of the Plaintiff, submitted that the matter for determination was the interpretation of the ruling of Mugo, J as to the meaning of '**full hearing**'. He further submitted that any other interpretation than for the matter to proceed to formal proof, would mean that the decisions of the Court by Mbaluto, J, Njagi, J and Lessit, J (in **H.C.C.C 560 of 2006**) had been appealed and/or reviewed. He further submitted that the Ruling of Mugo, J should be looked at in the light that the Defence had been struck out and at the time the Ruling was being made, there was no Defence on file and that the '**full hearing**' as reiterated and intended by Mugo, J, meant that the matter was to proceed by formal proof.

5. According to **Black's Law Dictionary, 7th Edition** at pg 725 a full hearing is described as;

“...a hearing at which the parties are allowed notice of each other's claims and are given ample opportunity to present their positions with evidence and argument.”

6. In the ruling of the court in the case of **National Bank of Kenya Ltd v Roseline Mary Kahumbu Civil Suit No. 560 of 2006**, Lesiit, J in delivering her Ruling on an application to strike out that suit, observed that;

“...quite clearly the Bank, having had its defence struck out in 1336 of 2001, has brought back the same Defence through the instant suit. And to leave no doubt as to their intention, the Bank has filed herein, an application seeking to consolidate H.C.C.C No. 1336 of 2001 with the instant suit. Has there been an abuse of the court process? The Bank has circumvented the court rulings of Hon. Mbaluto, J and Hon. Njagi, J striking out its Defence, by bringing back the same Defence in the form of a new suit and a Plaint. The very act of filing a new suit, after the orders made against it in 1336 of 2001, in the circumstances in which they were made, is a clear demonstration that the Bank has been dishonest and has acted in bad faith. The Courts cannot allow its functions to be misused, or its machinery to be used as a means of vexation or oppression in the process of litigation. By bringing back the same Defence struck by the Court, clothing it in a new outfit called 'a Plaint', the Bank was putting to question the Court's power to strike out its pleadings and is an affront to the powers and jurisdiction of the Court.” (underlining mine).

7. From the foregoing, it is evident that there is an ambiguity in the Ruling of Mugo, J as regards proceeding to full hearing. According to the said definition in Black's Law Dictionary, a full hearing is whereby each party '*... present their position with evidence and argument*'. In the present circumstances however, the Defence was struck out and thus the Defendant does not have the opportunity or privilege to present its evidence and argument. In light of the absence of a Defence on the file, it follows logically, that the matter would proceed to formal proof. What therefore is hearing by formal proof? In the case of **Samson S. Maitai & Another v African Safari Club Ltd & Another [2010] eKLR**, Emukule, J observed thus;

“..... I have not seen judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption.”

8. Can hearing therefore, by formal proof, be similar to a full hearing? According to the observations of Emukule, J, in a formal hearing, all rules of evidence and procedure are observed and the party to a suit has to adduce evidence sufficient to sustain the suit. In adducing this evidence, the party has to raise a presumption that whatever is claimed is true and this therefore goes to the merits of the case. The Court considering a full hearing, to determine the matter based on the evidence that is presented before it by parties. In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits.

9. In interpreting the Ruling by Mugo, J for the matter to proceed to “full hearing” and that the matter determined on merits, I believe that the learned Judge properly directed herself and was well aware that the Defence had been struck out previously by Mbaluto, J and as confirmed by Njagi, J. The “full hearing” therefore, would mean that the case would proceed to formal proof, for the same to be

determined on its merits. It would therefore follow that, in contradiction to the Defendant's submissions, the said Ruling did not review or overturn the Rulings made previously by the learned Judges Mbaluto and Njagi, as doing so, would mean that Justice Mugo had reviewed or sat on appeal on their decisions. Accordingly, I find that there being no Defence, the only way for this case to proceed is by formal proof. The Plaintiff may now fix the case for formal proof by taking a date at the Registry in the new Court term.

DATED and DELIVERED at NAIROBI this 12th day of February 2013.

J. B. HAVELOCK

JUDGE