REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 644 of 2005

KENYA AKIBA MICRO FINANCING LIMITED…….....PLAINTIFF
VERSUS

EZEKIEL CHEBII ……..……..…….1ST DEFENDANT

MOSES GITUMA…….…….2ND DEFENDANT

CHIEF INSPECTOR JOSEPH YEGON ……..... 3RD DEFENDANT

CHIEF INSPECTOR BERNARD BARAZA……..... 4TH DEFENDANT

INSPECTOR CHARLES NJOGU…….…… 5TH DEFENDANT

INSPECTOR MATHEW BETT……..…… 6TH DEFENDANT

INSPECTOR DUNCAN MACHARIA …….……..7TH DEFENDANT

INSPECTOR GRACE NDIRANGU……...……8TH DEFENDANT

INSPECTOR PETER NGANGA …….....……9TH DEFENDANT

SENIOR SEARGENT JOHN MWANGI……..……10TH DEFENDANT

CORPORAL DAVID YEGON…….……. 11TH DEFENDANT

POLICE CONSTABLE FELIX ODUOR …….…..…..12TH DEFENDANT

POLICE CONSTABLE PHILEMON LAGAT…….…….13TH DEFENDANT

CENTRAL BANK OF KENYA ……...…..14TH DEFENDANT

THE ATTORNEY GENERAL (on behalf

of the BANKING FRAUD INVESTIGATION

UNIT – KENYA POLICE)……..…...15TH DEFENDANT

RULING

1. By a Motion on Notice dated 4th April, 2013, the Attorney General who is the 15th Defendant, has applied for the review of the Judgment against it made on 4th May, 2012 and consequent thereto have his name struck out of these proceedings. The ground upon which the application is brought is that the Plaintiff had discontinued the suit against the Attorney General by a notice dated 11th January, 2006.

2. The application is supported by the Affidavit of Mwangi Njoroge, Advocate sworn on 5th April, 2013. The Applicant contended that on 4th April, 2013, Mr. Njoroge discovered that the Plaintiff had discontinued the suit against the Attorney General (hereinafter "the A.G") by a Notice dated 11th January, 2011, that the counsels who acted for the A.G between 12th January, 2006 and September, 2012 were unaware of the said Notice of Discontinuance of suit.

3. In his written submissions and oral hi-light thereon, Mr. Njoroge submitted that by the time the A.G entered appearance and filed his Defence to this suit, he was oblivious of the Notice of Discontinuance of suit dated 11th January, 2006. That the A.G was seeking the review of the ruling of 4th May, 2012 on the basis that there was a mistake or error apparent on the face of the record, that the error was discovered on 4th April, 2013.

4. It was Mr. Njoroge's submission that the suit against the A.G having been discontinued, the A.G could not be enjoined in the same proceedings, that the A.G did not participate in the subsequent proceedings that led to his joinder in the suit. That the Plaintiff should have brought a subsequent suit against the A.G but not to re-enjoin him in the suit that it had discontinued. That the ruling of Hon. Ochieng J made on 3rd April, 2006 indicating that the Defendants did not oppose the application to enjoin the new parties was not correct in that it did not apply to the Attorney General and that the Plaintiff had not indicated that the reason for discontinuing the suit against the A.G was because of lack of Notice to intention.

5. It was submitted that after the mistake was discovered on 4th April, 2013, the present application was filed on the following day. Mr. Njoroge relied on the cases of **National Bank of Kenya Ltd – vs- Ndungu Njau C.A o. 211 of 1996 and Nyamogo and Nyamogo Advocates –vs- Kogo 2001 eKLR** on the jurisdiction of the court to review its own rulings/orders and urged that the application be allowed.

6. The Plaintiff opposed the application vide the Replying Affidavit of Gideon Mwiti Irea sworn on 19th April, 2013. While admitting that the Notice of Discontinuance had been filed, it was contended by the Plaintiff that the said Notice did not bear the tenor and effect purported by the A.G, that the suit had been commenced under a certificate of urgency whereby the requisite Notice under the Government Proceedings Act was not issued, that for that reason the suit against the A.G was discontinued but an application was made shortly thereafter to enjoin the A.G among other Defendants and to amend the Plaint. That the said application was allowed and summons were issued to all the Defendants, the A.G included who filed their respective defences.

7. Mr. Njengo for the Plaintiff submitted that whilst the A.G was the 2nd Defendant in the previous suit, upon amending the Plaint, the A.G was enjoined as the 15th Defendant. He submitted that since discontinuance of a suit is not a defence to a subsequent action, the enjoinment of the A.G after amendment was akin to a subsequent action. That it is for that reason that fresh summons were issued upon the A.G amongst other Defendants joined with him. That the orders of Ochieng J of 3rd April, 2006 have not been challenged and that the suit has since proceeded based on the Amended Plaint resulting in a valid judgment of 4th May, 2012. He urged the court to find that there is no error apparent on the face of the record and to dismiss the application with costs.

8. I have carefully considered the Affidavits on record, the written submissions and the oral hi-lights of counsel. I have also considered the authorities relied on.

9. The jurisdiction to review a Ruling or Judgment of a court is to be found under Order 45 rule 1 of the

Civil Procedure Rules. Under that Rule, there are three grounds upon which a party can apply for review of a judgment or ruling. Out of the three, the present application is based on one of them which is that there is a mistake or error apparent on the face of the Ruling delivered by this court on 4th May, 2012. That error or mistake complained of is that, on 17th January, 2006, the Plaintiff had discontinued the suit against the A.G and that there was no suit against the A.G upon which the ruling (judgment) of 4th May, 2013 against the A.G could hinge on.

10. I agree with Mr. Njoroge as to what an error apparent on the face of the record means. The two cases he relied on are on the point. These are the **National Bank of Kenya Ltd –vs- Ndungu Njau C.A No.211 of 1996** wherein the Court of Appeal delivered itself thus:-

"a) A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of the law." (Emphasis provided)

And, in the case of **Nyamogo and Nyamogo Advocates –vs- Kogo (2001) eKLR** the Court of Appeal stated:-

"(b) We have carefully considered the submissions made to us by the advocates of the parties, to this appeal. An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long-drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, is a view adopted by the Court in the original record is a possible one, it cannot be an error apparent on the face of the record even though anther view was also possible." (Emphasis provided)

11. From the aforesaid pronouncements, it is clear that the error complained of must be self evident from the record. No elaborate argument and/or examination of the record is required to establish the error. The Court of Appeal was clear that if the error is to be established after a long drawn process of reasoning or points where two opinions are conceivable, there can hardly be said to be an error apparent on the face of the record.

12. I have looked at the proceedings that culminated in the ruling of 4th May, 2012 which is sought to be reviewed. I have also looked at the statement of claim upon which the proceedings were based on. Both the statement of claim and proceedings would show that the Attorney General was named as the 15th Defendant in the Amended Plaint filed on 7th April, 2006. It is also clear that throughout those proceedings, the Attorney General participated as a 15th Defendant. Such participation was based on the order made by Hon. Ochieng J on 3rd April, 2006, whereby the Attorney General was enjoined as a 15th Defendant in the suit. Indeed the A.G filed a Defence in which he did not contest his inclusion as a Defendant in these proceedings.

13. From exhibit "MN1" annexed to the Affidavit in support of Mwangi Njoroge, it is clear that the Notice of Discontinuance of suit against the Attorney General dated 11th January, 2006 was served upon and received by him on 17th January,2 006. Indeed it was not only stamped but also initialed by his office. The title shows that it was in respect of this suit, HCCC No.644 of 2005. The summons to enter appearance in this suit in respect of which he entered appearance and filed a Defence was in respect of this suit. In the Defence which the Attorney General filed, but was struck out vide the ruling he now contests, the A.G did not protest nor challenge his locus in the suit. How then can it be said that there was an error in the ruling of 4th May, 2012? If he had willingly participated in the suit ever since April, 2006

up to 4th April, 2013, how can he now claim that there was an error in the ruling of 4th May, 2012 in that he was not supposed to be a party? If he did not take advantage of contesting his joinder, as there is evidence of being served with the notice of Discontinuance of suit on 17th January, 2006, how can he now claim that the court had acted in error in pronouncing the ruling of 4th May, 2012? Having not filed any appeal against the order of Hon. Ochieng J of 3rd April, 2006 joining him to this suit and having defended the suit on merit, can it be said that there is an error apparent on the face of the ruling of 4th May, 2012? On my part, I see none.

14. If I am wrong on this, which I think I am not, I still think that the notice of discontinuance of suit dated 11th January, 2006 cannot be a basis for the A.G to seek to either review the ruling of 4th May, 2012 or challenge the Plaintiff's suit as it stands.

(a) Firstly, although that notice seems to have been filed and received by the court, the court seems not to have acted on it. The proceedings show that the same was never minuted. In the case of **Lawe Investments Ltd & Anor –vs- National Bank of Kenya Ltd HCCC no. 41 of 2003 (UR),** It was held that where a Notice of withdrawal of suit was not minuted or formally adopted by the court, the same remained ineffective. I hold the same view here that, since the Notice of Discontinuance of suit against the A.G was not minuted in the court record, the same was therefore not formally adopted by the court and it cannot be said to have been effective.

(b) Secondly, what brought the A.G to these proceedings after the 16th January, 2006 when the said notice was filed, was the order of the Hon. Ochieng J of 3rd April, 2006. The order joined the A.G as 15th Defendant. Summons to enter appearance were ordered to be issued upon which the A.G appeared. The A.G has never contested that order of Ochieng J. To attempt to contest the same by arguing that there was no suit against the A.G as at 4th May, 2012, in my view, is spurious. The order of Ochieng J of 3rd April, 2006 still stands and the ruling of 4th May, 2012 cannot be faulted on the basis that the orders of Ochieng J was made in error.

(c) Thirdly, the conduct of the A.G is suspect. I do not believe Mr. Njoroge when he swears on oath that the A.G was not aware that the suit against him had been discontinued on 16th January, 2006 until 4th April, 2013. As I have already stated, the Notice of Discontinuance annexed to the Affidavit in support and exhibited as "MN1" is clear that the same was received and initialed by the A.G's office on 17th January, 2006. If the State Counsels who were handling the matter decided to turn a blind eye to that notice until Mr. Njoroge decided to open his eyes wide enough to see that notice on 4th April, 2013, the court is not to blame. To my mind, this is but purely after thought.

(d) Fourthly, would it be right for the A.G to state that he be allowed to get out of these proceedings in which he has willingly participated since April, 2006? I don't think so. It is now seven (7) years since the A.G was joined in these proceedings. He has fully participated without any protest until his Defence was truck out. I have already indicated that he was aware of the Notice of Discontinuance way back on 17th January, 2006. In my view, it will not only be unjust, but most irregular for a party who has fully participated in proceedings for all that time, to be allowed to opt out at such a late stage of the proceedings. The Amended Plaint made serious allegations against the A.G. He put forth his defence in which he was heard but unfortunately, had it struck out for reasons given. I think the A.G is estopped from opting out of these proceedings as he has sought.

(e) Finally, I think the A.G having fully participated in these proceedings, it is a technical objection to now argue that notice of discontinuance had been filed. Article 159(2) (d) of the Constitution of Kenya will frown at that. Neither the court, the Plaintiff nor the A.G acted on that notice. It should be left to lie as it has all these years.

15. As regards the effect of Order 25 rule 1, I think once the Amended Plaint was filed and the A.G enjoined in that suit, the earlier Notice of Discontinuance of suit, ceased to have any effect. The Amended Plaint contained fresh allegations against both the remaining as well as the enjoined Defendants which

included the A.G.

16. I think I have said enough to show that the Notice of Motion dated 4th April, 2013 is without merit and the same is for dismissal. Accordingly, I hereby dismiss it with costs to the Plaintiff.

DATED and **DELIVERED** at Nairobi, this **24th** day of **May**, 2013.

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A. MABEYA

JUDGE