REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Appeal 75, 76, 77 & 78 of 2008 (Consolidated)

NYAMODI OCHIENG-NYAMOGO

WILLYS NYAMODI NYAMOGO *BOTH TRADINGS AS*

NYAMOGO & NYAMOGO ADVOCATES ………………… PLAINTIFF

Versus

THE COOPERATIVE INSURANCE CO. (K) LTD ....… DEFENDANT

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 76 OF 2008

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 77 OF 2008

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 78 OF 2008

NYAMODI OCHIENG-NYAMOGO

WILLYS NYAMODI NYAMOGO *BOTH TRADINGS AS*

NYAMOGO & NYAMOGO ADVOCATES ………………… PLAINTIFF

Versus

THE COOPERATIVE INSURANCE CO. (K) LTD ….… DEFENDANT

RULING

The plaintiff which is a firm of advocates has brought case nos. 75, 76, 77 and 78 of 2008 against the defendant. Looking at the plaint in all the cases they are a duplication. In other words it is one plaint duplicated in all those cases. The plaintiff has pleaded in all the plaints of those files that on 12th June 2008 its bills of costs was taxed at Kshs. 202202.20 as against the defendants insured. That the defendant had instructed the plaintiff firm of advocate to represent their insured in the four cases at Thika Magistrate's Court. It is pleaded by the plaintiff that the defendant is liable to satisfy the taxed costs on behalf of its insured. The plaintiff pleaded that it had made demand to the defendant but the defendant had failed to admit liability. In the final prayer of all the matters the subject of this ruling the plaintiff prayed for a declaration that the defendant is liable to pay Kshs. 202202.20. The plaintiff also prays that the amount should attract interest at court rates. The plaintiff's claim was defended. In their statement of defence the defendant denied instructing the plaintiff to act for its insured. It denied that costs had been taxed and denied that demand had been made to it. Without prejudice to those pleadings the defendant further pleaded that those taxed costs were not final and conclusive because they were the subject of challenge by a reference before a judge. It was stated that the plaintiff cannot then therefore file suit for recovery of those costs. In response to that defence the plaintiff filed a similar application in all the files. It is a chamber summons dated 6th August 2008. That application is brought under order VI Rule 13 (1) (b) (c) and (d) of the Civil Procedure Rules. That application seeks the striking out of the defendant's defence in all the files. The affidavit in support of that application is sworn by one of the partners of the plaintiff's firm. It deponed that the defendant in December 2003 instructed the plaintiff to represent the defendant's insured in the various matters at Thika Magistrate's Court. In that regard the plaintiff annexed a letter dated 18th December 2003 which letter enclosed the plaintiff summons in each matter and requested the plaintiff's firm to file a defence for the insured. The deponent confirmed that on receipt of those instructions the firm proceeded and successfully represented the defendants insured. On finalization of those various matters the plaintiff filed bills of costs against the insured and the same were all taxed on 12th June 2008 and in each matter the taxing master awarded the plaintiff Kshs. 202202.20 as against the insured. After taxation the plaintiff made a demand to the defendant. The plaintiff annexed a copy of the certificate of taxation and the letter addressed to the defendant demanding the global figure of

all the matters being Kshs. 808808.80. That on receipt of demand from the plaintiff the defendant company secretary personally spoke to the deponed pleading for time to contact their external advocates regarding their taxation. At a time later the said company secretary again called the deponent and informed him that the defendant company had sought the opinion of one of their external lawyers. Subsequently the company secretary availed to the deponent a copy of the opinion of the external lawyers which was annexed to the application. According to the deponent the opinion revealed that there was no dispute that the defendant had instructed the plaintiff and that the defendant was liable to pay the taxed costs. In the end the deponent stated that the defence filed herein was scandalous, frivolous and vexatious and was meant to delay fair trial of the suit. The application received a response from the defendant by way of two replying affidavits. At this juncture I wish to deal with the opposition raised by the plaintiff that the defendant was only entitled to rely on one affidavit and if they wished to file a further affidavit the leave of the court should have been sought. Order L Rule 16(1) of the Civil procedure rules provides as follows:-

"*Any respondent who wishes to oppose any motion or other application shall file and serve on the applicant a replying affidavit or a statement of grounds of opposition, if any, not less than three clear days before the date of hearing."(emphasis mine).*

As can be seen from that rule it is provided that a respondent should file and serve a replying affidavit. That indicates that a respondent should file one replying affidavit. In this case the defendant filed two replying affidavits by two different parties. The plaintiff did not raise the issue of the two replying affidavits before the hearing of the application. He chose to raise the issue in his arguments in support of the application. I am of the view therefore the plaintiff did not suffer any prejudice in having the two replying affidavits on record. Had he raised the issue as a preliminary issue the defendant would have had an opportunity to respond and much more would have had an opportunity belatedly as it may to seek leave to rely on the 2nd replying affidavit. I therefore reject the plaintiff's objection and the court will deem the 2nd replying affidavit as filed with the leave of this court. The first replying affidavit is by the defendant's company secretary. In that affidavit the deponent denied the averments of the plaintiff that he had contacted Mr. Nyamogo advocate. He denied having met with him and having released to him a confidential internal opinion. In his view the opinion was obtained by the plaintiffs in a dishonest unlawful means and in extreme bad faith. That opinion in his view was being used by the plaintiff to tarnish his name before the court and his employer and everyone else who would read the plaintiff's affidavit. He further deponed that the taxed costs were a subject of reference before the judge. In his view the application was lacking in merit. The 2nd replying affidavit was sworn by Nannette Miingi an advocate of the High Court of Kenya. She is practicing law in the firm of Mwaura & Wachira advocate who are the advocates on record in respect of the taxation cause. The deponent gave a list of the multiplicity of bills that he plaintiff has filed in respect of this matter. Those bills are the subject of a reference but she gave details of their inability to file the reference in time due to circumstance that were beyond their control that is, the respective files were from time to time held up by the taxing master of various issued arising therein. In submissions in support of the application, Mr. Nyamogo argued that in view of the fact that a certificate of taxation had been issued in each of these matters section 51(2) of the advocates Act applied. He argued that since there was no dispute as to the retainer stay of those costs could not be issued. Section 51(2) provides:-

"*The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the court, be final as to the amount of the costs covered thereby, and the court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs."*

The defendant's counsel argued that that section did not apply to the certificate of costs herein because those were advocates and clients costs. In my view that argument is erroneous. That section clearly states that it is a certificate of taxation where there is no dispute on retainer that judgment can be entered. The certificate of costs can either be of party and party costs or advocates and clients costs. That finding however does not mean that the plaintiff's application will succeed. The plaintiff has admitted in the pleadings that the certificate of cost issued by the court was as against the defendant insured. On that basis it does not follow that judgment can be entered against the defendant. In respect of the legal

opinion annexed to the plaintiff's affidavit I beg to differ with the deposition of the plaintiff. In my view the opinion does not show that the defendant admits that the taxed costs are payable by it. The defendant's counsel argued that this being a declaratory suit the plaintiff could only obtain judgment under *section 48* of the Advocate's Act. Section 48 in my view deals with a situation where costs are demanded before taxation. Section 48 therefore does not apply to this action. He did reiterate that the taxed costs were the subject of reference before a judge. The plaintiff had argued that the defendant's 2nd replying affidavit was in contravention of Order XVIII Rule 3(1). That rule required that an affidavit be confined to such facts as the deponent is able of his knowledge to prove. The reason why the plaintiff raised that argument is because in the defendant's 2nd replying affidavit particularly paragraphs 10, 11 and 14 the deponent stated in each of those paragraphs;-

"*That we, the firm of M/S Mwaura & Wachira advocates …….*"

The plaintiff argued that the use of the word *'we'* contravened the above rule. The defendant in response to that argument stated that the use of the word 'we' was plural. I have looked at those paragraphs and in my view they do not contravene that rule. The deponent was stating a fact pertaining to the firm of Ms Mwaura Wachira which she is part and parcel. So she was therefore deponing to facts known to her. I now wish to proceed to deal with the application before me. The power to strike out pleadings is only exercised in plain and obvious cases. In this regard I rely on the case of D.T. DOBIE & COMPANY (KENYA) LTD vs MUCHINA (1982) KLR 1 where the court held:-

" *…….. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and it is so weal as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for court of justice ought not act in darkness without the full facts of a case before it …….*"

The plaintiff in presenting the present application argued that the defendant defence was frivolous, scandalous and vexatious. The plaintiff did not specify which paragraphs of the defence were frivolous, scandalous and vexatious. In the case of NYAMODI OCHIENG NYAMOGO vs THE COOPERATIVE INSURANCE COMPANY (K) LIMITED CIVIL CASE NO. 95 OF 2008 (NYERI) Honourable Mr. Justice Makhandia reproduced the definition of those terms as follows:-

"The affidavit should show that the defence is scandalous, frivolous or vexatious. Pleading is .... frivolous if:

(i) It has no substance or

(ii) It is fanciful or

(iii) Where a party is trifling with court

(iv) When to put forward the defence would be wasting courts time.

(v) When it is not capable of reasoned argument.

.... It is said to be vexatious when

(i) It has no foundation

(ii) It has no chance of succeeding

(iii) The pleading is merely brought for purposes of annoyance.

(iv) It is brought so that the party pleading should get some fanciful advantage or

(v) Where it can really lead to no possible good

.... It turns to prejudice embarrass or delay fair trial upon

(i) If it is evasive or

(ii) Occurring or concealing the real question in issue between the parties in the case.

.... and finally it is an abuse of the process of court where it is frivolous or vexations" See generally Mrs. Katharbhai Ahmed & Anor v/s Suleiman Kassan Dava, HCCC No. 118 of 1996 (unreported)."

It would have assisted the court if the plaintiff had indicated the areas of the defence that were frivolous, vexatious and scandalous. The argument before the court over this application was very protracted. Each party relied on many authorities which although I have considered I have not found it necessary to be reproduced here. That only goes to show that this is not a plain and obvious case for striking out the defence. It is a case which the plaintiff will need to call evidence to prove that the defendant instructed the plaintiff to act for the insured. It has been alleged by the defendant that the opinion attached to the application was obtained dishonestly. Since in the defence the defendant denies instructing the plaintiff it is not clear under what circumstance the plaintiff obtained the letter of instructions. That will have to be left to a full hearing for determination. For the above reasons the plaintiffs' chamber summons application dated 6th August 2008 in HCCC No. 75, 76, 77 and 78 of 2008 are hereby dismissed with costs to the defendant.

Dated and delivered this 27th day of January 2009.

MARY KASANGO

JUDGE