



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 501 of 2003

STEPHEN NDUNGU NJUGUNA.....PLAINTIFF

VERSUS

SAFARICOM LIMITEDDEFENDANT

R U L I N G

The Chamber Summons herein, under Order 9B Rule 8 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act, seeks:

1. That the dismissal order dated 14/2/07 dismissing the Plaintiff's suit be set aside.
2. The Plaintiff/Applicant's suit filed on 28/5/03 be reinstated
3. Then costs.

The application is on the grounds, **inter alia**, that the Respondent unilaterally and with no Notice to the applicant dealt with the matter to the applicant's detriment; no evidence of a hearing notice having been served upon the applicant's former Advocates, as an invitation letter to fix a date is not sufficient; the applicant changed Advocates, and at the time of filing the Notice of change the file was noted missing and the same could not be filed; it was during the period that the file went missing that the Respondent went ahead to prosecute its Notice of Motion that led to the dismissal of the Applicant's suit.

The file resurfaced upon filing of an application for reconstruction and upon going to take a date for the same on 21/3/07; it is in the interest of justice that the applicant's suit be reinstated as his land, the subject matter herein, is going to waste.

In opposition, the Respondents aver, **inter alia**, that the pleadings closed on 14/7/03 but up to 19/8/05, when the Defendant filed the dismissal application, the Applicant had taken no steps to prosecute the suit; the application for dismissal was duly served on J.M. Waiganjo & Co. Advocates, advocates for the Applicant, on 25/8/05 and to date those remain the applicant's advocates, despite the alleged change of Advocates from Waiganjo to Khaminwa & Co., and Muniafu & Co. through a defective Notice of change dated 29/3/07; Accordingly, the Plaintiff/applicant's Chamber Summons is incompetent as it has been drawn and filed by an unauthorized representative; and finally, save for the defective Notice of Change of

Advocates the Respondents have never received any correspondence or process in respect of this suit from Muniafu & Co. Advocates or Khaminwa & Khaminwa Advocates or any firm of Advocates.

Over and above the above points of opposition, the Defendant/Respondent filed a Preliminary Notice of Objection on 27/9/07 as follows:

- (a) That the Chamber Summons by the Applicant, dated 19/4/07 is defective as it has been drawn and filed by unauthorised persons/agents contrary to the provisions of Order 3 of the Civil Procedure Rules;
- (b) The application is defective and incompetent as it has been brought under the provisions of the Civil Procedure Rules that do not correspond with the orders substantially sought.
- (c) The application is defective as it offends the mandatory provisions of Order 50 Rules 1 and 15(2).

I first turn to the Preliminary Objection which has the potential of disposing off the entire application herein.

Order 9B of the Civil Procedure Rules deals with **hearing and consequences of non-attendance**, and rule 8 thereof, under which the application is brought provides, as under:

“where under this order judgment has been entered or the suit has been dismissed, the court, on application by summons, may set aside or vary the judgment or order upon such terms as are just.”

The substantive prayer in the Chamber Summons before me seeks re-instatement of the applicant’s suit. That is not within the provisions of Order 9B rule 8.

The correct provisions are to be found in Order 50 rule 1 and rule 17 of the Civil Procedure Rules.

Order 50 rule 1 provides as under:

“All applications to the court save where otherwise expressly provided for under these Rules, shall be by motion and shall be heard in open court.”

Here, the application is by way of a Chamber summons rather than by motion. It is the applicant’s position that the application is properly before this court.

Close examination of the submissions by the Learned Counsel for the Applicant reveals the root cause of the misconception. The applicant is operating on the misperception that the suit was dismissed because of non-appearance (attendance) by the Plaintiff. That is clearly not the case as per this court’s ruling dated 14/2/07. The suit was dismissed for want of prosecution – not for want of appearance by the Plaintiff/Applicant.

Accordingly, the proper/correct provisions should have been Order 50 rule 1 of the Civil Procedure Rules, which provide that the application shall be by way of motion.

Even if the Plaintiff/Applicant were right that the dismissal was for non-attendance by the Plaintiff, [which was not the case] still, the application would be improperly before this court. The correct provisions would be Order 50 rule 17 **“The court may set aside an order made Exparte”** and that being a rule within Order 50, the application should have been brought by way of a motion, not Chamber Summons.

In brief, I agree with the learned counsel for the Respondent that the application is brought before this court under wrong mandatory provisions of Order 50 rule 1 of the Civil Procedure Rules.

The last ground on the Preliminary Objection to the application is that the application is defective as it is drawn and filed by unauthorized persons, contrary to the Legal Provisions under Order 3 of the Civil

Procedure Rules. The specific Rules relevant here are Rules 6 and 7 of Order 3.

Rule 6 provides, at the relevant parts:

“A party suing or defending by an advocate shall be at liberty to change his advocate....but unless and until notice of any change of advocate is filed in the court in which such case...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.”

Rule 7 of the same Order referred to above, provides, at the relevant parts:

“The party giving the notice shall serve on every other party to the cause or matter.....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)”

Perusal through the pleadings and submissions by counsel for the Plaintiff/Applicant shows that the provisions of Order 3 rules 6 and 7 of the Civil Procedure Rules were flouted. Accordingly, I find and hold that the Respondent/Defendant never got any notice of change of Advocates from the Plaintiff/applicant, except the defective one, which was in any case, after the dismissal being challenged herein.

All in all, and for the foregoing reasons, I uphold the Preliminary Objections – on all the three points of law. The Chamber summons herein, is dismissed for incompetence, failure to abide by the requisite Rules under which it should have been brought, and for having been drawn and filed by strangers in the case.

The Plaintiff/Applicant to pay the costs of both the application and the suit to the Respondent/Defendant.

It is so ordered.

DATED and delivered in Nairobi, this 7th Day of April, 2008.

O.K. MUTUNGI

JUDGE