



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT 3665 OF 1991

PETER NG'ANG'A MUIRURI PLAINTIFF

VERSUS

CREDIT BANK (K) LTD DEFENDANT

RULING

The application before court is a Chamber Summons dated 18th December, 2008 filed by the Defendant/Applicant. The same is brought under the provisions of Section 3A and S.75 of the Civil Procedure Act and Order XLII rule 1(3) of the Civil procedure Rules and all other enabling provisions of law. It is supported by the affidavit of **PATNAIK RABINDRA** who described himself as the Managing Director of the defendant/applicant.

The application is seeking for the following substantive orders.

- 1. There be a stay of proceedings in this case and execution of part of the ruling by the Honourable Lady Justice Ang'awa dated 26th November, 2008 directing that Kshs.700,000.00/= be released to the Plaintiff and the Plaintiff to receive half portion of the interest accrued on the deposited amount of Kshs.1,373,832.40/= pending the deposited amount of kshs..1,373,832.40/= pending the hearing and determination of this application.**
- 2. Leave be granted to the defendant to appeal against part of the ruling be the Honourable lady Justice Ang'awa dated 26th November, 2008 directing that Kshs.700,000/= be released to the Plaintiff and the Plaintiff to receive half portion of the interest accrued on the deposited amount of Kshs.1,373,832.40/=.**
- 3. Upon grant of (3) above there be stay of execution of part of the Ruling by the Honourable Lady Justice Ang'awa dated 26th November, 2008 directing that Kshs.700,000/= be released to the Plaintiff and the Plaintiff to receive half portion of the interest accrued on the deposit amount of Kshs.1,373,832.4/= pending the Lodging, hearing and determination of the appeal.**
- 4. The costs of this application be in the cause.**

The main grounds upon which the application is based are: -

1. Appeal does not lie as of right in respect of the ruling being appeal against the application having been brought under order 50 of the Civil Procedure Rules and section 3A and 34 of the Civil Procedure Act.

2. That the defendant has an arguable appeal, that is likely to be rendered nugatory if the stay is not granted.

The Plaintiff opposed the application and filed grounds of opposition dated 4th December, 2008 as follows:-

1. **That the application is bad in law incompetent misconceived and an abuse of the process of court.**
2. **That the Honorable court has no jurisdiction to stay the whole or any part of the ruling and order of 26th November, 2008 pending 1st Defendant's intended appeal either under section 3A and 75 of the Civil Procedure Act, 21 Laws of Kenya or Order XLII 1 (3) Civil Procedure Rules and should decline exercise of such Jurisdiction.**
3. **The exercise of jurisdiction discriminately permitting the Defendant/Applicant to gain material advantages over its opponent in the intended appeal and restraining the Plaintiff a necessary party to the intended part as urged by the Defendant is neither exercise of inherent jurisdiction nor in the interest of justice that the firm of M/S Nyachae & Ashitiva Advocates lacks capacity to agitate file papers or application or prosecute proceedings herein on behalf of any of the parties.**
4. **Proceedings actions and orders thereon heretofor at the urging of M/s Nyachae & Ashitiva Advocates are null & void.**
5. **That an order for stay of proceedings and execution in terms urged by the Defendant will by its terms application and effect.**
 - (a) **Upset status quo obtaining between parties ante quo the order intended to be appealed.**
 - (b) **Discriminate the Plaintiff vis-a-vis status ordered by the court of Appeal in CA No. 263 of 1998 Peter Nganga Mururi vs Credit bank Ltd & Another Litigation of which the intended Appeal proposes to continue.**
 - (c) **Will defeat claims of the Plaintiff in the dispute**
 - (d) **Will vest the defendant with right to take use and benefit materially and in very substantial. May a huge portion of funds the subject of the dispute thereby usurping the Plaintiff's rights therein and denying Plaintiff equal benefit and parity pending filing and/or hearing of the intended appeal.**
 - (e) **Deny the Plaintiff a fair hearing of a dispute the defendant a timeless immortal body corporate intends to agitate *ad infinitum* against the Plaintiff ,a mere mortal.**
 - (f) **Facilitate M/S Nyachae & Co. Advocates who have to-date with the knowledge and approval of the defendant failed and or refused with impunity to honour their professional undertaking and treat with contempt the order of the Court of Appeal in C. A No.263 of 1998 gain a material benefit and advantage thereby.**
 - (g) **Is unjust.**
6. **That inherent jurisdiction should be exercised for presentation of right not for their usurpation**

The matter for consideration before me today is ground 4 of the grounds of opposition namely –

“That the firm of M/S Nyachae & Ashitiva Advocates lacks capacity to agitate file papers or application or prosecute proceedings on behalf of the defendants.”

Mr. Wamalwa for the Plaintiff contends that there is already a Judgment. That the said firm of M/S Nyachae & Ashitiva Advocates are strangers and are not the agents of the defendants. In brief the said advocate are not on record.

On the other hand Mr. Odawa for M/S Nyachae & Ashitiva Advocates contends that his law firm is the successor to Nyachae & Co. Advocates, that the firm is the same, only the name & composition of the partners has changed. That this change does not go to the substance of the application before the court.

From the court record all pleadings save the current application were filed by M/S Nyachae & Co. Advocates. Representation of the defendants was also by the same firm until the 25th October, 2007, when the court record indicates the firm of M/S Nyachae Ashitiva & Co. as representing the defendants. The parties had lengthy proceedings before Ang'awa J, beginning the said date of 25th, October, 2007, where the new firm represented the defendants. Mr. Wamalwa for the plaintiff did not take issue then. The issue is being brought up more than a year later.

Procedurally, Mr. Wamalwa is right in his assertion in terms of Order III rule 6 & 7. The new Law firm whether a successor or otherwise is a stranger to these proceedings Order III. Rule 6 Provides –

“A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 7, the former advocate shall, subject to rules 11 and 12, be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

From the above provision the firm on record for all intents and purpose is M/S Nyachae & Co. Advocates. If the name or composition has changed and a new firm has come into being, as in the case here, then a notice of change ought to have been filed and served to all concerned as required by rule 7 which provides –

“The party giving the notice shall serve on every other party to the cause or matter (not being a party in default as to entry of appearance) and on the former advocate a copy of the notice endorsed with a memorandum stating that the notice has been duly filed in the appropriate court (naming it).”

Although I am in agreement with Mr. Wamalwa that the new firm ought to have placed itself on record, I am equally of the view that it is too late for him to bring forth the issue. This cause is old, having been instituted over 18 years ago. The issue in contention at the time of inception of the suit was settled. It is my view that, what is outstanding now needs to be settled at the earliest opportunity, in order to end this litigation. It is noteworthy that counsels have been in and out of court for all these years at the slightest disagreement. Concerned by the length of period this matter has taken, I am convinced that this is a matter where substantial justice other than procedural technicality should be the concern of this court. In arriving at this decision I have considered the following cases:-

**1. KAMLESH MANSUKHLAL DAMJI PATTINI vs. NASSIR IBRAHIM ALI & 2 OTHERS
CIVIL CASE NO. 418 of 1998**

Where a similar issue was raised. In addressing the same Judge A. Emukule had this to say –

“There is of course no question of inquiry into the validity of the Civil Procedure Rules or indeed Order III Rules 6 and 12 (2) of the said Order. The Civil Procedure rules are made by the Rules Committee under Section 81 of the Civil Procedure Act for the use of the court advocates and Litigants. --- To my mind whether a Judge or court follows the strict or liberal or “purposive approach” in the construction of the provisions of the statute or the rules or regulations made there under is entirely at the courts discretion.”

“--- A heavy burden is however laid upon the court as arbiter between competing rival parties and

their competing interests. The interest of the court however shall remain constant that of achieving substantive Justice.”

In the said case the court referred to the provisions of S. 3(2) of the Judicature Act where the Court of Appeal , the High Court and Subordinate Courts shall decide all cases according to substantial justice without due regard to technicality or procedure. Guided by the same the court declined to strike out the application & allowed the advocate 7 days within which to put himself properly on re cord.

2. In CONSOLATA NDINDA OWIRA & 4 OTHERS vs. BANUELBOVIS OMAMBIA Kubo J had this to say on procedural technicalities-

“ ----- This is not to say that procedural errors or omissions should always enjoy clemency, far from it court procedures are made for a purpose i.e ensure orderly, effective and predictable management of cases. But there will from time to time be cases where substantive justice demands priority over technicalities of procedures I hold that the present case provides one such instance.”

Guided by the above authorities, I agree as much, that the rules of procedure ought to be adhered to, but where such rules of procedure will create hardship, undue delay and where circumstances of a case militate against such procedures, the court should apply substantive justice. In the instant case the lawyer for the Plaintiff acquiesced in the irregular representation of the defendants by the current firm of advocates, rejecting the said advocates at this stage may have far reaching consequences that may not only be costly but, cause further delay to this long outstanding matter. In my view and in the circumstances of this case, no prejudice will be suffered by the Plaintiff if the court uses its discretion by over looking the procedural issue of representation raised, in favour of substantive justice. The preliminary objection is therefore dismissed. I direct that the defendants advocates regularize their representation within the next 14 days of today’s date to allow the chamber summons dated 1st December, 2008 be argued. I order further that the defendants do pay the Plaintiff’s costs arising from this Preliminary Objection before the hearing of the said application

DATED and DELIVERED at Nairobi this 15th day of June, 2009

ALI- ARONI

JUDGE