



**NAHYER SHARIFF HASSAN ALWI** (suing as an Administrator Under special limited grant of probate of the Estate of)

**SHARIFF HASSAN ALWI (DECEASED) .....PLAINTIFF**

**VERSUS**

**HOUSING FINANCE COMPANY OF KENYA LTD. ....1<sup>ST</sup> DEFENDANT**

**HITAN C. MAJEVDA .....2<sup>ND</sup> DEFENDANT**

**MAMTA H. MAJEVDA .....3<sup>RD</sup> DEFENDANT**

## **RULING**

The plaintiff filed an application dated 29<sup>th</sup> July 2009 for various orders. The application was filed by Gikandi & Company Advocates for the plaintiff. The applicant has a pending appeal, his suit having been struck out.

The counsel on record for the 1<sup>st</sup> Defendant has been Kanyi & Company Advocates. The Advocates who have been on record for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have been Khatib & Company Advocates.

Before the Defendants could file any response, the firm of Y.A. Ali Advocates filed a Notice of Change of Advocates to act for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in place of Khatib & Company Advocates.

By the time of striking out, the suit was not fully determined as there were counterclaims by both the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively.

The 1<sup>st</sup> Defendant in its counter claim, sought judgment for Shs.33,208,223.20 with interest being balance of the plaintiff's loan while the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as purchasers of the property sought an eviction order against the plaintiff.

M/s Khatib & Co. Advocates now have raised an objection that the Notice of Change of Advocates was irregular and his firm is still on record. That he had not given his consent and neither had the court granted leave. The firm of Y.A. Ali Advocates contend that they have a right to come on record since the suit is still pending and there is no final determination.

I have considered the matter. In a suit where there is a plaint and defence and counterclaim/set off is filed, this means that there are two suits in one. If the plaint is struck out, this leaves the counterclaim pending for determination.

Order VII, Rule 2 of the Civil Procedure Rules provides as follows:

“2 A defendant in a suit may set off, or set up by way of counterclaim against the claims of the plaintiff; any right or claim, whether such a set-off or counter-claim sound in damages or not, and whether it is for

a liquidated or unliquidated amount and such set-off or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim, but the court may on the application of the plaintiff before the trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed refuse permission to defend to avail himself thereof.”

From the foregoing, my interpretation is that once there is a defence and counterclaim in a suit then ordinarily there must be a final judgment in both the original and cross-claim. However, on application the court if it deems that the counterclaim cannot be conveniently disposed of in the suit but in an independent suit or otherwise the court may disallow the counter claim or claim to be determined in the same suit. Otherwise there can only be one final judgment in a suit with a counterclaim even if a plaint is struck out with costs. The costs of the Defendant cannot be enforced or recovered separately, it must await the final judgment on the counterclaim and/or set-off. There can be no two decrees, one for the original suit and one for the cross-claim.

As a result I do hold that the plaint having been struck out in this case, the counterclaim is still pending and therefore the entire suit has neither been determined or disposed of. It is a partial determination which cannot give rise to a decree except with the leave of the court upon application for the special reasons warranting such partial decree.

In view of the foregoing, the suit is not concluded and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are entitled to change their advocate in accordance with order III, rules 6 and 7 of the Civil Procedure Rules. May Khatib & Associates step out of these proceedings as it appears that the rules were complied with. The firm is at liberty to pursue its legal fees and costs in the usual manner.

I may now proceed to give directions in respect of the pending application. No order as to costs in this regard.

**Dated and delivered at Mombasa this 30<sup>th</sup> day of October 2009.**

**M. K. IBRAHIM**

**J U D G E**

**Coram:**

Ibrahim, J

Court clerk – Kazungu

Mr. Hamza for 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

Mr. Nyabera h/b Mr. Gikandi for the plaintiff

Mr. Wanyeri for Mr. Kanyi for 1<sup>st</sup> Defendant

No appearance for Mr. Khatib Advocate for (2<sup>nd</sup> and 3<sup>rd</sup> Defendants)