



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

CIVIL CASE 522 OF 2006

AMOS KINYURU KINANI.....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY LIMITED.....1ST DEFENDANT

ISAAC KINUTHIA KIBE.....2ND DEFENDANT

R U L I N G

The application under consideration is a very interesting and unique one. The Applicant, who is the 1st Defendant in this case has by Notice of Motion dated 9th January 2008 sought the following two orders.

2. THAT this Honourable Court be pleased to set aside and/or vacate the ex-parte Judgment herein and all the consequential orders and the 1st Defendant be allowed to defend the Plaintiff's suit on merit.

3. THAT pending the *inter-parte* hearing of this application this Honourable Court be pleased to grant *exparte* orders of say of execution against the 1st Defendant.

The application is expressed to be brought under **Section 3A of Civil Procedure Act, Order 1 rule 21, Order 21 and Order L, rule 1** of the **Civil Procedure Rules**. There are six grounds for this application, which are:

(a) THAT the 2nd Defendant has obtained *exparte* judgment against the 1st defendant/applicant by way of a counter-claim.

(b) THAT a Counter-claim is a cross-suit and can only be against the plaintiff and not a co-defendant.

(c) THAT the 2nd Defendant has not served the 1st defendant/applicant with a NOTICE making this claim for indemnity, contribution or otherwise against the 1st Defendant.

(d) THAT in any event the 2nd defendant has not suffered any judgment and cannot therefore pass the same to the applicant.

(e) THAT it is only fair and in the wider interest of justice that the orders sought be granted as it is against the tenets of natural justice for a party to be condemned unheard.

(f) THAT the Plaintiff does not stand to suffer any prejudice if indeed its case holds merit as claimed.

The application is supported by the affidavit of JOSEPH KANIA, the Manager, Legal Services, of the 1st Defendant.

The Respondent to the application was the 2nd Defendant who has opposed the application by way of grounds of opposition dated 4th March 2008. The Respondent relies on the following six grounds.

1. THAT the application is wholly misconceived, is frivolous and vexatious and a gross abuse of the process of the Honourable Court.
2. THAT the 2nd defendant by dint of the provisions of sections 5, 6 and 7 of the Civil Procedure Act cap 21 of the Laws of Kenya instituted a counterclaim against the 1st defendant as a distinct suit which the 1st defendant failed to attend.
3. THAT the 2nd defendant's claim as against the 1st defendant is absolutely distinct though emanating from the same transaction as the main suit and could not therefore be a chain for either indemnity or contribution.
4. THAT no reason has been advanced by the 1st defendant why it did not file any defence to the counterclaim or seek to have the counterclaim struck out after proper service of the defence and counterclaim was effected upon it.
5. THAT the 2nd defendant has lost interest in the suit property and the 1st defendant will suffer no prejudice in the refund of the principal amount to the 2nd defendant.
6. THAT the application is not bona fide and constitute an unjust intention on the part of the 1st defendant to keep the 2nd defendant funds unnecessarily in face of a very strong challenge by the plaintiff.

The simple facts affecting this application are that after the 2nd Defendant was served with the plaint and summons to enter appearance, he filed a defence and a counterclaim on the 8th October 2007. The 2nd defendant's counterclaim had two prayers, one of them in the alternative. That alternative prayer sought an order from the court directed at the 1st Defendant, the applicant herein, to refund the purchase price the 2nd Defendant had paid to the 1st Defendant for the suit house together with interest at 14% from 20th July, 2006.

After filing the defence and counterclaim, the 2nd Defendant served the 1st Defendant's Advocate on record with a copy of the defence. This is evidence in the affidavit of service dated 23rd November, 2007. The 2nd Defendant's Advocate then wrote to court requesting for judgment in default of defence to counterclaim under **Order IXA rule 3** of the **Civil Procedure Rules** against the 1st Defendant on the 23rd November 2007. The court proceeded to enter judgment against the 1st Defendant on 28th November, 2007. The judgment stamp signed by a Deputy Registrar of this court reads as follows:

“1. Housing Finance Company Limited

2. Isaac Kinuthia Kibe

Judgment:

Defendant, Housing Finance company limited having been dully served and having failed to enter appearance/file defence and on the application of the advocate for the plaintiff enter judgmental as prayed.

Date: 28/11/07

DEPUTY REGISTRAR

HIGH COURT OF KENYA

MILIMANI-NAIROBI.”

It is this judgment which is sought to be set aside in this application.

As is evidence from the wording in the stamp, judgment was entered in favour of the Plaintiff against Housing Finance Company of Kenya, which is the 1st Defendant and the Applicant herein. No judgment was entered in favour of the 2nd Defendant as against the 1st Defendant. It matters not that the request for judgment was made by the 2nd Defendant. Is such a judgment envisaged under the rules?

Order VIII rule 2 deals with set offs and counterclaims and stipulates 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 set-off or counterclaim 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 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 defendant to avail himself thereof.”

Going by the provisions of **rule 2** of the said order, it is quite clear that a set-off and counterclaim under the rules is envisaged only as between a Plaintiff(s) and a Defendant(s). None is envisaged between two Defendants in the same suit. However, a counter claim can be made against persons who are not parties to a suit under **rules 7, 8 and 9 of Order VIII**. In that case, unless the court orders otherwise, such persons should file a defence to the counterclaim within 15 days from date of service. The alternative procedure is to apply to court under **Order VIII rule 11** of the **Civil Procedure Rules** to have the counterclaim excluded from the suit. In that light, therefore, the procedure adopted by the 2nd Defendant was defective and unprocedural.

Mr. Adan’s submissions that **Order 1 rule 21** of **Civil Procedure Rules** sets out the procedure of how Defendants can claim against Co-defendants is quite correct. Under that rule, the Defendant is enjoined to serve a notice to such a Co-Defendant making a claim either of contribution or indemnity or relief or remedy. The 2nd Defendant did not adopt this clearly laid down procedure. The 2nd Defendant proceeded as if the claim it was making was against the Plaintiff in the suit, by filing a counterclaim as envisaged under **Order VIII**. Going by the submissions of Mr. Kimani for the 2nd Defendant, it is quite clear that the wrong procedure was adopted and that it rendered the exparte judgment an illegality, null and void.

Having come to the conclusions I have of this matter:

- 1. I allow the application dated 9th January, 2008 as prayed in prayer 2 of the motion.**
- 2. The exparte Judgment entered on the 28th November 2007 against the 1st Defendant be and is hereby set aside together with all consequential orders.**
- 3. The costs of this application be borne by the Respondent/2nd Defendant.**

Dated at Nairobi this 4th day of July, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Kosgey holding brief for Mr. Adan Mohamed for the Applicant/1st Defendant

Mr. Obwayo holding brief for Mr. Kimani for 2nd Defendant

N/A for Mr. Kangethe for the Respondent

LESIIT, J.

JUDGE