



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI COMMERCIAL COURTS COMMERCIAL & TAX DIVISION)

CIVIL CASE 943 OF 1999

KENYA POSTS & TELECOMMUNICATION CORPORATION..... PLAINTIFF

VERSUS

1. BENJA INVESTMENT LTD

2. GEOFFREY CHEGE KIRUNDI.....DEFENDANTS

DIRECTIONS

1. I have now perused this file.
2. The Plaintiff's claim is for refund of monies paid towards purchase of some two pieces of land in Nairobi upon failure of the Defendants to transfer the properties to the Plaintiff.
3. The Defendants filed defence and counterclaim.
4. At some point hearing commenced before Nambuye, J (now JA). In the course of PW1's testimony-in-chief it became apparent that the copy of the defence and counterclaim in the possession of the Plaintiff's counsel was different from that in the court record and in possession of the Defendant's counsel. The point taken by the Plaintiff in this regard was that some crucial admissions made had now been altered to read otherwise.
5. Following various representations made by both sides, an application was filed by the Plaintiff seeking to strike from the record the defence and counterclaim then on record and substituting therefor the defence and counterclaim in their possession upon the ground that the one on the record was a forgery.
6. The application was canvassed *inter partes* before Nambuye, J (now JA). In a ruling running to 63 typed pages the learned Judge did not resolve the issue. She directed that the signatures in question be examined by a document examiner and a report be filed.
7. Eventually the matter went before Rawal, J (now JA). Various representations were made before the learned judge. But it appears that the issue regarding the defence and counterclaim was still not resolved. I was informed that Rawal, J (now JA) indicated that she would determine that issue in the judgment once she heard the suit fully.
8. Indeed hearing commenced *de novo* before Rawal, J (now JA) on 28th February 2011. PW1 testified fully and the matter was fixed for further hearing on 24th April 2011.

9. On that date the court (Rawal, J) revisited the issue of the defence and counterclaim. It directed that the issue be determined as a preliminary issue. If further directed that the parties do file statements of witnesses and documents they intended to rely upon in respect to that issue before the hearing date (24th May 2011).

10. By that date the parties had not complied and an extension was granted to 30th May 2011.

11. On 30th May 2011, following representation by learned counsels, hearing of the case started *de novo*. PW1 then commenced his testimony afresh, in the course of which production of certain documents in evidence was objected to. The court recorded that the counsels agreed to compare and compile separate bundles of agreed documents and those in dispute. Hearing was to continue on 23rd June 2011. It is not clear if such bundles were compiled and exchanged.

12. On 23rd June 2011 the court (Rawal, J, now JA) directed that the parties file witness statements within a specified time. The Plaintiff was also to give notice of production of the documents it intended to use. The parties had not complied by 6th September 2011.

13. The Defendants then filed notice of motion dated 2nd September 2011 for dismissal of the suit for failure to comply with the order of 23rd June 2011.

14. On 13th September 2011 the court gave further directions for compliance with the orders of 23rd June 2011. On 9th December 2011 the court (Rawal, J, now JA) fixed the case for further hearing on 13th March 2012. It is not clear if the order of 23rd June 2011 had been fully complied with. In the meantime both Nambuye, J and Rawal, J were elevated to the Court of Appeal.

14. On 13th March 2012 the matter was placed before me. Mr Sagana, learned counsel for the Plaintiff, wanted the matter referred to Rawal, JA to see if the learned judge of appeal would agree to complete the trial. On the other hand, Mr A.B. Shah for the Defendants wanted the matter allocated to a judge of this division to either continue with the hearing from where it had reached before Rawal, J or to start the hearing *de novo*, after dealing with the outstanding issue of the defence and counterclaim. Mr Shah further stated that he had asked Rawal, J to recuse herself from further dealing with the matter, though I cannot find that on the record.

16. Having perused the court record, the following facts stand out-

(i) The issue of the impugned defence and counterclaim is still outstanding. That issue is whether the defence and counterclaim on the court record is a forgery. This is not an academic point. The defence and counterclaim in the Plaintiff's possession, which it contends was the document duly filed and served, makes admission of receipt of the sum claimed by the Plaintiff. The defence and counterclaim on the court record does not. Hearing upon one or the other defence and counterclaim would certainly not be the same. It is thus necessary for that outstanding issue to be resolved one way or the other before hearing of the suit can proceed.

(ii) Hearing of the action is at an early stage. PW1 had barely started his testimony when the issue of production of documents arose.

17. Judges of Appeal are very busy with Court of Appeal work. There would be no cause to burden Rawal, JA with this matter (in the unlikely event that the learned judge agreed to complete the trial. I say "unlikely" advisedly on account of other part-heard High Court matters that have been placed before the learned judge recently).

18. I therefore direct that the suit be heard by a judge of this division (other than myself) in due course after outstanding preliminary issues are dealt with. For personal reasons I hereby recuse myself from this matter. The judge seized of the matter shall direct whether or not to start trial of the suit *de novo*.

18. Costs will be in the cause.

DATED AT NAIROBI THIS 24TH DAY OF APRIL 2012

H.P.G. WAWERU
JUDGE

DELIVERED AT NAIROBI THIS 11TH DAY OF MAY 2012