



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

Civil Suit 62 of 2004

**ZACHARIA SOMI
NGANGA.....PLAINTIFF/APPLICANT**

VERSUS

KENYA COMMERCIAL BANK LTD..... 1ST DEFENDANT/RESPONDENT

NDARUGU MERCHANTS.....2ND DEFENDANT/RESPONDENT

FRANCIS MWANGI NJUGUNA.....3RD DEFENDANT/RESPONDENT

MARGARET WANGWICHI NJUGUNA.....4TH DEFENDANT/RESPONDENT

R U L I N G

The application under consideration is the one dated 27th October, 2008 expressed to be brought under Order XLIV rule 1(a) and section 3A and section 8 of the Civil Procedure Rules and Civil Procedure Act. The application seeks orders 2 to 4 namely:

- 2. THAT there be a review of the orders of this Honourable Court made on the 9th day of October 2008 striking out the Plaintiff's suit.**
- 3. THAT upon such review, the Plaintiff's suit be re-instated.**
- 4. THAT in the interim period, there be orders preserving the status quo currently obtaining.**

The application is based on grounds on the face of the application namely:

- (a) THAT by virtue of the orders made by the Honourable Court on the 20th September, 2007, the Summons to Enter Appearance issued on 4th February, 2004 was spent and as such fresh Summons attached to the Amended Complaint ought to have been issued.**
- (b) THAT consequently, stalemate of the Summons does not arise.**
- (c) THAT there is sufficient reason to review the orders made by the Court on 9th October, 2008.**
- (d) THAT this application is made timeously.**

The application is supported by the affidavit filed on 29th October, 2008 sworn by the Plaintiff to this suit. I have considered the contents of that affidavit.

The application is opposed. The Respondents/Defendants have filed grounds of opposition in which the following four grounds are raised.

- 1. The application as drawn is incurably defective.**
- 2. No new evidence and/or matters have been adduced, to warrant a review of the order sought to be reviewed.**
- 3. The continued occupation of the Defendant on the suit premises is detrimental to the interests of the 3rd and 4th defendants.**
- 4. The Plaintiff's application has not been brought in good faith, and the same reeks of malafides.**

The brief background to this application is that the Plaintiff's suit was struck out on 9th October, 2008, on application by the Respondents, on grounds that the Plaintiff had failed to serve summons to enter appearance upon the 1st and 2nd Defendants and that the subsequent joinder of the 3rd and 4th Defendants was a nullity. This court allowed the Defendants' application to strike out the Plaintiff's suit, which application was unopposed, on the grounds that the Plaintiffs' suit had long lapsed for non-compliance with Order V rule 1 of the Civil Procedure Rules, and that it could not be revived. The Applicant now seeks a review of the court's order of 9th October, 2008.

I have considered submissions by Mr. Aduda for the Plaintiff and Mr. Njenga for the Defendants.

Order XLIV rule 1(a) stipulates:

"1(1) Any person considering himself aggrieved –

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order which no appeal is hereby allowed

And who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reasons, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay"

The Applicant must annex to the application the order or decree which has aggrieved him. The Applicant must then show that he has discovered a new and important matter or evidence which was not within his knowledge at the time the order was made, even after exercise of due diligence. Alternatively the Applicant must show some mistake or error apparent on the face of the record or any other sufficient reason that could warrant a review of the judgment, order or decree.

The first point I take with the Applicant is that he has not annexed the ruling or order sought to be reviewed. Indeed the Applicant has indicated that the ruling is marked 'ZSN1'. However, no document with such marking is annexed. There is however a ruling without any marking of an exhibit and itself unsigned and uncertified. It cannot suffice as an annexure or an exhibit to the Applicant's affidavit.

Even if the offending ruling or order was annexed I do not think that the application can succeed. The Plaintiff had not opposed the application to strike out his suit out of which the order now sought to be

reviewed was made. No attempt is made to explain why the initial application was not opposed. Since the Plaintiff deliberately chose not to participate in the application giving rise to the striking out of the suit, it is my view that the Plaintiff's remedy lay on appeal not in an application for review.

That notwithstanding, I will consider this application. The supporting affidavit of the Plaintiff seems to argue that the court order striking out the suit for non-compliance with Order V rule 1 of the Civil Procedure Rules went against this court's earlier order of 20th September, 2007 allowing the Plaintiff to amend his plaint in order to join the 3rd and 4th Defendants to the suit. The Applicant is arguing that after leave to amend was granted, it was the duty of the court to issue fresh summons for service upon the 3rd and 4th Defendants.

This suit was not struck out as a result of failure to serve the 3rd and 4th Defendants with summons. It was struck out for the Plaintiff's failure to serve the 1st and 2nd Defendants with summons to enter appearance for over 24 months from 4th February, 2004 when summons were issued. The signed copies of the summons are still intact in the file. By 20th September, 2007 when the application to join new parties was filed, the summons to enter appearance for the 1st and 2nd Defendants issued more than 3 years earlier had expired. The Plaintiff applied to add new Defendants to the suit, when the suit had already lapsed even these Defendants were not served with summons by the time the application dated 2nd May, 2008 was filed.

The Plaintiff cannot be heard to blame the court. The Plaintiff already had summons to the 1st and 2nd Defendants duly issued and signed, and which he neglected to serve in good time. Even if the Plaintiff's contention that the court should have issued new summons on 20th September, 2007 when his application was allowed, the summons could only have been for 3rd and 4th Defendants. In any event by then the Plaintiff's suit had already abated. On the other hand, if there was any defect in the proceedings, this was a matter the Plaintiff could have discovered earlier if he exercised due diligence. The court's failure, if any does not excuse the Plaintiff's failure to serve the 1st and 2nd Defendants with the summons. The summons were ready for collection since 4th February, 2004 to date and the Plaintiff made no effort to collect and serve them.

I do find that the Plaintiff has not shown a new or important, matter or evidence which he could not have discovered if he used due diligence. I also find that the Plaintiff has not shown any good or reasonable cause to justify the application sought to be made. This suit lapsed before the Plaintiff served the summons to enter appearance on the 1st and 2nd Defendant. Nothing could revive the already dead suit, not even the order granting the Plaintiff leave to add the 3rd and 4th Defendants to the suit. I see nothing to review in this case.

In conclusion, I find the application lacks in merit and dismiss it with costs.

Dated at Nairobi this 5th day of December, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered in presence of:-

Mr. Aduda for the Plaintiff

Mr. Njenga for the Defendants

.LESIIT, J.

JUDGE