



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL CASE 520 OF 2005

KENYA TEA DEVELOPMENT AGENCY LIMITED.....PLAINTIFF/APPLICANT

VERSUS

LEO MASORE NYANG'AU T/A

MASORE NYANG'AU & CO. ADVOCATES.....DEFENDANT/RESPONDENT

RULING

This is a Chamber Summons application brought under order VI Rule 13(d) of the Civil Procedure rules and sections 6 and 7 of the Civil Procedure Act. The application is dated 18th September, 2007 and seeks to have the Plaintiff's suit against the Defendant struck out with costs.

The grounds upon which the application is premised are on the face of it thus:

- (a) THAT the purported cause of action in this case is a brief the Plaintiff entrusted with the Defendant out of which the defendant was entitled to legal fees and disbursements.**
- (b) THAT the Defendant filed various bills of costs in another court of concurrent jurisdiction prior to this suit in which the Defendant is accounting for the sums entrusted to him for the said brief.**
- (c) THAT the bulk of the said sums were paid to the sellers of the parcels of land earmarked for purchase and the balance was the defendant's fees.**
- (d) That the court before which the bills have been filed has the requisite jurisdiction to determine all questions involved in the dispute.**
- (e) THAT filing another suit in another court of concurrent jurisdiction is an abuse of the process of the court.**
- (f) THAT as the court before whom the bills have been filed has jurisdiction to dispose of all the issues between the parties hereof, this court does not have jurisdiction to even stay this suit but to strike it out.**

The application has been opposed. The Plaintiff has filed a replying affidavit which is sworn by Rebecca Mbithi, the Head of the Legal and Regulatory Affairs of the Plaintiff company. The gist

of the replying affidavit is that the Originating Summons has been brought in order to expedite the pending matter between the Plaintiff and the Defendant. The affidavit sets out the background of the case, which is that the Plaintiff instructed the Defendant to act for the Plaintiff as a Purchaser for various parcels of land that were to be bought from farmers. Pursuant to that instruction the Plaintiff paid to the Defendant Kshs.3.7 million as purchase price for the various parcels of land. The Agreement was not pursued as it fell through and the purchase of land was called off. The Plaintiff avers that the Respondent has now failed to refund unutilized sums of money on grounds that the same were his legal fees. The Plaintiff has averred that the suit has been brought for the purposes of taking of accounts of the funds deposited with the Defendant. The Plaintiff's contention is that the taxation of the various Bills in the various courts are not affected by the current suit.

The Plaintiff in this case, KTDA Limited instituted this proceedings by way of an Originating Summons in which four questions for determination by the court have been raised. The Originating Summons has been brought under Order LII rule 4 and Order XXXVI, rule 3 of the Civil Procedure Rules. In the instant application, the Respondent in the Originating Summons seeks to have the entire suit struck out. He has invoked order VI rule 13(b) and sections 6 and 7 of the Civil Procedure Act.

The gist of the application is that since the Respondent has filed various Bills of Costs touching on the subject matter of the instant suit, this suit ought not to proceed and should be struck out. Mr. Nyang'au gave his submissions in support of the application on behalf of his firm, which is the Defendant in the case. Ms. Mogusu opposed the application on behalf of the Plaintiff. Mr. Nyang'au's main contention is that since this instant suit was filed subsequent to the filing of the various Miscellaneous Applications for the taxation of the Defendant's Bill of Costs the instant suit which is directly related to the Defendant's Applications ought not to proceed as it is an abuse of the Court process. Counsel submitted that for that reason this suit ought to be struck out. Mr. Nyang'au also argues that the Originating Summons has been brought under the wrong Order. Counsel urged that Order XXXVI does not cloth this court with jurisdiction to determine the matter since the matter was between an Advocate and Client. Counsel also urged that Order LII rule 4 did not apply because under sub rule (3), where an Advocate alleges that he has a claim for costs on any monies deposited with him by the Client, the only power the court has is to make an order for taxation or for payment and therefore the order did not apply. Mr. Nyang'au submitted that since the Plaintiff gave the Defendant a brief as an Advocate, and since the Advocate has filed Application for the taxation of Bills of Costs, the taxation should be allowed to proceed and that in the circumstances, the instant case is not necessary. Mr. Nyang'au also urged that the various Bills of Costs filed by his firm are different suits relating to the same cause of action as the instant cases, as defined under section 2 of the Civil Procedure Act and Order II rule 1 of the Civil Procedure Rules. Counsel submitted that therefore, under section 6 of the Civil Procedure Act, this court ought to stay the instant suit, being the latter suit filed after the Bill of Costs. Counsel submitted that the Bill of Costs were for the purposes of taking accounts as evidenced by Civil Form 55A which is titled "NOTICE OF TAXATION/ACCOUNTS". Counsel submitted that in the circumstances, whatever claims the Plaintiff has against the Defendant it will be able to recover in the Bill of Costs, and therefore the instant suit was not necessary.

Mr. Mogusu relied on the replying affidavit filed by Ms. Mbithi. Counsel submitted that the suit was properly before the court and that the jurisdiction invoked was the correct one. Ms. Mogusu submitted that order XXXVI of the Civil Procedure Rules provides that a Vendor or Purchaser can bring a suit by way of an Originating Summons. Counsel submitted that the Plaintiff was a Purchaser and that it has brought the Originating Summons in that capacity, seeking a refund of the money forwarded to the Advocate herein for transmission to various Vendors in the failed Agreement. Counsels urged that the Plaintiff's contention was the Defendant ought to refund the money deposited with the firm since the sale did not go through. Counsel submitted that the Plaintiff was not opposed to the Bill of Costs but that what it required was an account for the purchase price that it forwarded to the Defendant. Ms. Mogusu

submitted that there was nothing impeding a Plaintiff from filing a suit in the face of pending Bill of Costs. Counsel has placed reliance on the case of **Ali Salim Ngoni vs. Kennedy Ogero Mokaya (Mom) HCCC No. 278 of 2008 (UR)** for the proposition that a party could file an Originating Summons in the face of pending Bill of Costs, and that the court could order the deposit of the sum in question with the court pending the taxation of the Bill of Costs. Counsel relied on the case of **Naphatali Paul Radier vs. David Njogu Gachanja Carrying t/a D. Njogu & Company Advocates [2006] eKLR** for the proposition that the purpose of an Originating Summons is to have the matter expeditiously determined.

Mr. Nyang'au for the Defendant has distinguished the case of **Ali Salim Ngoni**, supra, from the instant one on the grounds that in the cited case, a judgment had already been entered and that the principle sum was therefore ascertained, which is not the case in the instant suit. Mr. Nyang'au also distinguished the case of **Naphatali Radier**, supra, on the grounds that the facts of the case and the circumstances under which the matter came to court are not similar to the instant one and that in the cited case the Originating Summons was heard in full.

I have carefully considered this matter. On the issue whether this case should be stayed under section 6 of the Civil Procedure Act, section 6 provides:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously institute suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

The issue is whether the various Bills of Costs filed by the Defendant are directly or substantially matters in issue in this Originating Summons suit.

The purpose of the Bill of Costs is totally different from the purpose of an Originating Summons. The Originating Summons has been brought under Order LII rule 4 of the Civil Procedure Rules. The side notes of rule 4 of this order reads: *“Power to order Advocates to deliver cash, account, etc.”* The purpose of the Originating Summons is to enable a Client have delivery of a cash account or of a list of the monies or securities which the Advocate has in possession or control on behalf of a Client. It also enables a Client to have the Advocate pay or lodge in court any such money or securities or the delivery up of papers and documents which the Client is entitled to.

Mr. Nyang'au has urged that the only orders that this court can make in the Originating Summons filed by the Plaintiff is for the taxation of the Bill of Costs and that therefore this suit is not necessary. What Mr. Nyang'au has submitted is in fact true as is provided under rule 4(3) of order LII. However, the only difference is that the court can only make such an order for taxation after hearing the Originating Summons. Whereas Mr. Nyang'au's position is correct that the only order the court can make is that of taxation but also in addition it can make an order for payment or the securing of payment of sums which are in issue in the case. Any order under rule 4(3) can however only be made after and not before the Originating Summons is heard.

As I have stated above, the purpose of an Originating Summons under order LII is to assist in the expeditious determination of the issues between an Advocate and his Client relating to the issues of cash accounts payments among other things. An application under Order LII of the Civil Procedure Rules cannot be equated to a Bill of Costs. If anything, a suit instituted under Order LII by a Client would assist in the determination of the Bill of Costs, as it will narrow down the issues for determination and may in fact dispose off the Bill of Costs more expeditiously. I do not think that this suit violates section 6 of the Civil Procedure Act and therefore that issue is without merit and is dismissed.

The Advocate has argued that this suit is *res judicata*. The Advocate invokes section 7 of the Civil Procedure Act on the face of the application. I have carefully considered the submissions made by both Counsels. The doctrine of *res judicata* only applies to suits where an issue raised is either directly and substantially in issue in a former suit between the same parties or between parties under whom they claim and which a competent court has heard and finally decided. From Mr. Nyang'au's submissions, which Ms. Mogusu also supports, the Bill of Costs filed by the Defendant Advocates are still pending in various courts. They have not been heard or determined by a competent court. Mr. Nyang'au cannot use those pending Bills of Costs to contend that the instant case is *res judicata*, since those Bills have of course not been determined. That ground is therefore also without merit.

The application has also been brought under order VI rule 13(1) (b) of the Civil Procedure Rules. It means that the Defendant is relying on the ground that the instant suit is an abuse of the process of the court. I have considered the submission by Mr. Nyang'au. The gist of those submissions is that it was not necessary for the Plaintiff to file the instant suit since the Defendant has already filed various Bills of Costs. I have already made my observations regarding this suit as against the provisions of order XXXVI and order LII of the Civil Procedure Rules. On the basis of my observations on those two Orders and also on the basis of my observations of the case regarding section 6 and 7 of the Civil Procedure Act, I do not find any basis upon which I can hold that the instant suit is an abuse of the court process. I do find that the Defendant has not demonstrated that this suit is an abuse of the court process and therefore that ground is also dismissed.

In conclusion I find no merit in the application dated 18th September, 2007 and I therefore dismiss it with costs to the Plaintiff.

Dated at Nairobi this 12th day of June, 2009.

LESIIT, J.

JUDGE

Read, delivered and signed in presence of:

Mr. Nyang'au for the Applicant

N/A for Mr. Mogusu for the Respondent

LESIIT, J.

JUDGE