



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 38 of 1997

SHABAHA INVESTMENTS LIMITED PLAINTIFF

- Versus -

DHANJAL INVESTMENTS LIMITED DEFENDANT

RULING

There are two applications before the court. The first in time is an application by Notice of Motion dated 19th April, 2007. It is made under Order IV rule 3(4), and Order L rules 1, 2 and 3 of the Civil Procedure Rules. It seeks the following orders:-

1. That the summons to enter appearance issued in this suit and all pleadings following the plaint be struck out.
2. That all applications and proceedings be set aside.
3. That the plaintiffs do pay the costs of this application and all costs thrown away forthwith before any other or further steps the plaintiff may take in the matter.

The application is supported by the annexed affidavit of Nirmal Singh Dhanjal, the defendant's managing director, and is based on the grounds that:-

- (a) The summons to enter appearance issued by the court on 12th February, 1997, requiring the defendant to enter appearance within 10 days from the date of service contravened the mandatory proviso to Order IV rule 3(4) of the Civil Procedure Rules.
- (b) Breach of the said proviso rendered the pleadings and all proceedings following the plaint invalid, null and void.

On 24th April, 2007, the plaintiff filed grounds of opposition dated 23rd April, 2007.

The second application is by a Chamber Summons dated 31st August, 2007 and taken out under Order VII rule 1 of the Civil Procedure Rules. It prays for the following orders:-

- (i) That the summons to enter appearance dated 10th July, 2007 be struck out as having been issued whilst proceedings in the suit herein are still pending.

(ii) That costs of this application be provided for.

The application is based on the grounds that the plaintiff has not complied with Order V rule 1 (2), (3) and (5) of the Civil Procedure Rules, and that failure to do so is an abuse of the process of the court.

The two applications came for hearing together. In both of them, Mr. Pandya appeared for the applicant while Mr. Khanna appeared for the respondent. With regard to the application by Notice of Motion dated 19th April, 2007, Mr. Pandya submitted that the summons to enter appearance was fatally defective and that all the proceedings after the plaint were null and void. Mr. Khanna for the respondent then said that he was conceding to prayers 1 and 2 in that application. Mr. Pandya thereupon urged the court to order that the plaintiff be at liberty to issue a fresh summons in place of the defective one in compliance with the Civil Procedure Rules. He further said that he was not asking for costs.

In respect of the application by Chamber Summons dated 31st August, 2007, Mr. Pandya argued that the same was made because after the filing of the application by Notice of Motion, Mr. Khanna purported to take out and serve fresh summons to enter appearance. Mr. Pandya submitted that this was a wrong step to take while the proceedings in the suit were pending. He submitted that it would be tragic if the suit proceeded to hearing without allowing the plaintiff to put its house in order, otherwise all the proceedings would be a nullity and yet the stakes on either side were very high. He also said that he was not asking for costs.

In response, Mr. Khanna submitted that O. V rule 1 was no longer relevant because the original summons was a nullity. However, all the authorities were in agreement that the suit itself was not a nullity. Following the decision in NATIONAL MUSEUMS BOARD OF GOVERNORS v. COMMISSIONER OF LANDS & 4 ORS., Mombasa HCCC NO. 357 of 1997, the plaintiff's advocates took the initiative to issue fresh summons on 10th July, 2007, since there were no valid summons issued. In so doing, Mr. Khanna submitted, no leave or order of the court was needed. Similarly, he further submitted, it was not necessary to amend the plaint to accommodate the amendments effected by Legal Notice Number 36 of 2000 and/ or Legal Notice No. 128 of 2001.

Finally, Mr. Khanna submitted that there was no need to extend the summons since there was no valid summons. He therefore urged the court to dismiss the application by Chamber Summons dated 31st August, 2007.

In a short reply, Mr. Pandya maintained that he had not asked for any orders, and that the amended rules required a verifying affidavit.

After considering the applications and the arguments of respective counsel, I find that the application by Notice of Motion dated 19th April, 2007, has been compromised to the extent that Mr. Khanna conceded to prayers 1 and 2 thereof, and Mr. Pandya was not asking for any costs, which he had initially claimed in prayer 3.

With regard to the application by Chamber Summons dated 31st August, 2007, it is clear from the authorities that any summons to enter appearance which does not accord a defendant at least 10 days after service within which to enter appearance is contrary to the letter and spirit of Order IV rule 3(4) of the Civil Procedure Rules. Consequently, such summons was held by the Court of Appeal in CENEAST AIRLINES LTD v. KENYA SHELL LTD, Civil Appeal No. 174 of 1999, to be invalid and of no effect. However, the invalidity of the summons does not affect the validity and competence of the suit.

Mr. Pandya submitted that the amended rules require a verifying affidavit, to which Mr. Khanna responded by submitting that it is not necessary to amend the plaint unless the court

finds that it is necessary to do so. I would observe from these submissions that this suit was filed in court on 12th February, 1997. The amended rules that were referred to were promulgated by Legal Notice No. 36 of 2000, by which Order VII rule 1 was amended to incorporate subrule (2) which states as follows:-

“The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint.”

There was nothing in the Legal Notice to suggest that the amendments therein would operate retrospectively. The plaint filed herein on 12th February, 1997, did not, therefore, require a verifying affidavit. Secondly, none of the two applications which are the subject of this ruling touched upon amendment(s) to the plaint. The issue of a verifying affidavit is a non sequitur.

In sum, given that Mr. Khanna conceded to some prayers, I accordingly make the following orders:-

1. The summons to enter appearance issued in this suit on 12th February, 1997, and all pleadings following the plaint be and are hereby struck out.
2. All applications and proceedings be and are hereby set aside.
3. The plaintiff be at liberty to issue and serve a fresh and proper summons in place of the defective one if it has not yet done so.
4. If the summons to enter appearance dated 10th July, 2007 has already been served, the same shall be deemed to have been issued and served with leave of the court.
5. There will be no order as to costs in respect of the application by Notice of Motion dated 19th April, 2007.
6. The application by Chamber Summons dated 31st August, 2007, is hereby dismissed with no order as to costs.

Dated and delivered at Mombasa this 24th day of April, 2008.

L. NJAGI

JUDGE