REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 3818 of 1994

CHANASE INVESTMENTS LIMITED ....PLAINTIFF

V E R S U S

1. **KERUZI ENTERPRISES LIMITED**
2. **JOSEPHINE KERUBO OMWERI**
3. **DAMARIS N. MUCHOMA**
4. **JANE KIBWAGE**
5. **JULIUS KIBWAGE**
6. **JAMES KIMANI**
7. **JEREMIAH NYATICHI**
8. **EXOTICA COMPANY LIMITED ....DEFENDANTS**

R U L I N G

This suit came up on 30th September, 2008 for hearing of two applications. The first application was by notice of motion dated 6th September, 2006 by the Plaintiff seeking leave under section 94 of the Civil Procedure Act, Cap. 21 (the Act) to execute the decree herein before ascertainment of costs. The second application is by the 1st to 7th Defendants. It is by notice of motion dated 16th November, 2006 and seeks two main orders; first, that the notice of change of advocates filed by F. M. Mulwa, Advocate on 12th August, 2005 be struck out and all the orders made consequent thereto be set aside, and secondly, that the suit be dismissed with costs for having abated. Learned counsels agreed that the latter application be disposed of first.

The notice of motion dated 16th November, 2006 is expressed to be brought under Order 50, rule 1, Order 3, rules 8 & 9, Order 4, rule 3, Order 5, rule 1 and Order 9B, rules 3 & 8 of the Civil Procedure Rules (the Rules). Section 3A of the Act is also invoked.

The grounds for the application appearing on the face thereof can be re-phrased as follows:-

1. The Plaintiff's suit abated as at 26th October, 1995.

2. Interlocutory judgment against the 1st to 7th Defendants was not available to the Plaintiff as its claim was not liquidated, and the same was entered in error.

3. F. M. Mulwa was not properly on record for the Plaintiff, and thus has no locus in the matter. All proceedings taken out by him were therefore null and void.

4. That the order of court of 9th December, 2005 (Ojwang, J) was made in error.

The application is supported by the affidavit of the 1st Defendant. It essentially argues the grounds of the application.

The Plaintiff has opposed the application as set out in the grounds of opposition dated 14th and filed on 15th December, 2006. Those grounds include:-

1. That the filing of a notice of change of advocates instead of notice of appointment was inadvertent and a mere irregularity that is curable.

2. That the Plaintiff's suit has not abated as alleged.

3. That the order of 9th December, 2005 has not been reviewed nor set aside.

4. That the Plaintiff was entitled to interlocutory judgment under Order IXA, rule 3(2) of the Rules.

5. That the Defendants' application is frivolous and an abuse of the process of the court.

No replying affidavit appears to have been filed.

A little background of this matter is necessary. This suit was filed on 27th October, 1994. The Plaintiff sought a sum of money from the 1st to 7th Defendants, the same said to be due and owing upon a contract of sale of certain goods. The claim as against the 8th Defendant was dismissed with costs by a consent order entered on 14th December, 1994.

At the institution of the suit the Plaintiff was represented by one DR. WILLY MUTUNGA, ADVOCATE. On 4th November, 1994 the 1st to 7th Defendants appointed ONSANDO OSIEMO & COMPANY, ADVOCATES, to act for them. The said advocates have been on record for those Defendants up to date.

The Plaintiff was not happy with the consensual dismissal of its case against the 8th Defendant on 14th December 1994. It appears then to have instructed C. N. KIHARA & COMPANY, ADVOCATES to act for it in place of Dr. Willy Mutunga. No notice of change of advocates appears to have been filed by C. N. Kihara & Company Advocates. The Plaintiff applied through those advocates to set aside the aforesaid dismissal of its case against the 8th Defendant. The application was eventually dismissed on 4th October, 1995.

C. N. Kihara & Company continued to act for the Plaintiff until they apparently withdrew from so acting. At any rate, in January, 2000 the Plaintiff started acting in person through its director. On 12th August, 2005 F. M. MULWA, ADVOCATE filed a notice of change of advocates of the same date on behalf of the Plaintiff. He purported to take over conduct of the matter for the Plaintiff from C. N. Kihara & Company. This was obviously an error as C. N. Kihara & Company had ceased to act for the Plaintiff quite some time back and the Plaintiff was acting in person.

The Plaintiff, through F. M. Mulwa, Advocate, applied by *ex parte* notice of motion dated 17th October, 2005 for an order that summons to enter appearance herein be signed "notwithstanding that the same were not filed with the plaint in terms of Order IV, rule 3(5)" of the Rules. The requirement for summons to be filed together with the plaint was introduced by Legal Notice No. 5 of 1996, long after suit herein had been filed. The court granted the order sought on 9th December, 2005.

It appears that summons to enter appearance and copy of the plaint were duly served upon the 1st to 7th Defendants. They never filed defence, and on 15th May, 2006 interlocutory judgment was entered against them.

That is the essential history of this matter. I have considered the submissions of the learned counsels appearing, including the authorities cited. There are three issues to be decided in this application:-

1. Has the Plaintiff's suit abated?

2. Was F. M. Mulwa, Advocate properly on record for the Plaintiff?

3. Was interlocutory judgment available to the Plaintiff?

It was also argued by the Defendants' learned counsel that the order of 9th December, 2005 has been properly challenged in this application. I do not think so. There is no prayer to review or set aside the said order in the present application. It was a substantive order by which summons to enter appearance were issued. These summons were subsequently served upon the Defendants; judgment in default was also entered. The order cannot be challenged by implication. There ought to be a substantive application.

Has the Plaintiff's suit abated?

If I understood correctly the argument of counsel for the Defendants on this point, it was as follows. This suit was filed in 1994 when there was no requirement for summons to enter appearance to be filed together with the plaint, which requirement was introduced by Legal Notice No. 5 of 1996. But when that requirement came into force, summons to enter appearance in this suit had not been issued. The suit, further argued Mr. Osiemo, should therefore have been withdrawn and filed afresh as it was inchoate without summons. The subsequent summons validated by the order of 9th December, 2005 were thus defective.

Mrs. Ameka, learned counsel for the Plaintiff answered that Legal Notice No. 5 of 1996 did not have retrospective effect. Therefore, the Plaintiff's suit, filed before the requirement that summons be prepared by the plaintiff and filed together with the plaint, was thus good. The court had the necessary jurisdiction to order issuance of summons, as it did by its order of 9th December, 2005. In any case, that order has not been properly challenged.

Indeed Legal Notice No. 5 of 1996 did not have, and cannot have had, retrospective effect. All suits filed before the amendments enacted by that legal notice were of course valid. In applying by *ex parte* notice of motion dated 17th October, 2005 the Plaintiff was under the misapprehension that its suit had been filed when there was the requirement that summons be filed together with the plaint. Its suit was filed when there was no such requirement. No summons had ever been issued. When the suit was filed in 1994 it was the duty of the court to prepare and issue summons. In effect what the Plaintiff was seeking was issuance of summons, and the court obliged by its order of 9th December, 2005.

Summons were then served. The Defendants chose not to file defence and were content to live with the order of 9th December, 2005 until the Plaintiff sought leave, by its notice of motion dated 6th September, 2006, to execute the preliminary decree. I find, for the above reasons, that the Plaintiff's suit did not abate.

Was F. M. Mulwa, Advocate, properly on record for the Plaintiff?

It is obvious that what F. M. Mulwa should have filed was a notice of appointment, not change, of advocates because the Plaintiff was acting in person just prior to filing of the notice. This was an inadvertent error that did not, and could not, occasion the Defendants any prejudice. They did not raise any issue with regard to C. N. Kihara & Company who did not even file a notice of change of advocates. They were happy to deal with them for a number of years. The mere fact that what should have been a notice of appointment of advocates was wrongly called a notice of change of advocates did not detract from the fact that the Plaintiff duly appointed F. M. Mulwa, Advocate to act for it in this matter. The Plaintiff has not said that it did not so appoint the advocate. In these circumstances the representation of the Plaintiff is really a matter between it and the advocate concerned. It should not concern the Defendants. F. N. Mulwa was not a meddling stranger. He was a duly appointed counsel in the matter.

Was interlocutory judgment properly entered?

Part of the claims made by the Plaintiff in the plaint was the sum of KShs. 1,089,234/00, the same said to be the balance of the purchase price for kitchen equipment, furniture, fixtures and fittings sold to the 1st Defendant and the purchase guaranteed by the 2nd to 7th Defendants. This was a liquidated demand.

Order 9A, rule 3(2) of the Rules states:-

"(2) Where the plaint makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the court shall, on request in Form No. 26 of Appendix C, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1), but the award of costs shall await judgment upon such other claim."

The Plaintiff made a liquidated demand with other claims. The Defendants did not file defence. Under this sub-rule, as read with rule 9 of the same Order, the Plaintiff was entitled to judgment upon the liquidated demand.

In the result, I find no merit in the application by notice of motion dated 16th November, 2006. It is hereby dismissed

with costs to the Plaintiff. It is so ordered.

DATED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2008

H. P. G. WAWERU

J U D G E

DELIVERED THIS 5TH DAY OF DECEMBER, 2008