



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 460 of 2007

**STANBIC BANK OF KENYA
LTD :::::::::::::::::::::APPELLANT**

VERSUS

GEOFFREY NDIKU MUTISYA & ANOTHER ::::::::::::::: RESPONDENT

RULING

The Appellant M/S Stanbic Bank of Kenya Limited moved to this Court vide a memorandum of appeal dated 28th May 2007 and filed the same date. The appeal is against one GEOFFREY NDIKU MUTISYA AND DKENMWA enterprises Ltd as respondents. The heading indicates that is in an appeal against the ruling of Honourable Mrs Odero delivered on 25th May 2007 on the appellants notice of motion application dated 5th of April 2007 in civil suit number 2248 of 2007 at the Chief Magistrates Court at Milimani.

Simultaneous with the filing of the memo of appeal was also filed a Notice of Motion under dated the same date and filed the same date brought under Section 3A of the Civil Procedure Act Order 41 rule 4 Civil Procedure Rules and Order 50 rule 1 of the Civil Procedure Rules and all enabling provisions of the law. Among other the said application sought:-

- An order of stay of execution of the ruling of the honourable Mrs Odero delivered on 25th May 2007 in civil case number 2248 of 2007 pending the hearing and determination of the Applicants Appeal.
- That the stay order do act as a stay o fall proceedings on the subordinate court.
- The said application was canvassed inter parties and it gave rise to a ruling dated and delivered by this court on 2nd day of August, 2007. Among the orders made by this court run from lien 7 from the top on page 24 to page 26. These are:-

(1) As observed earlier on in this ruling order 50 rules 16 (1) gave locus to the appellant/applicant to oppose the interim application by filing a replying affidavit. Other process and steps taken in the matter besides the filing of a replying affidavit required the appellant/applicant to file a notice of appointment either alone or with memorandum of appearance. As observed these two documents have not been exhibited. Should this procedural step not have been complied with by the applicant in the lower court, then the entire process be4comes flowed and the matter ends here. Meaning that the applicant will have

to go back to the lower Court regularize his status and then begin all over again if however the correct position is that those papers are placed in the lower Court file, then the following orders will follow....”.

The above observation prompted the respondent to move to this court vide an application by way of notice of motion dated 17th August, 2007 and filed on 20th August, 2007.

The application is brought under Section 3a of the civil Procedure Act, Order VI rule 13(e) of the Civil Procedure Rules and any other enabling provisions of the law. Among others it seeks orders that:-

- The appeal herein and the notice of motion dated 28th May 2007 be struck out with costs to the 1st respondent.
- That the costs of this application be borne by the appellant in any event.
- Any other order as the court may deem fit and/or necessary in the circumstances.

The heading of the application first reads STANBIC BANK LTD VERSUS GEOFFREY/NDUKU MUTISYA 1ST RESPONDENT DIKEMWA enterprises 2nd respondent.

It is signed by Mutisya Ngata & Co. Advocates for the 1st respondent. It is drawn and filed by Mutisya Ngata & Co. Advocates protection house 9th November, P.O. Box 58 – 00100 Nairobi.

To be serviced upon Njoroge Regeru & Co advocates ABHOBOUR NAIROBI.

The parties filed written skeleton arguments as well as authorities. High lights by both sides were made on 13/05/08.

In the process of writing a ruling on the merits of the said application in lien with arguments presented by either side for and against it that the courts attention was drawn to the heading as well as the general layout of the application. Of great importance is that it does not show from its heading who is the applicant of the application and who is responding to the application.

This court had occasion to rule on a similar issue in its own ruling delivered on 15th February, 2008 in Nairobi HCCC A 81 OF 2003 MURIITHI APPELLANT KAMAU & 3 OTHERS DEFENANT VERSUS STANDLEY GATHOGO GIKONYO PLAITNIFF/RESPONDENT.

At page 3 of the said ruling line 4 room the bottom this court observed:-

“An application is a plea to the court for a specific relief hence the need for a clear description of which party is seeking that relief and against whom.....”.

Applying that to this application it is this Courts opinion that the heading of the current application under review should have read: STANBIC BANK KENYA LTD APPELLANT/RESPONDENT VERSUS GEOFFREY NDIKU MUTISYA 1ST respondent/applicant. Dickemwa enterprises.

Respondent likewise the applying counsel should have described himself as Mutisya Ngala & Co. Advocates for the 1st Respondent/Applicant.

In the same ruling at page 5 lines 4 from the top this court went on to state this.

“The aforementioned defects are not curable under the provisions of order 50 rule 12 Civil Procedure Rules as they are not limited to failure to state rules under which the application is brought. Neither are they curable under Order VI rule 12 Civil Procedure Rules which cures lack of form. They are fundamentally defective. As noted an application like any other pleading renown in law is usually a plea to the Court by particular party to the proceedings against another particular party to the proceedings.

It can never e granted clandestinely.

This court still holds the same view on misdescription of parties. Further it is of the view that if the court were to ignore the misdescription it will then means that the beneficiary of the application should be the appellant who ha snot asked for it.

At page 6 of the said ruling this court made the following concluding remarks:-

“In conclusion since the applications have been found to be defective there is no need to go into the merits of the same”. The same concluding remarks will apply to the current application.

The said application is struck out for being incompetent but leave to the applicant to prevent a proper one. Parties will be at liberty to adopt their written skeleton arguments as well as their oral high lights on record and allow the court to proceed to examine the merits of the application without further arguments.

(2) The appellant who was the respondent to the application will have costs of the same.

DATED, READ AND DELIVERED AT NAIROBI THIS 13TH DAY OF JUNE 2008.

R.N. NAMBUYE

JUDGE