



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

Civil Case 698 of 1988

NEW BALLISO BAR (Suing as a Firm).....PLAINTIFF/RESPONDENT

-versus-

LAND SECURITIES LIMITED.....1ST DEFENDANT

ADOLF ISAAC MUCHIRI

t/a DOLLINE AUCTIONEERS.....2ND DEFENDANT/APPLICANT

KAMAU JOHN KINYANJUI t/a K. J.

KINYANJUI & CO. ADVOCATES.....3RD DEFENDANT/RESPONDENT

RULING

Before me in this ruling are two chamber summons both dated 25th June 2008 and filed that same date by Adolf Isaac Muchiri the 2nd Defendant in this suit. The 1st chamber summons has six prayers, four of them already determined and only two remaining. Those remaining and therefore for me to determine are prayer 6 for costs and prayer 3 seeking orders:

“That the honourable court be pleased to review the order and decree captioned in the judgment against the 2nd defendant and set it aside.”

The judgment in question is the one dated 21st June 2007.

The 2nd chamber summons has seven prayers, but only two of them, the first and third prayers, have been granted. The remaining five all relate to the honouring of an advocate’s undertaking by the 3rd Defendant in this suit, Kamau John Kinyanjui. Prayers 4 and 5 are of more interest and state as follows:

“4. That the 3rd defendant in this suit do honour his undertaking as an advocate of this court, vide his letter reference 083/86 dated 8th January 1987 addressed to the 2nd defendant and as per the

judgment of this Honourable Court of 21st June 2007 with costs and interest awarded thereon against the 2nd defendant of the decretal amount.

5. *THAT all court orders in future in relation to the award of this Honourable Court be directed to the 3rd defendant as per his undertaking reference 083/86 dated 8th January 1987.”*

The two chamber summons are opposed by the Plaintiff and the 3rd Defendant as Respondents. Mr. Mwiti is the Advocate for the Plaintiff.

Carefully considering what was brought to my attention during the hearing of the two chamber summons which were heard together, and in light of the grounds of applications and supporting affidavits plus opposition thereon, it is clear that the 2nd chamber summons, though not stated as an application for review, is in effect an application for review of the judgment dated 21st June 2007. The framing of prayers 4 and 5 quoted above leaves no doubt about that. Yet the Applicant is not prepared to accept that. In as much as he has been so smart as to be able to disguise the 2nd chamber summons as an application to enforce an advocate's undertaking when what is stated therein ought to have constituted part of his 1st chamber summons praying for review, the Applicant rendered the 2nd chamber summons misconceived and incompetent, if not an abuse of the process of this court and therefore not maintainable and will be dismissed as evidence of the alleged professional undertaking was canvassed during the trial of the suit when the Applicant who ought to have raised his claim for the enforcement of the undertaking raised no such claim. Moreover, the alleged undertaking is a contested issue likely to properly feature in an appeal against the questioned judgment for a proper decision in the appeal. The undertaking is not therefore something new which was not in the evidence in the trial before Hon. Justice Sheikh Amin. In those circumstances **Order LII Rule 7** of the **Civil Procedure Rules** will not apply even if **section 3A** of the **Civil Procedure Act** is also brought in.

Having said and bearing in mind the above and therefore taking the 2nd chamber summons to be an application for a review of the judgment dated 21st June 2007, each one of the two chamber summons is hereby dismissed for the following reasons.

Firstly, no grounds for review under **Order XLIV Rule (1)** of the **Civil Procedure Rules** has been proved.

Secondly, the Applicant has gone to the Court of Appeal challenging the entire judgment dated 21st June 2007 and under **section 80** of the **Civil Procedure Act** and **Order XLIV** of the **Civil Procedure Rules** as well as case authorities such as ***KARANI & 47 OTHERS –V- KIJANA & 2 OTHERS***, Civil Appeals Nos.43 and 153 of 1986 (consolidated) (1987) KLR 557, review of that judgment is ousted and the matter to be remedied by review, if any, must merge in the appeal. In this matter, not only the 2nd Defendant but also the 3rd Defendant is appealing. Each has already filed a notice of appeal.

Thirdly, these applications for review are disguised appeals against my judgment brought before me to sit on the said appeal. Look at the grounds in support, the affidavits in support of the said chamber summons Almost all say I “erred”. How am I going to condemn myself that I “erred”? The law does not even give me the jurisdiction to do that. I have no jurisdiction to sit on an appeal against my own judgment and there is no way the Applicant can convince me that his two chamber summons here before me do not amount to an appeal against the judgment dated 21st June 2007.

The Applicant to pay costs of each chamber summons to the Plaintiff and the 3rd Defendant.

Dated this 17th day of October 2008.

J. M. KHAMONI

JUDGE

Present:

Applicant In Person

Mr. Mwiti for the Plaintiff.

The 3rd Defendant.

Kabiru – Court Clerk.