REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL SUIT 265 OF 2011

JOHN MAINA MBURU

T/A JOHN MAINA MBURU & CO ADVOCATES.....PLAINTIFF

VERSUS

GEORGE GITAU MUNENE (Sued as Administrator of the Estate of

SAMUEL GITAU MUNENE)…….....…….....1ST DEFENDANT

IAN MUKORA MUNENE…….....……..2ND DEFENDANT

JANE GATHONI MUNENE…….....…….....……..……..3RD DEFENDANT

JOAN MUGURE MUNENE…….....…….....……..4TH EFENDANT

R U L I N G

This suit was instituted by way of a plaint dated 13th July 2010 which was filed on 14th July 2011. By the said plaint, initially filed only against the 1st and 2nd defendants, the plaintiff sought judgement against the defendants jointly and severally for:

(a) The sum of Kshs. 23,477,010.00

(b) Costs of the suit;

(c) Interest on (a) and (b) above at court rate

The cause of action herein from the plaint is not a very complicated one. The plaintiff's aforesaid claim arises from legal services allegedly rendered by the plaintiff to the 1st defendant giving rise to agreed fees whose payment were guaranteed by the 2nd defendant. Apparently the plaintiff's claim is in respect to the balance of the aforesaid fees.

The defendants in due course filed a joint defence dated 1st September 2011. While admitting the retainer between the plaintiff and the 1st defendant, the defendants, however contend the alleged agreement was in respect of two matters for Kshs. 1,000,000.00 and Kshs. 13,477,010/- respectively in which the former sum was duly settled while the latter was subject to negotiations or arbitration both of which are yet to be undertaken. Accordingly the 2nd defendant's liability was similarly subject to the foregoing. The defendants further contend that in light of the said arbitration clause, the Court lacks the jurisdiction to entertain this matter.

Subsequently, the plaintiff, vide motion on notice dated 2nd September 2011 applied for the joinder of two other defendants in this suit – the 3rd and 4th defendants. Apparently the said parties were joined as co-administrators of the estate of **Samuel Gitau Munene** together with the 1st and 2nd defendants. The said application was allowed by way of a consent order entered into on 14th October 2011. By the same consent it was ordered that the necessary pleadings be filed within 14 days and the plaintiff may rejoin within 7 days. From the record, one cannot tell what the parties exactly meant with "necessary pleadings". However, under Order 1 rule 10(4) of the Civil Procedure Rules,

Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.

In this case I cannot see where the court ordered "otherwise". Instead, the parties agreed that necessary pleadings be filed within 14 days. In my view, necessary pleadings are

pleadings which the law deems necessary as a result of the addition of new parties. One of such necessary pleading, under the foregoing provision is the amended plaint. There is no such amended plaint, from the record. Instead, the new defendants proceeded to file a defence which was replied to. The reason why it is necessary that on addition of new parties the plaint be amended is to disclose the cause of action as against the added parties. Going by the original plaint in this suit, there does not seem to be any specific prayers sought by the plaintiff either in the plaint or in the reply to the defence against the 3rd and 4th defendant since as stated above the plaint only seeks judgement against the 1st and the 2nd defendants while the reply to the 2nd and the 3rd defendants seeks that "the defendant's (sic) defence be struck out and judgement entered for the plaintiff ***as prayed in the Plaint***". (Emphasis mine).

In their joint defence, the 3rd and 4th defendants denied knowledge of the retainer between the 1st and 2nd defendant on one hand and the plaintiff on the other hand, and similarly deny any knowledge of the alleged agreement in respect of the plaintiff's fees as well as the guarantee by the 2nd defendant and contend that if there was any such agreement, the 1st and 2nd defendant should be held personally liable rather than the estate of the deceased. On his part the plaintiff contends that the 3rd and 4th defendants were well aware of the retainership and in fact executed documents relating thereto and that the subsequent agreement in respect of fees was simply in furtherance of the fulfilment of the said transaction. The plaintiff then went ahead to send a warning to the defendants that he would at an opportune moment apply for striking out the defences since, in his view, the same amounted simply to bare denials.

That threat was duly put into motion by way of an amended Notice of Motion dated 9th January, 2012, the subject of this ruling, by which the plaintiff is seeking that summary judgement be entered against the defendants for the amount claimed as well as interests and costs. The application is supported y an affidavit sworn by **John Maina Mburu**, the plaintiff himself. In the said affidavit the plaintiff avers that he was retained in respect of matters pertaining to rectification of grant issued in Succession Cause No. 1511 of 2001 and a joint venture agreement relating to the sub division and development of L R No. 89/2 as well as incidental and related services. By the time of the said instructions the 3rd and 4th defendant had not been appointed co-administrators to the 1st defendant. The instructions were, however, issued with authority and consent of the 3rd and 4th defendants as beneficiaries of the said estate and relies on the instruction note dated 12th April 2010 as evidence therefor. When the 1st defendant sought to withdraw the said instructions a fee settlement agreement was entered into dated 16th February 2011 in the sum of Kshs, 14,477,010.00 in respect of the aforesaid retainership whose payment was guaranteed by the 2nd defendant. The 1st defendants, it is the plaintiff' case, only paid Kshs. 1,000,000.00 leaving a balance of Kshs 13,477,010.00 outstanding which sum remains unpaid todate despite demand therefor having been made. In support of his case the plaintiff has annexed a copy of the said agreement. In a supplementary affidavit sworn by the plaintiff on 21st February 2012, the plaintiff contends that the value of the subject matter of the retainership was estimated at Kshs. 1.8 Billion hence the fees claimed and relies on a copy of a valuation report which is annexed. He further deposes that it was the failure of negotiations that prompted the filing of this suit. These negotiations, however, took place before the 3rd and 4th defendants were joined as co-administrators. The delay in filing this motion was occasioned by the plaintiff's failure to trace the file until 6th September 2011.

Unamused by the application, the 1st defendant swore a replying affidavit on 31st October 2011 in which he reiterated the contents of the defence more particularly while admitting the existence of the retainership, he contends that the plaintiff never rendered any services to the deceased's estate. He reiterates that the fee settlement was in respect of two matters one of which was settled while the other was subject to negotiation and arbitration which are yet to be undertaken hence the non-settlement thereof. On his part the 2nd defendant in his replying affidavit avers that his guarantee was subject to the said negotiations or arbitration which are yet to take off.

The 3rd and 4th defendants on their parts filed grounds of opposition dated 7th December 2011 which state as follows:

1. The court cannot grant the said orders against the third and fourth defendants.

2. Any such judgement should be entered only against the first and second defendants in their personal capacities as they had no authority to bind the estate.

3. The third and fourth defendants stand to be prejudiced if the orders are granted against the estate.

The application was prosecuted by way of written submissions. According to the plaintiff it is not in dispute that there was a retainership agreement that resulted into the settlement agreement which was partly settled. Further the 3rd and 4th defendant were brought into the picture when the transactions forming the subject matter of this suit were complete but were beneficiaries. It is submitted that whereas the application was filed after the 1st and 2nd defendants had filed their defences, that was not the position with the 3rd and the 4th defendants. However, the delay in filing the application has been explained and in light of the overriding objective of the Civil Procedure Act litigants should be afforded substantive justice without undue regard to technical and procedural requirements. It is submitted that the sum claimed, which is liquidated arose from the subject matter whose value is Kshs. 1.8 Billion. As the plaintiff was instructed by the 1st defendant as the sole administrator of the deceased's estate which instructions were confirmed by all the other defendants, the matter is within the requirement of Order 36 of the Civil Procedure Rules, and the entry of summary judgement is proper. While conceding that the fee settlement agreement was subject to negotiation or arbitration, it is submitted that the applicant unsuccessfully negotiated with the 1st respondent prior to the filing of this case. As the agreement provided for either negotiation or arbitration, one option was sufficient, it is submitted. Relying on **Agip (K) Limited vs. Kibutu Civil Appeal No. 43 of 1981**, it is submitted that the defendants having filed their defences, it is nolonger open to them to rely on the arbitration clause in the said agreement. It is submitted that since at the time of the transaction the 1st defendant was the sole administrator he was empowered under section 82 of the Law of Succession Act to fully conduct the affairs relating to the said estate including issuing of legal instructions and that his actions were not nullified by the joinder of the 3rd and 4th defendants as co-administrators. According to the plaintiff the defences lack merit and since the underpinning objective of Order 36 is intended to enable a plaintiff with a liquidated claim to which there is clearly no good defence to obtain a quick and summary judgement without being unnecessarily kept from what is due to him by delaying tactics of the defendant, the application, in the plaintiff's view should be allowed.

On their part the 1st and 2nd defendants submit that since the outstanding sum of Kshs. 13,477,010.00 was subject to negotiations or arbitration, that figure cannot be said to be liquidated hence is not recoverable by way of summary judgement since it is not, according to ***Black's Law Dictionary***, settled or determined amount. It is further submitted that since the defendants had by the time of the filing of the amended application filed their defences, the remedy of summary judgement is not available to the plaintiff, notwithstanding the allegation that the file was missing. It is further submitted that the replying affidavits as well as the defence raise triable issues since it is not agreed that negotiations did take place and that even if there was a stalemate, the figure would not be liquidated. Since the plaintiff failed to disclose that the agreed fee was subject to negotiation or arbitration, the plaintiff is undeserving of the orders sought, it is submitted. The failure to agree on the negotiations, it is further submitted does not confirm the amount in dispute.

The 3rd and 4th defendants have, similarly submitted that the remedy of summary judgement is only available where a party has appeared but has not filed a defence. Since the 3rd and 4th defendants have filed a defence, the said remedy, it is submitted is nolonger available. Relying on **Gurbaksh Singh and Sons Limited vs. Njiiri Emporium [1985] KLR 695**, it is submitted that the issues raised herein are complex issues that should go to full hearing.

I have now considered the application, the affidavits both in support of and in opposition of the application, the pleadings on record, the submissions and authorities cited. As already noted above, the plaintiff is yet to comply with the provisions of Order 1 rule 10(4) aforesaid. One cannot therefore say at this stage whether the plaint on record discloses a cause of action against the 3rd and 4th defendants. True, the plaint is capable of being amended to so disclose a cause of action. However, summary judgement is a drastic remedy that cannot be resorted to except in clear cases and cannot, in my considered view, be granted where the success of the plaintiff's suit depends on an amendment which is yet to be effected. In other words summary judgement cannot be based on speculative actions to be undertaken by the plaintiff.

That aside, Order 36 rule 1 of the Civil Procedure Rules, 2010 states as follows:

"1. (1) In all suits where a plaintiff seeks judgment for—

(a) a liquidated demand with or without interest; or

(b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been

forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits."

It is obvious from a reading of the provisions of Order 36 rule 1 aforesaid that a plaintiff can only apply for Summary Judgement either where the suit is for a liquidated demand or recovery of land and not otherwise. See **Raol Investments Ltd vs. Lake Credit Finance Ltd Civil Application No. Nai. 303 of 1997; Cosmoair P. L. C. vs. Diani Beach Cottages Ltd Civil Appeal No 119 of 1998.**

However, in mixed claims where one of them is liquidated, the Court has Jurisdiction upon application to make Summary Judgement only on that part of the claim, which is liquidated, where the liquidated claim is severable from the other claims and can be dealt with separately without doing any violence to the other claims. See **Trust Bank & Another vs. Investech Bank Ltd & 3 Others Civil Applications Nos. Nai. 255 And 315 of 1999.**

What then are the results of an application for Summary Judgement? If the plaintiff has fulfilled all the conditions precedent outlined above the court can proceed to enter summary judgement as prayed in the application. If on the other hand the court finds that the case is not within order 36 or where the plaintiff, in the opinion of the court, knew that the defendant relied on a contention which would entitle him to unconditional leave to defend, the application may be dismissed with costs to be paid forthwith by the plaintiff. This is in line with the holding in **Delphis Bank vs. Sanyu Int. Ltd (Nairobi) HCCC No. 714 of 1995** and **East African Packaging Industries Ltd vs. Zoeb Alibhai Civil Appeal No. 124 of 1996.** If, on the other hand the Court finds that there are triable issues, or even one triable issue, the court has no otherwise but to give unconditional leave to defend.

It was further held by the Court of Appeal in **Trikham Maganlal Gohil & Anor vs. John Waweru Wamae Civil Appeal No. 42 of 1982** that in an application for Summary Judgement the application is not to be dismissed but rather leave to defend is to be granted either conditionally or unconditionally, if the same is not allowed. It is therefore clear that whereas, an application which should not have sought summary remedy in the first place is to be dismissed, in an application where the court finds that there are triable issues, the same is not to be dismissed but leave to defend is to be granted.

What then is a liquidated claim? "Liquidated demand" is defined as "including liquidated damages". With regard to the definition of the words "Liquidated damages" it is defined as a genuine pre-estimate of the loss that will be caused to one party if a contract is broken by the other. In this case it is called liquidated damages, and it constitutes the amount no more and no less, that the plaintiff is entitled to recover in the event of breach without being required to prove actual damage. Liquidated damages mean that it shall be taken as the sum which parties have by a contract assessed as the damage to be paid whatever may be the actual damage. See**Stroud's Judicial Dictionary 3rd Edn. at Page 1160; The Law of Contract by Cheshire and Fifoot 4th Edn. at Page 510.**

Can it be said that the sum claimed herein is a sum which "parties have by a contract assessedas the damage to be paid"? Whereas it is true that the instructions note dated 12th April 2010 indicates that it was signed by all the defendants herein, the sum of Kshs. 13,477,010.00 which is the sum in contention in this suit was clearly indicated to be subject to negotiation or arbitration. It is not contended by the plaintiff that there was any such arbitration. It is also not contended that the negotiation resulted in any agreed figure. To the contrary it is the plaintiff's case that it was the failure by the attempt at negotiations to yield any fruits that prompted or triggered the institution of these proceedings. By indicating that the figure of Kshs. 13,477,010.00 as being subject to negotiation or arbitration, it was a clear manifestation that after such negotiation or arbitration the figure ultimately arrived at could be the same figure or a figure in excess or less than the said amount. It cannot at this stage be said with certainty that the exact figure was agreed by the parties in order for the same to fall into the category of "liquidated demand" or claim.

Further there is the issue of the competency of this application. It is not in dispute that the application was filed when there was already a defence on record by the 1st and 2nd defendants. I must make it clear that whereas under Order 36 rule 1 of the Civil Procedure Rules an application for summary judgement should be made after the entry of appearance but before the filing of a defence, the mere fact that a defendant files a defence while an application for summary judgement is pending does not render the application incompetent. The Court is, however, enjoined to look at the defence on record to determine whether or not it raises triable issues. On the other hand, where there is clearly a defence on record at the time of the filing of the application, the application is, without more, incompetent. In this case the plaintiff's case is that he was unable to file his application due to the fact that the file could not be traced. That may be so. However, that does not justify the filing of an application in contravention of the clear provisions of the law. That may be a reason for seeking extension of time to file the application out of time or for validation of an application filed out of time. In this case, no such application has been made either formally or orally. What has been sought by the plaintiff is that the court ignores its rules of procedure. It must be noted that the amendments to Order 36 rule 1 were meant for attainment of the overriding objective so as to ensure that applications for summary judgement are made and dealt with as soon as the suit is filed. Dealing with the said issue in Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009 it was stated as follows:

"On 23rd July 2009 both the Civil Procedure Act and the Appellate Jurisdiction Act were amended to incorporate sections 1A and 1B in the Civil Procedure Act and sections 3A and 3B in the case of the Appellate Jurisdiction Act. These provisions incorporate into the civil process an overriding objective which has also been defined. All courts are required when interpreting the two Acts and the rules made under both Acts or exercising the power under both Acts and the rules to ensure that in performing both functions the overriding objective is given the pride of place including the principal aims of the objective…The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with and whatever is in conflict with it must give way. A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. The court must warn the litigants and counsel that the courts are now on the driving seat of justice and the courts have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in the civil process and to weed out as far as is practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner. *If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible*". (Emphasis mine).

The court of appeal in **Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 of 2010** held *inter alia* that:

"the applicant cannot be allowed to invoke the "O2 principle" and at the same time abuse it at will. All provisions and rules in the relevant Acts must be "O2" compliant because they exists for no other purpose. The "O2 principle" poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In the court's view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day. If improperly invoked, the "O2 principle" could easily become an unruly horse and therefore while the enactment of the "double O" principle is a reflection of the central importance the court must attach to case management in the administration of justice, in exercising the power to give effect to the principle, it must do so judicially and with proper and explicable factual foundation. The overriding principle will no doubt serve us well but it is important to point out that it is not going to be a panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained.

In **Christ For All Nations vs. Apollo Insurance Company Limited Nairobi (Milimani) HCCC No. 477 of 1999 [2002] 2 EA 366, Ringera, J** (as he then was) stated that justice is a double-edged sword and it sometimes cuts the plaintiff and at other times the defendant and each must be prepared to bear the pain justices cut with fortitude and without condemning the law's justice as unjust.

Dealing with the same issue it was held in **Safaricom Limited vs. Ocean View Beach Hotel Limited & 2 Others Civil Application No. 327 Of 2009** *inter alia*, as follows:

"Expressed differently, the purpose of the "double O principle" in its application to civil proceedings is to facilitate the just, quick and cheap resolution of the real issues in the proceedings. Like oxygen, the principle has the potential to re-energise the civil system of justice and give the courts the freedom to attain justice in each case in a manner that is just, quick and cheap and above all in a manner which takes into account the special circumstances of each case or appeal and the best way of handling it.

Given the novel circumstances of this matter, the endeavour towards this goal has not been in vain. It must however, be quickly added that while it is possible that a new ground could have been broken in the area of law covered, the ratio of this ruling is deliberately designed and given with the special circumstances of this particular case in view. The ruling is certainly not intended to open the floodgates or serve as a magic potion intended to cure all ills. It is therefore apt to throw in a word of caution concerning the "O2" principle". It should be regarded as a double edged sword in that it is a powerful enemy of those litigants bent on frustrating the course of justice because it has the potential of stopping them at the earliest opportunity and it will also be a powerful ally of those litigants who want to attain justice in a manner that is just, quick and cheap. The "O2" principle has not come to us as a packaged product for application to all situations. Instead, its application and management will depend on the circumstances of each case. At this stage, in the development of the principle, it will demand our skills, energy, will and commitment to innovate in all deserving cases and appeals so as to address its principal aims".

What in effect the Courts are saying is that the overriding objective should not be used selectively. It should be used for purposes of attaining justice either by not unduly delaying a party from realising what was truly and justly due to him or by ensuring that a party is accorded an opportunity to present his case on the merits where he has shown that he has one. In other words the plaintiff should not expect the Court to ignore his failure to comply with procedural requirements in order to assist him obtain his orders summarily.

In my view, where a defence has been filed before an application for summary judgement is made, it is nolonger open to a party to apply for summary judgement since no leave to defend would then be required. In such a case if a party feels that the defence filed does not disclose any reasonable defence or is vexatious or frivolous or amounts to an abuse of the process of the court, the only recourse available is for the party to apply for the defence on record to be struck out and judgement entered accordingly. It would be a mockery of judicial process for the court to enter summary judgement without striking out the defence on record and since the two jurisdictions are distinct and separate, to apply for summary judgement when there already is a defence on record would be to muddle up the two jurisdictions.

Accordingly, I find that this application was filed contrary to the express provisions of the law, firstly, because the prayers sought in the plaint do not, strictly speaking, lend themselves to an application for summary judgement and secondly, because the application itself, is filed in disregard of the rules of procedure.

However, even if the application was merited, it would still fail on the ground that the plaintiff has not surmounted the defence raised by the 1st and the 2nd defendants that the figure in the settlement agreement was subject to negotiation or arbitration none of which have been undertaken. Whether or not in the absence of any negotiated figure, the plaintiff was entitled to fall back on the figure to be negotiated cannot be said to be so clear as to warrant the entry of summary judgement. In **Five Continents Limited vs. Mpata Investments Limited Civil Appeal No. 306 of 2000 [2003] KLR 443; [2003] 1 EA 1** it was stated that if the defendant shows a *bona fide* triable issue he must be allowed to defend without conditions and that in an application for summary judgement even one triable issue if, *bona fide*, would entitle the defendant to have unconditional leave to defend. The court further stated that in an application for summary judgement, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial but not that it raises a defence which must succeed. It is my respectful view that the issue raised by the 1st and 2nd defendants is *bona fide* and whereas it may not necessarily succeed, it cannot be dismissed off-hand. Accordingly, the defendants are entitled to unconditional leave to defend.

In the result the Amended Notice of Motion dated 9th January 2012 and filed on 16th January 2012 fails and is dismissed with costs to the defendants.

Ruling read, signed and delivered in court this 28th day of May 2012

G.V. ODUNGA

JUDGE

In the presence of:

Mr. Omondi for Ms. Caroline Oduor for the Plaintiff

Ms. Muhanda for the 1st and 2nd Defendants

Ms. Muhanda for Ms. Kamau for the 3rd and 4th Defendants